

Chapter 6

India's Nuclear Trade – Inching Forward?

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Introduction

India elected a new government in May 2014, and it is too early yet to observe any major policy changes in the energy sector, or to predict precisely how it will resolve the current reluctance by suppliers to sign contracts with the Indian operator.¹ Some of the modalities currently being reviewed to cut this Gordian knot will be touched upon in this paper.

Much has already been written about the *Civil Liability for Nuclear Damage Act, 2010* (CLND Act) and CLND Rules, 2011,² and its possible interpretation.³ There also seems to be an increasing interest in trying to better understand how courts in India would hypothetically interpret the CLND Act and its Rules. Therefore, we will first provide an overview of the role the central Supreme Court and the State-level High Courts have carved out for themselves and what type of judicial decision-making typifies them, and in which instances judges tend to adopt a “social engineering” role. With this aim in mind, we will highlight the patterns in environmental case law which can be discerned, and will offer some pointers in how technical

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¹ One of the rare public comments by the new Prime Minister relating to the nuclear sector were made during his visit to the Bhabha Atomic Research Center (BARC) on July 21, 2014, where he underlined the importance of ensuring that nuclear energy remained commercially viable and competitive with other sources of clean energy in the long run. See: Economic Times, “Make Nuke Energy Economical”, July 22, 2014, at p. 4.

² Both the Liability Act and the Liability Rules entered into force on November 11, 2011. Copies of the Act and Rules can be found at: <www.nlain.org/links>; and *Nuclear Law Bulletin*, No. 88, Volume 2011/2, pp. 145-171.

³ See for additional background, *inter alia*, Robert J. Gruendel and Els Reynaers Kini, “Through the Looking Glass: Placing India’s New Civil Liability Regime for Nuclear Damage in Context”, *Nuclear Law Bulletin*, No. 89, 2012/1, available at: <<https://www.oecd-nea.org/law/nlb/nlb89.pdf#page=47>>; Yash Mannully, “Issues in Indian Nuclear Liability Law”, *Nuclear Inter Jura Congress 2012*, Manchester, available at: <http://www.burges-salmon.com/INLA_2012/10144.pdf>; Mohit Abraham, *Nuclear Liability: A Key Component of the Public Policy Decision to Deploy Nuclear Energy in Southeast Asia*, Cambridge, Mass, American Academy of Arts and Sciences, 2014, available at: <<http://www.amacad.org/gnf>>.

(nuclear) legal disputes could be approached by the Indian courts, particularly in the absence of any apparent void or failure on the part of the executive branch and in a sphere where a clear (nuclear) policy has been laid down by the government.

There are not that many cases directly relating to the nuclear energy sector, but the 2013 Judgment of the Supreme Court pertaining to the commissioning of the Kudankulam Nuclear Power Plant (KK Judgment),⁴ clearly falls under the case law where the interest of the public at large and the larger benefit to society in terms of electricity generation is given greater weight than the individual or more local “right to life” concerns of people. The KK Judgment in this sense confirms the discernable pattern in the Supreme Court case law when it addresses large public infrastructure projects, as will be illustrated in the first part of this paper.

In the second part, we will touch upon the importance which a Supreme Court would attach to parliamentary debates as “external aids” while interpreting laws, as was borne out in a recent high-stake case pertaining to India’s patent laws. In this context, detailed account is given of some of the crucial exchanges that took place in Parliament while adopting the CLND Act. Given that these debates could very well be relied upon when interpreting the CLND Act, sufficient attention is paid to the intent which can be distilled from these debates, which predominantly revolved around the right of recourse provision. This also leads us to more closely assess the contemporary relevance of the right of recourse provision, as well as the flexibility offered under the CSC Annex to contracting parties.

As mentioned, in the last part of this paper, we will touch upon the possible options currently being reviewed by the newly elected government to activate its nuclear trade and propel its long-term nuclear energy ambitions. Some of these long-term energy security policies in which nuclear energy has a role to play, are increasingly being attached to domestic policies to combat climate change as well. This macro perspective is all the more relevant as these developments in 2014 may well be played out in a more significant manner during the COP 21 of the UNFCCC to be held in December 2015, where a more meaningful binding agreement is expected to be concluded between all contracting parties, and where the twain may very well meet.⁵

⁴ For a detailed analysis of the KK Judgment see: Dr. M.P. Ram Mohan and Akshay Shandilya, “Nuclear Energy and Risk Assessment by Indian Courts: Analysis of Judicial Intervention in the Kudankulam Nuclear Power Project”, *Journal of Risk Research*, 2014.

⁵ Rudyard Kipling, *Barrack-room Ballads*, 1892: “Oh, East is East, and West is West, and never the twain shall meet” (referring to the gulf of understanding between the people in India and the British).

