INSTITUTE FOR DEFENCE STUDIES & ANALYSES
रक्षा अध्ययन एवं विश्लेषण संस्थान

IDSA ISSUE BRIEF

Some issues in respect of India's nuclear liability law - II
India and the Convention on Supplementary Compensation

G. Balachandran

G. Balachandran is a Consulting Fellow at the Institute for Defence Studies and Analyses, New Delhi.

February 19, 2015

Summary

There is a general feeling among analysts that while US government lawyers may have been satisfied that the CLNDA is compatible with CSC in light of explanations offered by the Indian government, this view is being reportedly challenged by nuclear industry lawyers. The three issues that need to be discussed in this regard are: (i) Is it necessary that concurrence between the CLNDA and CSC be established and recognised as such by others? (ii) How important is the formal recognition by the US of such an agreement between CLNDA and CSC? (iii) How important is CLNDA and CSC conformity necessary for global nuclear industry to engage in nuclear commerce with India?

One of the issues of concern with the Indian Civil Liability for Nuclear Damage Act (CLNDA) that was the subject matter of discussion with the United States was the conformity of the Act with the provisions of the Convention on Supplementary Compensation (CSC). This was an issue of concern only to United States; the other two established suppliers of nuclear equipment – France and Russia – had not expressed any specific concern in this regard. This had led some Indian analysts and commentators to infer that India signed the CSC came at the insistence of the United States. In reality, however, India's interest in joining the CSC predated the Indo-US nuclear deal of July 2005, let alone the letter of September 10, 2008 from then Foreign Secretary Shiv Shankar Menon to US Under Secretary of State William Burns stating that "India also recognises the importance of establishing an adequate nuclear liability regime and it is the intention of the Indian Government to take all steps necessary to adhere to the Convention on Supplementary Compensation for Nuclear Damage."

Because of the provisions of the Indian Atomic Energy Act 1962, the nuclear power plants and facilities in India are all owned by either the Central Government or its Public Sector Undertakings. Therefore, any incident or accident that happens in these installations, and the liability issues arising therefrom, are the responsibility of the Central Government. In addition, because of the rules and procedures of the Nuclear Suppliers group (NSG) formed after the 1974 Indian nuclear test, India was cut off from all international commerce in nuclear equipment after 1974. As a result, all the nuclear reactors built in India after 1974 were built with the help and involvement of the Indian nuclear industry.

However, the 1988 Agreement between the Republic of India and the Union of Soviet Socialist Republics on cooperation in the construction of a nuclear power station in India and the subsequent 1998 supplement to the 1988 Agreement introduced a new element. The Russian reactors were to be built at Kudankulam (Tamil Nadu), which lay relatively close to Sri Lanka. Given that the geographical extent of the damage caused by a nuclear accident may not be confined only to Indian territory and may have some trans-boundary effects as well, it was felt that, in such an event, it is desirable that protection be accorded to victims of such an accident through a third party liability regime.

Accordingly the Department of Atomic Energy sponsored a project in the year 1999 titled "A critical and comprehensive study of the nature and extent of State responsibility arising out of nuclear incidents/accidents within national boundaries and beyond". The project report was submitted by Professors V.B. Coutinho and S. Rajagopal in 2001. Concurrently, the Government had also constituted an inter-ministerial multi-disciplinary Committee on Civil Liability for Nuclear Damage. Both recommended a national legislation on nuclear liability after examining the various international conventions on the subject, including the CSC. However, since the commissioning of the Kudankulam nuclear power plant was a decade away and the NSG embargo on nuclear commerce with India was still in place, the government did not see any great urgency in bringing forward such legislation.

These circumstances changed dramatically after the announcement of the India-US nuclear deal in July 2005. By the end of 2008 the NSG had granted an exemption for nuclear commerce with India. But major international nuclear component and equipment suppliers were hesitant to supply such items in the absence of a nuclear liability law in conformity with international conventions. Except for the Russian Federation, all other countries including USA and France had expressed a need for an Indian nuclear liability regime. India's cooperation agreement with France had, in fact, a specific article stating that "The Parties agree that for the purpose of compensating for damage caused by a nuclear incident involving material, nuclear material, equipment, facilities and technology, each Party shall create a civil nuclear liability regime based upon established international principles."

