

India Takes the Next Step in Forming Its Nuclear Liability Framework

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On February 4, 2016, India submitted to the International Atomic Energy Agency (IAEA) its Instrument of Ratification of the Convention on Supplementary Compensation for Nuclear Damage (CSC). Under the applicable rules, the CSC will take effect for India 90 days after ratification, giving it access to the international nuclear liability damages pool. Ratification of the CSC, along with guidance on India's nuclear liability law issued last year by the Ministry of External Affairs (MEA) and a nuclear insurance pool currently being formed by the General Insurance Corporation (GIC), constitute three pillars India has put in place to form its nuclear liability framework. The question is whether these will be enough to now open India's nuclear market for business, particularly for U.S. suppliers.

The CSC, which entered into force last year, is designed to be a free standing convention linking countries with strong nuclear liability systems. In addition to India, Argentina, Japan, Montenegro, Morocco, Romania, the UAE and the United States are current members of the Convention, which seeks to establish a worldwide liability regime that distributes the economic burden of nuclear liability among member states through a system of contributions by these states, in the event of a catastrophic nuclear accident. One of the unique features of the CSC is that it allows member states with their own nuclear liability regimes to retain those regimes. The CSC is divided into a main body and an Annex, which is designed to permit nations like India (as well as the United States, Japan and Canada) which are not signatories to any of the other international nuclear liability conventions, such as the Vienna and Paris Conventions, to join the CSC as long as its national nuclear liability law is in compliance with the provisions of the CSC and its Annex. Under the CSC, if a nuclear incident occurs in a CSC member State, all third-party claims for nuclear damage resulting from it are channeled exclusively to the operator in that State responsible for the nuclear incident and are to be resolved exclusively through the legal system of that State.

India's Nuclear Liability Law

In 2010, India, which is not party to the Vienna or Paris conventions, enacted its nuclear liability law, the Civil Liability for Nuclear Damages Act of 2010 (CLNDA). Together with its instrument of ratification of the CSC last week, India submitted to the IAEA a Declaration that stated (i) that the CLNDA was enacted to provide for “prompt compensation to the victims of a nuclear incident through a no-fault liability regime channeling liability to the operator” and (ii) that it “complies with the provisions of the Annex” to the CSC. It may have sought to point this out because questions have lingered about whether the CLNDA actually conforms to the CSC. Specifically, Section 17(b) of the CLNDA provides, e.g., that the operator may have recourse against the supplier for equipment considered defective. Section 46 provides that the CLNDA “shall be in addition to, and not in derogation of, any other law for the time being in force.” These provisions have caused concern that the CLNDA in fact does not channel all liability to the operator and instead allows for claims to be brought against the supplier under other laws, such as tort law.

The Declaration also includes a web link to “FAQs” issued in 2015 by the MEA outlining its views on India’s nuclear liability law and its conformity with the CSC. With respect to Section 17(b), the MEA stated it “permits but does not require an operator to include in the contract or exercise a right of recourse.” With respect to Section 46, it stated “this section applies exclusively to the operator and does not extend to the supplier.” As such, the MEA’s position was that “[t]he CLND Act channels all legal liability for nuclear damage exclusively to the operator and Section 46 does not provide a basis for bringing claims for compensation for nuclear damage under other Acts.” Thus, the MEA concluded that “[t]he provisions of the CLND Act are broadly in conformity with the CSC and its Annex in terms of channeling the strict/absolute legal liability to the operator.”

There was some indication India may further formalize these views via a memorandum from the MEA or even an opinion from its Attorney General, though so far neither of these has been made public. In any event, unless and until these interpretations are tested in Indian courts, there very well may not be certainty about whether they ultimately can be relied upon. Nonetheless, through these clarifications, as well as implementing rules to the CLNDA issued in 2011, India has taken some meaningful steps to address questions about its nuclear liability law. Its ratification of the CSC is another such stride forward and is an improvement over the last five years, in which the world waited for India to act and even wondered whether it would.

As discussed above, India is also in the process of setting up an approximately US\$230 million insurance pool led by State-owned GIC. Per the FAQs, the pool will cover the liability of the nuclear operator NPCIL, as well as that of the suppliers under Section 17 of the CLNDA. The pool envisages three types of policies: an operator policy, a policy for turnkey suppliers and a special suppliers’ contingency policy for suppliers other than turnkey suppliers. Though it appears Indian authorities will have sufficient capitalization to put together the pool, this resource is still not entirely in place. Getting it finalized is an essential element of India’s strategy to address nuclear liability issues raised by suppliers.

The Path Forward

When the U.S. and India announced last year that they had reached an “understanding” on the issue of nuclear liability, they also indicated it was now up to industry to decide whether to proceed with investing. In doing so, rather than themselves confirm whether the nuclear liability regime was consistent with international best practices as may have been originally intended, this risk assessment was effectively outsourced to the private sector. On the one hand, amending the CLNDA to actually eliminate the provisions of concern naturally would provide greater certainty about the conformity of India’s nuclear liability law with the CSC. On the other hand, if now U.S. suppliers still do not come, query whether at this

point that will simply provide greater opportunity for vendors from France and Russia and potentially create an opening for other players such as from Asia.

Last year, General Electric indicated that it would not enter the India nuclear market unless the CLNDA was “homogenized” with international nuclear liability rules. Last month, it was announced that Westinghouse anticipated being able to finalize an agreement with NPCIL to build nuclear reactors in India later this year. Thus, it remains to be seen whether 2016 will in fact bring the long-awaited international opening of India’s nuclear market estimated at \$150 billion, which will help power the country, make it part of the global nuclear supply chain, and otherwise allow its potential to begin to be realized.

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