Judicial Decision-Making in India – Environmental and Nuclear-Related Case Law

On Environmental Constitutionalism in India

Much has been written about the importance of the Public Interest Litigation (PIL) tool for citizens to approach courts in India,⁶ and increasing attention is being paid to the recent phenomenon of “environmental constitutionalism”, which can be observed across jurisdictions worldwide.⁷ Suffice it to say, for the purpose of this article, that it is now well-established in India that the classic constitutional *habeas corpus* or “right to life” article encompasses the right to a wholesome environment. In other words, the right to life under Article 21 of India’s Constitution⁸ includes the right of enjoyment of a pollution free environment.⁹

When addressing fundamental rights, the Supreme Court and state-level High Court Judges have been proactive in lowering procedural hurdles for citizens to approach the court,¹⁰ or by *suo moto* taking up issues based on newspaper articles.¹¹ A good example in point is the 2014 case pending before the Jharkhand High Court in which it took *suo moto* cognizance of a news report published in February 2014, pertaining to the alleged negative health and environmental impact of Uranium mining in the area.¹² The Jharkhand High Court stated in its Order that “this Court is under constitutional obligation to express on the impact of U.C.I.L. [Uranium Corporation of India Limited] operations on the health and environment in the State of Jharkhand and seeks immediate response from the respondents”, in particular with regard to the safety measures and standards adopted in respect of workmen working in the uranium mining; the

⁶ See, *inter alia*, Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems”, published in B.N. Kirpal et al, eds., *Supreme but not Infallible — Essays in Honour of the Supreme Court of India*, New Delhi, Oxford University Press, 2000, p. 159, available at: <www.ielrc.org/content/a0003.pdf> (hereinafter Desai and Muralidhar); and Gurdip Singh, *Environmental Law in India*, McMillan, 2005, p. 421.

⁷ James R. May and Erin Daly, *Environmental Constitutionalism: Implications for Present and Future Generations*, Cambridge University Press (forthcoming November 2014) (final Review Manuscript, May 2013, on file with author). See also country-specific presentations made at the Annual Conference of the International Bar Association, Boston, 2013, on “Environmental constitutionalism — environmental protection as a fundamental constitutional or human right?” More at: <http://caminhoverde.files.wordpress.com/2014/05/iba.pdf> .

⁸ Article 21 Constitution: “No person shall be deprived of his life or personal liberty, except according to the procedure established by law”.

⁹ See e.g. *Subhash Kumar v. State of Bihar*, 1991 SCR (1) 5 (India Sup. Ct.); *M.C. Mehta v. Kamal Nath*, (2000) INSC 334 (India Sup. Ct.).

¹⁰ To the point of accepting letters addressed by individuals to the court. See e.g. *M.C. Mehta v. Union of India*, AIR 1987 SC 1080 (India Sup. Ct.) (Shriram Gas Leak case).

¹¹ See e.g. *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (India Sup. Ct.).

¹² *Court on Its Own Motion v. Union of India and Ors* (February 28, 2014), W.P. (PIL) No. 1188 (Delhi H.C.).

measures taken to prevent the effect of nuclear radiation emanating out of the mining operation, transportation and disposal of the radioactive waste on the health of the people at large and the environment surrounding the area. In August 2014, the Jharkhand High Court further stated in reply to the argument by respondents that the newspaper article had no scientific basis that “it is always open to the respondent to put forth its case and satisfy the Court about the safety measures that have been taken” — thereby clearly reversing the burden of proof; implicitly in line with the precautionary principle which the Supreme Court of India has held to be part of “customary international law”.¹³

Historical Background on the Judicial Decision-Making Approach in India

The Judges of the Supreme Court of India were not always as proactive, and it is a trend that has been observed since the early 1980s.¹⁴ As a matter of fact, many have analyzed it as a counter swing to the limited role it dared to play during the Emergency period (1975-1977),¹⁵ and during which it failed to be the “guardian of citizens’ liberties”.¹⁶ Importantly, just prior to the Emergency, the Supreme Court adopted the doctrine that still holds good according to which fundamental rights cannot be derogated even by Constitutional amendment.¹⁷ And even more far-reaching, parliament would not have the right to amend the Constitution which would violate the “basic structure” of the Constitution,¹⁸ a concept which lends itself to being defined over time, and has been held to include the power of judicial review which can never be taken away from the courts.¹⁹

¹³ See *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (India Sup. Ct.), in which the Supreme Court further held that “the precautionary principle in the context of municipal law means: ... (iii) the ‘onus of proof’ is on the actor or the developer/ industrialist to show that his action is environmentally benign”. The statement of the Supreme Court according to which the sustainable development principle, of which the precautionary principle is part, is part of “customary international law” is interesting as e.g. neither the ICJ or the WTO Dispute Settlement Body have gone as far as holding so. For a detailed discussion, see: Els Reynaers Kini, *The Precautionary Principle, Multilateral Treaties and the Formation of Customary International Law*, EDIS publications, 2008, p. 174.