By end 2008, India had signed civil nuclear cooperation agreements with the major international nuclear equipment suppliers – France, USA and Russia. It was felt that given the prospects of a major expansion of the civil nuclear power programme in India with nuclear power plants located at sites close to the international boundary, there was an imperative need for a civil nuclear liability regime in conformity with international norms.

Although a national law alone, in conformity with established international norms, would have been sufficient to assure international suppliers, because of the additional benefits conferred by the CSC to its members, India has chosen to adhere to this convention. The CSC will give India access to international funding, beyond those available through national resources, to pay for damages in the event of a nuclear accident. The CSC is a free standing international nuclear liability regime supplementing/complementing two other international nuclear liability regimes – the Vienna Convention on Civil Liability for Nuclear Damage (Vienna Convention), and the Paris Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention). It was opened for signature in 1997, but is yet to come into force. Although 18 countries had signed the CSC and five ratified it by the end of 2014, it could not come into force because of the additional requirement that these five states should have a minimum of 400,000 units of installed nuclear capacity. It is only the signature and ratification by a sixth state, Japan, on January 2015 that makes it possible for the Convention to come into force on April 15, 2015. The International Atomic Energy Agency (IAEA) is the depository for the CSC.

India signed the CSC on October 27, 2010 but is yet to ratify it. India did, in fact, promise President Obama during his first visit to India in 2010 that it would ratify the CSC by the end of 2011, but has failed to do so till now. Although the reasons for the delay have never been explained properly, India once again assured the US that it would ratify the CSC during the recent Obama visit.

One of the reasons put forward for India's reluctance to ratify the CSC was the charge made by some, especially the United States, that the Indian nuclear liability law was not in conformity with CSC requirements. This charge arose particularly because of two sections of the CLNDA: (i) Section 17(b) dealing with the "Right of Recourse"; and (ii) sec. 46 dealing with potential claims against the supplier.

CLNDA and CSC compliance

The presence of Sec. 17(b) and Sec. 46 had led many, especially the US, to the conclusion that CLNDA was not in compliance with CSC requirements. As recently as September 2011, the US administration in response to the question:

> "**Question:** Does the U.S. consider the IAEA an appropriate platform or body to adjudicate on liability matters, and is there a precedent for that? By asking for the IAEA to get involved is it the U.S.'s position that the India liability bill does not in fact conform to the Convention on Supplemental Compensation?"

had answered that:

> "**Answer:** The IAEA is an appropriate venue for clarification on issues related to the Convention on Supplementary Compensation on Nuclear Damage (CSC), which deals with international nuclear liability. The Agency can be helpful in assisting countries in evaluating their compliance with the CSC. There continue to be serious concerns that India's 2010 nuclear liability law is not consistent with the CSC."

The US had suggested at various times that India consult with the IAEA to determine whether CLNDA was consistent with CSC requirements. India had refused to do so, citing Article XVIII (1) of the CSC which only requires that for a State to join CSC it only has to declare "that its national law complies with the provisions of the Annex to this Convention."

Now, according to Indian official briefings and hand-outs, there is no discord between India and the US on the CLNDA's conformity with CSC provisions and requirements. The India-US Joint Statement issued at the end of Obama's visit had stated that "the Leaders welcomed the understandings reached on the issues of civil nuclear liability and administrative arrangements for civil nuclear cooperation." At the press briefing at the end of Obama's visit, India's then Foreign Secretary had stated: "Based on the presentations by the Indian side and the discussions thereon, there is a general bilateral understanding that our law is compatible with the CSC." On the same occasion, Joint Secretary (DISA) said that "the presentations we have given to the US side clarify and underline that these two sections are in conformity with the CSC."

