IDSA ISSUE BRIEF

Should India Sign the Convention on Supplementary Compensation?

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Summary

A lot of attention has been paid recently to the Convention on Supplementary Compensation (CSC), free standing international convention on civil nuclear liability. US had urged India to sign the CSC and India had committed itself to doing so. However, this paper argues that the CSC does not confer any benefit to India and that it may in fact prove to be detrimental to Indian interests and why it should, therefore, not be signed.

There has been much speculation that during the forthcoming visit of US President Obama to India, one of the major topics of discussion between the two countries would be the Indian nuclear liability bill. The US has been unhappy with the provisions of the bill and would like it to be amended and also that India should sign the Convention on Supplementary Compensation (CSC). This paper examines the various factors that should influence the course of the discussion on the subject.

India, after much debate in the Lok Sabha, passed the bill for civil nuclear liability in mid 2010. Of the 30 countries in the world that operate civil nuclear power reactors, 28 had already passed such legislation or adhered to one of the two international nuclear liability regimes: The Paris Convention and the Vienna Convention. However neither of these two conventions has been adopted universally. Only 21 of these 28 countries are party to one of the two international conventions. The other seven- Canada, China, Japan, Republic of Korea, South Africa, Switzerland and USA- have national laws on nuclear liability. The United States did not choose to become a party to these international instruments, as they would require significant changes to the U.S. tort liability system.

Because the United States is not a party to any nuclear civil liability convention, U.S. suppliers of nuclear technology face potentially unlimited third party civil liability arising from their work in foreign markets. This potential liability was felt to limit commercial opportunities for these U.S. companies.

In order to address its concerns related to nuclear power the United States worked with the international community to draft the Convention on Supplementary Compensation for Nuclear Damage ("CSC" or "Convention"). The CSC was adopted on September 12, 1997, in Vienna at the 41st General Conference of the International Atomic Energy Agency ("IAEA"), and signed by the United States on September 29, 1997, the day it was opened for signature. However it was ratified by US only in 2005. To date, 13 countries have signed the CSC, and only four of these have ratified it. The treaty is yet to come into force.

India had considered enacting a civil nuclear liability bill more than decade ago and one of the principal reasons for such a bill was to allow for transborder effects of nuclear incidents especially after the decision to build the Koodankulum Nuclear Power Plant. In fact in the Statement of Objects and Reasons accompanying the bill the Government of India had stated that “It is, therefore, considered necessary to enact a legislation which provides for nuclear liability that might arise due to a nuclear incident and also on the necessity of joining an appropriate international liability regime.” Finally India did pass such a nuclear liability bill in mid 2010.

While the bill conformed in almost all respects with all the three international conventions- the Paris Convention, the Vienna Convention and the CSC- doubts have been expressed about whether the provision granting a right of recourse against the supplier complies with these international conventions which provide for recourse only if: (a) there is a

written contract and (b) if the damage results from an act or omission of someone with intent to cause damage. So, the Indian legislation providing an additional right of recourse against the supplier for a nuclear incident that has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services, has caused some uncertainty about its acceptability to the CSC. However, this may not prove to be an obstacle to India joining the CSC as Art. XVIII (i) of CSC only requires that a State *only declare* that its national law complies with the provisions of the Annex to the CSC Convention to become a member and the Indian government has already stated so.

Although during the deliberations before the Parliamentary Standing Committee on Science and Technology that was examining the bill some experts had suggested that this Bill was mainly to favour United States of America the government officials indicated that this was not true, that was no international pressure and that the Government of India has entered into agreement with several countries such as France, Russia and USA. However it is a fact that the Government of India did promise in writing to the US Government that it would sign the CSC.

The issue at the heart of the debate is whether or not India should sign the CSC even if its nuclear liability bill is in conformity with the CSC. **All evidence points to the incontrovertible fact that it will not only not confer any special benefits to India it may even in fact take away some of the benefits it may have enjoyed under CSC under different circumstances.** What are these?

As mentioned earlier the CSC was initiated at the behest of US to allay some of the fears of the US nuclear supplier industry. During the hearings before the US Senate when it was considering ratification of the CSC, administration officials contended that ratification of the CSC by the United States and other countries will establish a global regime and because the United States was such a proponent of the CSC and because so many of the provisions were tailored to meet the needs of the United States, other countries, while they had expressed support or interest in the CSC, had made it clear that they expect the United States to take the lead in ratifying this convention. It was expected that once US had ratified the CSC many others would follow suit. Unfortunately not only has no other country ratified the treaty, as matter of fact none has even signed it after US ratification.

There is one another important factor to be considered that would indicate why India ***should not*** sign the CSC.

While ratifying the CSC, the US administration had submitted to the Congress an implementing legislation required for the United States to comply with the Convention's provisions. The executive branch had held then that the CSC will not require substantive changes to the U.S. civil liability system for nuclear damage under the Price-Anderson Act. The Price-Anderson Act did not allow for any right of recourse to the operator. As

already mentioned the CSC allows for such a right of recourse under limited conditions which are also present in both the Indian act and the other two international conventions. However, the US legislation for the implementation of CSC specifically states that it ***does not provide for an operator of a nuclear installation covered by CSC*** any right of recourse under the CSC. This implies that even if the operator has a written contractual provision with the supplier explicitly providing for such a right of recourse, it would not be admissible under US laws!