¹⁴ The first decades of its operation it interpreted its own role in a narrow manner and essentially in “accordance with narrow procedural rules”. See more at: Desai and Muralidhar, *supra* note 6 at p. 1.

¹⁵ The Emergency period lasted between June 25, 1975 and March 21, 1977, during which, then Prime Minister Indira Gandhi, ruled by decree, elections were suspended, the media censored and civil rights were set aside.

¹⁶ Desai and Muralidhar, *supra* note 6 at p. 2.

¹⁷ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (India Sup. Ct.). See for a discussion: Desai and Muralidhar, *supra* note 6 at p. 1; and in more detail: *VN Shukla's Constitution of India*, Eastern Book Company, MP Singh, 12th Edition, 2013.

¹⁸ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (India Sup. Ct.). For commentaries, see references in note 17.

As we will illustrate in the section below, based on the rich environmental case law in India, at a doctrinal level the judicial decision-making by the judges in India can be categorized as “pragmatic instrumentalism”.²⁰ This is often placed in contrast to the more “formalist” or “conceptualist” style of decision-making based on the assumption that the judges’ main role is to apply existing law and not make new rules, and that such a social role should solely be performed by the legislative or executive branch²¹ — an understanding of separation of powers many civil lawyers may feel more familiar with. An instrumentalist judge on the other hand tests “the formulation and application of each rule by its purpose or policy”, and will take into account the “social ends” of the rules to be applied to which they are merely the means. Hence, “for an instrumentalist judge, the act of interpreting a constitution, statutes, or prior common law decision will often require consideration of sound social policy to resolve leeways in the law”.²² One could conclude that the judges under this paradigm fulfill a role of “social engineers”.²³

Judges as “Social engineers” Tend to Tango With Policy

From the end of the 1980s onwards India has witnessed an explosion of environmental case law. It is now well-settled law that the polluter pays principle and the precautionary principle form the bedrock of this rich case law. However, in several other cases the Supreme Court also made inroads

¹⁹ *Ibid*; and *S.P. Gupta v. President of India and Ors*, AIR 1982 SC 149 (India Sup. Ct.). See also VN Shukla’s Constitution of India, *supra* note 17 at pp. A-53 and A-54, for a comparison of the “judicial review” notion between India and the US (e.g.: “judicial review in India goes far beyond its counterpart in the US, insofar as the validity of the constitutional amendments can also be reviewed by the courts on the ground that an amendment violates the basic structure or features of the Constitution”).

²⁰ R. Randall Kelso, “Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making”, 20 Pepp. L. Rev. 2 (1993), Vol. 20, Issue 2, Article 6, pp. 531-641, available at: < <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1607&context=plr> > .

²¹ *Ibid* at p. 533.

²² *Ibid*.

²³ *Ibid* at note 15. See also references in note 21 according to which “Formalists generally viewed the law as a relatively closed system of conceptions and axioms from which judges and others could deduce resolutions of almost any issue.” See further illustrative Table 1 of Style of Judicial Decision-Making at p. 538. See also at pp. 540 - 543 on the “Holmesian approach”, which viewed that judicial decision-making should be separated from “moral discourse” and that “certainty and predictability were important virtues of law” Indeed, Holmes believed that “if the law were based on internal or subjective standards, disagreement would be more likely, thereby leading to uncertainty and unpredictability in the application of the law”. Particularly in emerging fields of law, or where there are clear policy voids, governance inefficiencies, failure on behalf of the executive branch, etc. many Supreme Court Judges in India would not shy away to leave a strong personal (and historical) imprint, at the risk of upsetting case predictability. Therefore, to a large extent the author is tempted to place the Indian judicial decision-making approach in the instrumentalist camp rather than the Holmesian one, but this can be debated further.

in clear policy choices or was highly critical of the role played by the executive branch. For instance, in a landmark environmental case, local villagers filed a PIL before the Supreme Court exposing the fact that various chemical industries were discharging untreated sludge, thereby making the subterranean supply of water unfit for human consumption. A fact that had gone completely unnoticed by local enforcement agencies.²⁴ Apart from confirming that the failure to act on the part of the Central Government, the State Government and the state pollution control board (SPCB) “is seriously undermining the right to life guaranteed by Article 21 of the Constitution”, the Supreme Court suggested in its final directions that the Central Government should consider “strengthening the environment protection machinery both at the Centre and the States and provide them more teeth”. More specifically, the Supreme Court suggested that “the head of several units and agencies should be made personally accountable for any lapses and/or negligence on the part of their units and agencies”, while it also suggested establishing specialized environment courts.²⁵

Similarly, in the *CNG case*, the Supreme Court was highly disapproving of government inaction and more directly entered the policy sphere by directing that the entire city bus fleet in India’s capital had to be converted to a single fuel mode of CNG by March 31, 2001.²⁶ In the *CNG case*, the Supreme explained its own role when stating that: “It was by reason of the lack of effort on the part of the enforcement agencies, notwithstanding adequate laws being in place, that this Court has been concerned with the state of air pollution in the capital of this country.”