The FAQ subsequently released by the Government of India was more categorical. In a Q&A format it stated:

> "**Q6.** Is India's CLND Act compatible with the CSC?
>
> **Ans.** The provisions of the CLND Act are broadly in conformity with the CSC and its Annex in terms of channelling the strict/absolute legal liability to the operator, the limitations of the liability in amount and time, liability cover by insurance or financial security, definitions of nuclear installation, damage, etc. In fact, the CLND

> Act provides the basis for India joining an appropriate international liability regime such as the CSC. Article XVIII of CSC requires that the national law of a Contracting Party that is not a Party to either the Vienna Convention or the Paris Convention has to comply with the provisions of the Annex to this Convention. The CLND Act is compliant with the Annex to the Convention."

There has been no such categorical statement from the United States expressing agreement that the CLNDA is in conformity with the CSC. American statements and clarifications have been vague, rather than categorical. One press report noted that, at a conference, US Assistant Secretary for South and Central Asian Affairs Nisha Biswal

> "said, We are still in the process of taking what these top-line commitments were and trading paper to be able to find the more detailed understandings," adding, however, that the U.S. resolution of this "lingering challenge" hinged on the convergence between India's 2010 Civil Liability for Nuclear Damage Act (CLND) and the 1963 [sic] CSC. The Modi administration's statement of alignment "will help to create the assurances that India's liability law meets international standards, which is fundamentally what we have been seeking," Ms. Biswal explained, adding that as those details get worked out "there is an understanding at the working level and the top level that needs to be memorialised in some way," and this would define the way forward for Washington." (The Hindu, February 7, 2015)

Nevertheless, there is a general feeling among analysts that while US government lawyers may have been satisfied that the CLNDA is compatible with CSC in light of explanations offered by the Indian government, this view is being reportedly challenged by nuclear industry lawyers. The three issues that need to be discussed in this regard are:

(i) Is it necessary that concurrence between the CLNDA and CSC be established and recognised as such by others?

(ii) How important is the formal recognition by the US of such an agreement between CLNDA and CSC?

(iii) How important is CLNDA and CSC conformity necessary for global nuclear industry to engage in nuclear commerce with India?

Strictly speaking there is no need for any country to be part of any international nuclear liability convention to be able to engage in commerce in nuclear material and equipment. After all, there are a number of countries that are not members of any of the established international nuclear liability conventions. But they all have a national nuclear liability regime, widely accepted to be in conformity with the "international norms" for a nuclear liability regime, accepted as such by both governments and more importantly the global nuclear industry. In short, there is no requirement that a country be part of an international

nuclear liability convention in order to be able to import nuclear material and equipment, only that the importing countries have a nuclear liability regime that is satisfactory to suppliers. No country has any legislation forbidding or restricting nuclear commerce with any country that is not part of any international convention – in fact not even restricting nuclear trade with a country not having any domestic nuclear liability legislation!

There is, however, a caveat to the above statement. As mentioned earlier, the India-France nuclear cooperation has a specific article which requires that "The Parties agree that for the purpose of compensating for damage caused by a nuclear incident involving material, nuclear material, equipment, facilities and technology, each Party shall create a civil nuclear liability regime based upon established international principles." France already has such a liability regime, being party to the Paris Convention. India would have established such a credential by being part of the CSC. Does the French government consider that the CLNDA is "based upon established international principles."? The French government, true to its tradition of being silent on questions that may potentially embarrass it, has so far maintained silence on this question. If, for the sake of discussion, it does not accept that the Indian liability regime is based on accepted international principles, could that potentially nullify the cooperation agreement? In that case, can the French industry participate in India's nuclear energy programme? Interesting questions, for which no answers can be given by anybody other than the French government, which, as noted, has been studiously silent.

On the other hand, any action that may require a formal ruling on whether India's nuclear liability regime is in line with the CSC has the potential to derail India's conclusion that its liability regime conforms to CSC requirements and hence established international norms. At this moment, while others, especially CSC member States, can question the conformity of CLNDA with CSC, as the US has done earlier, there is nothing they can do about it.