It has been held by some Indian commentators that while under the CSC and the proposed Indian law, victims of a nuclear accident in India would not have the right to approach an American court or even an Indian court directly, a claim against a U.S. supplier under the right of recourse can be pressed by the operator before an Indian judge and that Article XIII.6 of the CSC, to which the U.S. is now a party, says the judgment of a court in the country where the accident occurs shall be legally enforceable by any other contracting party "as if it were a judgment of a court" of its own. Thus, if an Indian court were to accept that a particular nuclear accident were caused by negligence on the part of an American supplier, the U.S. authorities would be obligated to help the operator recover the money already paid out in compensation to the victims from the U.S. companies concerned.

Unfortunately the above reasoning is only partly true since Art. XIII.5 of CSC also states that "A judgment that is no longer subject to ordinary forms of review entered by a court of a Contracting Party having jurisdiction shall be recognized ***except: (c) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought***, or is not in accord with fundamental standards of justice." And as the US CSC implementing legislation states that as a matter of law, and hence public policy, there is no provision for the operator for any right of recourse, even if an Indian operator were to get a favourable judgment it cannot be enforced in the US under the CSC.

Can India amend its nuclear liability bill?

As mentioned earlier, the bill had been passed after a parliamentary committee had examined it in detail. The committee presented a report which in turn had been discussed in the parliament, and after protracted negotiation between the government and the opposition, a compromise bill was adopted and passed. But there were still some strong reservations expressed by members of parliament. It is extremely unlikely that any amendment, especially one that would find favour with the US, could be passed by the government. Hence one can confidently rule out any repeal of or amendment to the bill.

It is therefore necessary to find a solution that excludes both these options- India signing the CSC or amending the already passed liability bill.

Can this be done? An analysis of the issue would suggest a number of ways in which this can be done. What are these?

India's External Affairs Minister Mr. S.M.Krishna is reported to have told press that "The whole context (of the Liability Act) was to provide a level playing field to all those who want to do nuclear business with India." So one way in which this can be done is way of extending to the US suppliers assurances that are incorporated in Art. 13.1 of the India-Russia Inter Governmental Agreement (IGA) which states that "The Indian side and its authorised organisation at any time and at all stages of the construction and operation of the NPP(Nuclear Power Plant) units to be constructed shall be the operator of the power units of the NPP and be fully responsible for any damage both within and outside the territory of the Republic Of India caused to any person and property as a result of a nuclear incident occurring at the NPP and also in relation with a nuclear incident during the transportation, handling or storage outside the NPPs of nuclear fuel and contaminated materials or any part of NPP equipment both within and outside the territory of the Republic of India." This effectively indemnifies the supplier against any right of recourse by the operator in case of a nuclear incident and thus should assure the US suppliers of a level playing field and removes the need for any Indian signature to the CSC. Incidentally as already mentioned very few, if at all, any of the countries importing reactors are party to the CSC apparently without any detriment to their ability and capacity to engage in civil nuclear trade, including with US suppliers. Hence there is no reason why India should sign the CSC to be able to engage in civil nuclear commerce with US suppliers.

A second approach would be to let the suppliers take out a financial insurance package similar to the one required of the operators for the maximum amount of operator liability, since under any right of recourse the operator can claim only to the extent of claims paid out by the operator. The operator can indemnify the supplier against any insurance premium that is required to be paid. The maximum operator liability in India is Rs. 1500 crores. Assuming a notional 0.2 % rate of premium, in actual practice it has been less in many of the countries, the premium to be paid annually will be Rs. 3 crores. If one further assumes a rate of discoiunt of 10%, then the present value of the premium to be paid over the life of the reactor will be less than Rs. 33 crores. A 1000 MWe NPP- which is expected to be standard size of an imported NPP- will be around Rs. 7000-8000 crores. A lifetime premium of Rs. 33 crores, even if added to the cost of the NPP, will hardly make any difference to the total costs of the NPP or its operating costs. This premium can be either be borne by the supplier or the pool of suppliers, if there is more than one supplier. Further it is also possible that the supplier and the operator can agree to share this additional premium or the operator undertake to indemnify the supplier of the premium paid. Any number of combinations and arrangements are possible that will assure the suppliers that even in case of a nuclear incident the operator exercises the right of recourse it will not financially impact the supplier. In particular the US suppliers will be relived of the anxiety of the possibility of facing potentially unlimited third party civil liability arising

from their work in India.

A third possibility is a written undertaking by the operator foregoing any right of recourse against the supplier.

In short one can think of any number of options that will allay the fears of US suppliers of facing potentially damaging financial costs as a result of a nuclear incident as a result of either a civil suit in the US or the operator exercising the right of recourse without India having to either sign the CSC or amend its already passed liability bill. What is not possible, however, is that it has to be done in the manner suggested or required by the US suppliers- India should sign the CSC and/or amend its nuclear liability bill.