The Supreme Court then moved on to compare the vaster ill effects of air pollution with the Bhopal gas tragedy: “The increase in respiratory diseases especially amongst children should normally be a cause of concern for any responsible government. The precautionary principle enshrined in the concept of sustainable development would have expected the government and the health authorities to take appropriate action and arrest the air pollution” and went as far as stating that “the Government now appears to protect the financial health of the polluters . . . The statistics show that continuing air pollution is having a more devastating effect on the people, than what was caused by the Bhopal gas tragedy. In that case, the nation,

²⁴ *Indian Council for Enviro-Legal Action v. Union of India (Bichhri Village case)*, AIR 1996 SC 1446 (India Sup. Ct.).

²⁵ After many failed attempts, the *National Green Tribunal Act, 2010*, has now set up an effective mechanism of green tribunals with regional presence. The scope of these national green tribunals is limited to a “substantial question relating to the environment” linked to any of the exhaustively enumerated environmental laws in Schedule 1 of the Act. The jurisdiction of the NGTs is more limited than the writ jurisdiction of the High Courts. The Madras High Court has recently struck down some of the cases which the NGTs had initiated on a *suo moto* basis, stating that NGTs did not have such vast powers similar to the High Courts and the Supreme Court.

²⁶ See: *M.C. Mehta v. Union of India*, AIR 2001 SC 1948 (India Sup. Ct.); and *M.C. Mehta v. Union of India*, AIR 2002 SC 1696 (India Sup. Ct.) (also known as the “*CNG case*”).

including the Union of India, was rightly agitated and sought action and compensation from the multinational company, who was held to be responsible for the same. Here, in the case of CNG, the shoe is on the other foot because the government is not facilitating measure for clear air and water including the supply of CNG or any other clear unadulterated fuel . . . Under these circumstances, it becomes the duty of the Court to direct such steps being taken are necessary for cleaning the air so that the future generations do not suffer from ill-health.”

Similarly, in the *Taj case*²⁷ where 300-odd local brick-kiln and foundry factories were found to be causing the yellowing of the white marble of the Taj Mahal, the Supreme Court held that the emissions violated the right to life of the residents and ordered that the industries either: (1) switch from coke/coal to natural gas as a natural fuel; or (2) approach the local government authority for allocation of an alternate plot of industrial land and simply relocate.

Additionally, the Supreme Court has adopted the practice of keeping more complex environmental cases on its board by way of “continuing mandamus”,²⁸ where parties are made to report regularly to the court which enables it to closely monitor the compliance with its directions.²⁹ In an even more far-reaching case, as part of such a continuing mandamus matter, the Supreme Court set up a techno-legal expert committee in 2002, the Central Empowered Committee (CEC), to resolve all forest and timber-related disputes and to grant prior clearances to industry stipulating the conditions under which they can use timber and forest produce. In other words, the CEC closely monitors the usage and protection of India’s forest coverage; and it has by now become an institution to reckon with in its own right.³⁰ As Chowdhury has observed, the creation of such a specialized body with wide ranging decision-making powers, and which updates the Supreme Court on a regular basis about the cases it has handled, is not only a very creative approach but clearly enters the policy-making sphere, “and has allowed the Supreme Court to usurp powers of enforcement agencies”.³¹

²⁷ *M.C. Mehta v. Union of India*, (1997) 8 SCC 770 (India Sup. Ct.).

²⁸ On the notion of “continuing mandamus”, see the following Supreme Court case: *Vineet Narain v Union of India*, (1998) 1 SCC 226 (India Sup. Ct.).

²⁹ See also: Desai and Muralidhar, *supra* note 7 at p. 10.

³⁰ Central Empowered Committee website: < <http://cecindia.org/aboutcec.php> > . The continuing mandamus forest case referred to is: *T.N. Godavarman Thirumulpad v. Union of India*, AIR 1998 SC 769 (India Sup. Ct.).

³¹ Nupur Chowdhury, “Environmental Risk Regulation and the Indian Supreme Court: an Exercise in de-Formalization of the Law?”, *Journal of Risk Research*, 2014, Vol. 17, Issue, pp. 61-80, available at: < <http://EconPapers.repec.org/RePEc:taf:jriskr-v:17:y:2014:i:1:p:61-80> > .

There are a myriad of environmental cases, and environmental lawyers in India now know to expect that if the courts notice inaction on the part of the government or its environmental enforcement agencies, which thereby infringes the constitutional right of life of citizens, that void will be filled by the courts.