As the International Court of Justice (ICJ) stated in an advisory opinion:

> "Until (this) ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention"

It also held that

> "an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the (earlier) reply only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;"

and further that

> "an objection to a reservation made by a State which is entitled to sign or accede

but which has not yet done so, is without legal effect." ("*Reservations to the Convention* on *Genocide, Advisory Opinion: I.C. J. Reports 1951, p. 15.*").

Therefore, the attitude of the US government after India's ratification of the CSC is crucial to establish whether CLNDA is in conformity with the CSC and hence with established international principles. Because, then, the earlier US objection to CLNDA will have legal effect. As the ICJ held in the cited advisory:

> "a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is ***compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention***."

Therefore, if the US formally objects that the CLNDA is not in conformity with CSC objectives, then there is a potential danger of the Indian membership in CSC being held invalid, which would effectively mean that the CLNDA is not in conformity with international principles.

If the US does raise such an objection, there is some possibility that the CLNDA may be held to be incompatible with CSC notwithstanding the Indian claims that CLNDA and CSC are compatible.

It is to be hoped, therefore, that along with the notes/memorandum/understanding that the Indian side may present to the US as a result of bilateral discussions, it has also asked for, and will get a similar note/memorandum/understanding from the US government to the effect that it will not raise any objection after India ratifies the CSC.

In that case, it being very unlikely that any other CSC member will object to India's CLNDA, Indian membership in CSC will stand and hence the CLNDA will be held to be in conformity with established international principles.

In that case, the doubts expressed by the US nuclear industry about compatibility between CLNDA and CSC will have no relevance or consequence. And the US nuclear industry will have to decide whether or not to participate in the Indian civil nuclear power programme based purely on:

(i) its reading of the CLNDA,

(ii) the explanations offered by the Indian and US government, and

(iii) most importantly, on its assessment of the associated benefits and risks.

As Ms. Biswal had stated at the conference referred to earlier, "it will be up to the companies to assess for themselves the business case scenarios and make their own decisions based on commercial aspects how to move forward."

So what is the bottom line conclusion?

(i) US industry: (a) There is a nuclear liability regime in India; (b) the Indian government has explained during discussions with the US Government and industry as to why it feels that the CLNDA is in line with international norms; (c) the US government has agreed that CLNDA is compatible with CSC (whether it will contest India's ratification of CSC is another matter, which in any case should have no bearing on the industry's assessment of the business case). Therefore, the ball is in their court. There is not much further that either the Indian or US government can offer to the US industry in their decision making. It is their call now.

ii) French industry: It will have to obtain confirmation from the French government whether or not the India-France nuclear cooperation agreement is dependent on the Indian nuclear liability regime being in conformity with international principles. If it is not, then India's ratifying or not ratifying the CSC makes no difference, since France is not a member of the CSC. If it is, then India's ratification and subsequent actions by the US government may have an impact – if the latter objects and CLNDA is held to be not in conformity with CSC. In that case, the French industry will have to wait until India's ratification of the CSC takes place.

iii) What happens if India does not ratify the CSC? The CLNDA cannot be established/ ruled to be in non-conformity with the CSC and hence with international norms. The US industry position does not alter; it remains as before. As for the French industry, it too can make a decision based on the assessment of business cases. It will be for the French government to make the call then – to decide whether or not CLNDA is in line with international principles and whether or not the nuclear cooperation agreement stands valid.

Note: If India ratifies the CSC and such ratification stands, even then the benefits of the convention will not accrue in case of a nuclear incident at any Indian reactor. It will be applicable only to those reactors that are under IAEA safeguards. According to Article II.2 of the CSC,

> "The system of this Convention shall apply to nuclear damage for which an operator of a *nuclear installation used for peaceful purposes* situated in the territory of a Contracting Party is liable under either one of the Conventions referred to in Article I or national law mentioned in paragraph 1(b) of this Article."

India has separated its nuclear facilities into civilian and non-civilian facilities and placed the former under IAEA safeguards. It is quite possible that other CSC members may hold that only those reactors declared as civilian can be construed as being used for peaceful purposes. At the very least, at the time of Indian ratification of the CSC, other CSC members may make reservations on the applicability of CSC provisions to all nuclear facilities in India.