Deference to the View of Scientific Experts – in Environmental and Nuclear Matters

It is important to underscore the great importance which courts attach to the view of scientific experts in deciding these often essentially technical environmental matters, and the few nuclear-related cases only confirm this attitude. In most writ petitions or PILs where there seems to be a divergence of opinions on the level of compliance or which technologies must be relied upon to arrive at full compliance, the courts tend to refer the matters for a final opinion to the highly-reputed National Environmental Engineering Research Institute (NEERI).³² Given that NEERI is a well-esteemed organization and carries the trust of all parties because it is seen as truly independent, its reports submitted to the court tend to be the final word in any matter, and often even overrule the technical opinions of environmental enforcement agencies.

There are only a few cases touching directly upon the nuclear energy sector or radiation-related issues. In the context of our analysis of the deference by the courts to the viewpoints of experts in technical matters, it is worth briefly referring to the case in which the import of Irish butter into India in the aftermath of the Chernobyl nuclear disaster was sought to be prohibited based on the claim of radioactive contamination.³³ Given that the court-appointed expert committee held that the consignment of the imported butter was safe for human consumption, while also referring to recommendations of the International Commission on Radiological Protection (ICRP) and the fact that the permissible levels set by the AERB were one of the lowest in the world, the Supreme Court dismissed the special leave petition. In other words, it absolutely relied on the view of the expert committee, which determined the outcome of the case.

Large Infrastructure Projects – the Other Side of the Coin

As observed by several other environmental scholars in India, such as Geetanjoy Sahu³⁴ and Nupur Chowdhury,³⁵ the dynamism with which the Supreme Court and the High Courts entertain environmental constitutional

³² NEERI website: < <http://www.neeri.res.in/> > .

³³ *Dr. Shiva Rao Shantaram Ram Wagle v. Union of India*, (1988) 2 SCC 115 (India Sup. Ct.).

³⁴ Geetanjoy Sahu, “Why the Underdogs Came Out Ahead — An Analysis of the Supreme

cases seems to be dampened when it needs to balance the fundamental (environmental) right to life, against the larger public interest at stake in large infrastructure projects, where the balance consistently tilts in favour of the large public projects. The ground reality in India where a large part of the population still lives in poverty, without access to basic necessities such as water and electricity, then clearly motivates the courts not to halt these large infrastructure projects. The KK Judgment confirms this pattern, as will be discussed below.

Dams

In a dam project of the large Narmada river which was studied from 1955 onwards, and which was challenged by a very active organization in 1994 who opposed the dislocation of a large segment of the local population, the Supreme Court ultimately held in 2000 that:

In respect of public projects and policies which are initiated by the Government, the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not *mala fide*, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive.³⁶

This ratio was reiterated by the Supreme Court in a more recent hydro power project case.³⁷

Here we see a very different type of reasoning coming to the forefront, which is illustrative of the Supreme Court's general position in large public infrastructure projects, where there is a clear reluctance to enter the policy sphere if no apparent illegality or implementation paralysis can be ascribed to the executive.

Highways

Similarly, the ongoing construction of national highways throughout India attract their fair share of PILs, in which the land acquisition or Environmental Impact Assessment (EIA) processes tend to be challenged. In cases as recent as 2014, the Supreme Court and various High Courts have

Court's Environmental Judgments, 1980-2010", *Economic and Political Weekly*, Vol. XLIX, No. 4, January 25, 2014, pp. 52-58.

³⁵ Nupur Chowdhury, *supra* note 31.

³⁶ *Naramada Bachao Andolan v. Union of India*, (2000) 10 SCC 664 (India Sup. Ct.).

³⁷ *N.D. Jayal v. Union of India*, AIR 2004 SC 867 (India Sup. Ct.). (The Supreme Court further clarified that it would not interfere even when divergent scientific views would be presented, and held "when the Government or the concerned authorities after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the Court to interfere").

shown a reluctance to interfere with these public infrastructure projects if due process is followed.³⁸ In these decisions the “larger public interest” of these projects always prevail, and a 2014 High Court decision confirms this position while stating that “the Courts are bound to take into consideration the comparative hardship which the people at large would suffer by stalling the project of a great public utility” and “the Courts should not be asked to assess the environmental impact of expansion of a highway, but at the most could ensure that the recommendations of the experts have been abided by the Government or the authority concerned”.³⁹

Nuclear Power Plants

In light of the above and “policy hands-off” approach by the courts in India when addressing large public infrastructure projects — particularly when no procedural fault or any implementation or enforcement failure of the executive can be established — the Supreme Court’s decision on May 6, 2013, in which it gave the go-ahead to the Kudankulam Nuclear Power Plant (KKNPP), did not come as a surprise.⁴⁰ Several authors have already given a detailed account of the KK Judgment,⁴¹ which covers safety and security, nuclear waste management,⁴² disaster management preparedness, CSR, and environmental compliance (including EIA requirements) in great detail,⁴³ but for the purpose of this article it may be worth specifically looking at the Supreme Court’s take on policy interference and the larger public benefit discourse.

³⁸ *Union of India v. Dr. Kushala Shetty & Ors.*, (2011) 2012 SCC 69, AIR 2011 SC 3210 (India Sup. Ct.); also referred to in *Vikram Trivedi v. Union of India*, 2014(4) FLT 524 (Gujarat H.C.).

³⁹ *Vikram Trivedi v. Union of India*, 2014(4) FLT 524 (Gujarat H.C.).

⁴⁰ *G. Sundarajan v. Union of India*, (2013) 6 SCC 620 (India Sup. Ct.).

⁴¹ See in particular: Dr. M.P. Ram Mohan and Akshay Shandilya, *supra* note 5.

⁴² The Supreme Court also refers to the Judgment of the US Court of Appeals (June 8, 2012) striking down NRC’s “waste confidence” rule, although it observed the difference between India’s “closed fuel cycle” and the US’ “open fuel cycle process”. See paras. 61-62 of the KK Judgment.

⁴³ The Environmental Clearance was issued on May 9, 1989, prior to the entry into force of the 1994 EIA Notification which mandated public hearings, whereas construction of the KKNPP was only started in 2002. The appellants argued that a fresh environmental clearance needed to be obtained. See Part II of the Judgment. However, the many related clearances obtained and completion of the land acquisition process, and the general conclusion that the EIA Notification, 1994 would only operate prospectively and that at a specific exemption contained in the EIA Notification, 1994 (Explanatory Note 8 with regard to projects for which the land acquisition process has already been completed), would apply. EIA Notification, 2006 does apply to KKNPP units 3 to 6. See also detailed discussions held during the Third Annual Meet on “Nuclear Energy and Indian Society: Public Engagement, Risk Assessment and Legal Frameworks”, Nuclear Law Association India, New Delhi, March 1, 2014, proceedings will be published in Nuclear Law Bulletin No. 93 / 2014.

The opening paragraph of the Judgment acknowledges that the Three Mile Island, Chernobyl, Fukushima and Bhopal disasters “might be haunting the memory of the people living in and around Kudankulam, leading to large-scale agitation and emotional reaction to the setting up of the NPP”. However, it immediately followed this with a detailed historic sketch of the legislative and regulatory history of the nuclear sector in India, while stating that “the Parliament in unequivocal terms has pronounced its national policy through the [Atomic Energy] Act, that is to develop, control and use of atomic energy for the welfare of the people of India”.⁴⁴ The court also referred at length to the various international arrangements India has entered into with foreign countries “in order to give effect to the national policy for development, control and use of atomic energy”.⁴⁵ The Supreme Court, while referring to the other PIL where the CLND Act is sought to be declared as unconstitutional and void *ab initio*, merely, succinctly, referred to the 1978 US Supreme Court case in which the constitutional validity of the *Price-Anderson Act* was upheld, but without further delving into the constitutionality issue.⁴⁶

With regard to its own role and policy matters, the Supreme Court unambiguously held that the “NPP has been set up at Kudankulam as part of the national policy . . . It is not for the Courts to determine whether a particular policy decision taken in fulfilment of a policy, is fair”, and while referring to many precedents it also ruled that “unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere *ipse dixit* of the executive authority or is invalid in constitutional or statutory mandate, court’s interference is not called for”. It further stated that “we are therefore firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russia agreement. Courts also cannot stand in the way of the Union of India honouring its Inter-Governmental Agreement entered into between India and Russia”.⁴⁷

Echoing its ratio laid down in large public infrastructure projects, it held that “while balancing the benefit of establishing KKNPP units 1 to 6, with the right to life and property and the protection of environment . . . we have to strike a balance, since the production of nuclear energy is of extreme importance for the economic growth of our country, alleviation of poverty, generation of employment, etc. While setting up a project of this nature, we have to have an overall view of larger public interest rather than the smaller

⁴⁴ *G. Sundarajan v. Union of India*, (2013) 6 SCC 620 (India Sup. Ct.), see paras. 2 to 6, and para. 11.

⁴⁵ *Ibid* para. 10.

⁴⁶ See para. 82, with reference to *Duke Power Co. v. Carolina Environmental Study Group Inc.* 438 U.S. 59 (U.S. N.C. S.C. 1978).

⁴⁷ *Ibid* para. 13. Referring to the inter-governmental agreement between India and erstwhile USSR in November 1988 followed and the supplementary agreement on June 21, 1998.

violation of the right to life guaranteed under Article 21 of the Constitution”,⁴⁸ and that “the larger public interest of the community should give way to individual apprehension of violation of human rights and the right to life guaranteed under Article 21”.⁴⁹ In a more far-reaching manner, and which is bound to be quoted in future cases relating to the nuclear sector, it held that nuclear power plants are “being established not to negate the right to life, but to protect the right to life guaranteed under Article 21 of the Constitution”.⁵⁰

Indeed, the court further held that given the enormous amounts of money already spent on the development, control and use of atomic energy for the welfare of the people, citizens would have to put up with such “minor inconveniences . . . because the benefits we reap from KKNPP are enormous since nuclear energy remains an important element in India’s energy mix which can replace a significant part of fossil fuels like coal, gas, oil, etc.”.⁵¹ The apprehension expressed by some sections of the public simply has “no basis” in the court’s view, and therefore, once the “justification test is satisfied, the apprehension test is bound to fail”.⁵²

The concurrent opinion by Justice Misra⁵³ stressed the importance of public safety which “at no stage, can be brushed aside or ignored” and should be treated with “paramount primacy”, based on the principle that welfare of the people is the supreme law.⁵⁴ Essentially, the concurrent opinion sought to emphasize that in the context of nuclear energy it is not merely the concerns of, for instance, people whose land was acquired in a national highway project and their “minor inconveniences”, but the looming possibility, as minute as it is, of a large-scale disaster which could entail death and where “the grammar has to be totally different” and as such the “life of some cannot be sacrificed for the purpose of the eventual larger good”.⁵⁵

Detailed attention was paid to the numerous government and expert committee reports, which were ultimately “unanimous in their opinion of the safety and security of the KKNPP both to life and property of the people and the environment”, and which were given due weight.⁵⁶

⁴⁸ *Ibid* see para. 175.

⁴⁹ *Ibid* para. 179.

⁵⁰ *Ibid* para. 184.

⁵¹ *Ibid* para. 180.

⁵² *Ibid* para. 181.

⁵³ Concurrent Opinion of Justice Misra (paras. 192–229).

⁵⁴ *Ibid* paras. 209, 215 and 216.

⁵⁵ *Ibid* para. 228. See also Dr. M.P. Ram Mohan and Akshay Shandilya, *supra* note 4, at p. 15, who question whether on the competing views on Article 21 of the Constitution, the court “took a lenient view strictly seeing nuclear energy from the prism of national policy?”.

⁵⁶ See Part I; and paras. 161, 178, 185–188, and 190.

Another significant distinction with some of the more “socially driven” environmental case laws that we have discussed above, is that its judicial evaluation in the KK Judgment centered around whether or not the project proponent strictly conformed to the standards set by the Ministry of Environment & Forests, the state pollution control board (SPCB), and generally followed all environmental laws — because “no plant specifically the one dealing with radioactive materials can be allowed to function or commission even if it has been cleared by the Atomic Energy Commission (AEC), Atomic Energy Regulatory Board (AERB), the Nuclear Power Corporation of India Ltd. (NPCIL), etc.”.⁵⁷ This is very indicative of how many future nuclear energy-related cases may be dealt with by the courts, given that the nuclear sector tends to be one of the most closely monitored sectors from a safety and environmental perspective, a reality (independently of whether one is in favour of nuclear energy per se or not) which in India will often be in dramatic contrast with the widespread non-compliance by companies vis-à-vis environmental laws and which will necessarily attract a different type of case law when faced with PILs pertaining to such unregulated pollution and blatant non-compliance situations,⁵⁸ where the courts may often push the balance of power boundaries and enter the sphere of the executive.⁵⁹

Reflections on the Tenacious Right of Recourse Issue

Although, we depicted a contemporary Supreme Court of India which does not shy away from a social engineering paradigm, it must be underlined that courts more readily enter the policy sphere where there is an apparent abdication by the executive branch or its enforcement agencies to fulfill its role. When dealing with large public infrastructure projects where courts cannot find fault with the procedure followed as such, the large public benefit these projects intend to fulfill, will prevail. We also indicated that courts give due weight to expert views, and particularly of well-established and respected bodies, which tend to have a final say on technical matters.

⁵⁷ *Ibid* see para. 123.

⁵⁸ It is noteworthy that the Bhopal Gas Tragedy exposed the legal lacunae in the environmental field, and it is only in the aftermath of the disaster that the *Environment (Protection) Act*, 1986, was adopted in India.

⁵⁹ Non-compliance by companies can be due to financial constraints, ignorance of the specific environmental requirements, non-enforcement and/or corruption by government officials, etc. There are many factors that make the compliance issue in India a challenging one, where constructive dialogues with enforcement agencies are close to impossible, and no incentives are provided for proactive disclosures. This inherently makes these interactions with enforcement agencies rather adversarial in nature. There is clearly a need to improve the environmental governance model, and until then the courts will often end up being the last resort to rectify environmental pollution issues.

Statutory Interpretation – Relevance of Parliamentary Debates – CLND Act

One more aspect which may turn out to be highly relevant during the interpretation of the CLND Act by the judiciary, is the relevance that would be attached by courts to the underlying meaning and intent of the Act as can be culled out from Parliamentary debates and reports.

Novartis Case – Giving Meaning to India’s Patent Act Based on Parliamentary Debates

In the 2013 *Novartis* case, relating to the interpretation of India’s intellectual property rights (IPR) laws and its conformity with India’s WTO obligations, the Supreme Court went at great length to review the precise meaning of terms based on parliamentary debates before deciding that no patent could be granted to the *Novartis* medicine which it found to be mere “evergreening” of an earlier patent.⁶⁰ Suffice it to say, for the purpose of this article, that India’s *Patent Act, 1970*, underwent drastic changes from 1995 onwards to bring it in consonance with the WTO TRIPS Agreement,⁶¹ particularly to allow product patents in India. The Supreme Court particularly needed to understand the importance of certain amendments to its domestic law, and for that it held “it is necessary to find out the concerns of Parliament, based on the history of the patent law in the country, when it made such basic changes in the Patents Act. What were the issues the legislature was trying to address? What was the mischief Parliament wanted to check and what were the objects it intended to achieve through these amendments?”⁶² The Supreme Court referred to several precedents which confirmed that reliance on “external aids” such as the statement of Objects and Reasons when the Bill is presented in Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees, and that “occasional excursions into the debates of Parliament” would be permitted.⁶³ The Supreme Court also extensively referred to Parliamentary debates, including opinions expressed by opposition party representatives to highlight the major underlying concerns and decided on the final interpretation of terms “examined in the large perspective of the development of the law . . . and especially keeping in mind the debates in the Parliament preceding the . . . amendment”.⁶⁴

⁶⁰ See: *Novartis AG v. Union of India & Ors.*, (2013) 6 SCC 1 (India Sup. Ct.).

⁶¹ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) entered into force on January 1, 1995.

⁶² *Novartis AG v Union of India & Ors.*, *supra* note 60 at para. 26.

⁶³ *Ibid* at paras. 27-28.

⁶⁴ *Ibid* at paras. 80-84.

This is rather relevant when trying to assess how courts in India would possibly handle an interpretation of the CLND Act. That is, judges would not merely limit itself to a textual interpretation based on “internal aids” but in order to assess the full scope and breadth and underlying intent of certain provisions, they would not hesitate to delve into the reports of the Parliamentary Standing committees and the parliamentary debates to assess why a specific terminology was upheld in the CLND Act. With this in mind, it is worth assessing the recommendations of the Parliamentary Committee, the various versions of the CLND Bill, and the final CLND Act — in particular pertaining to the right of recourse provision.

Right of Recourse Provision and Parliamentary Discussions

The international conventions on civil liability for nuclear damage recognize that an operator to which liability is channeled may in some instances exercise a claim against its supplier if: (a) such right is expressly provided for in a contract in writing; and (b) the nuclear incident has resulted from an act (commission or omission) of an individual done with the intent to cause nuclear damage.⁶⁵ However, s. 17 of the CLND Act identifies *three* distinct situations where the operator shall have a right of recourse (after paying compensation to the victims for nuclear damage — capped by the liability amounts specified under the Act), to know where:

- (a) such right is expressly provided for in a contract in writing;
- (b) the nuclear incident 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;
- (c) the nuclear incident has resulted from an act of commission or omission of an individual done with the intent to cause nuclear damage.

Several insightful papers have analysed the historical origins of the right of recourse construct as part of the *Harvard Report* recommendations;⁶⁶ its inclusion of the Vienna Convention and the Paris Convention⁶⁷

⁶⁵ See Article 6(f) of the Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960 (Paris Convention); and Article X of the Vienna Convention on Civil Liability for Nuclear Damage, 1963 (Vienna Convention); also reflected as an option in Article 10 of the Annex to the Convention on Supplementary Compensation for Nuclear Damage, 1997.

⁶⁶ A Forum Report — International Problems of Financial Protection against Nuclear Risk, 1959, Atomic Industrial Forum Inc., p. 95 (on file with author).

⁶⁷ See, *inter alia*: IAEA, The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage — Explanatory Texts, IAEA International Law Series No. 3 (hereinafter IAEA, Explanatory Texts); and IAEA, Handbook Nuclear Law, 2003, p. 168, available at: < http://www-pub.iaea.org/mtcd/publications/pdf/pub1160_web.pdf > .

— and why it was never absorbed in the *Price-Anderson Act, 1957*,⁶⁸ as well as India's stance and “volte face” during the original Vienna Convention negotiations,⁶⁹ and finally how it was carried forward to the Convention on Supplementary Compensation, 1997 (CSC).⁷⁰ Not unlike the discussions which took place in these international fora, the parliamentary debates of India's lower house shed a fascinating light on the underlying concerns pertaining to this right of recourse concept.

The right of recourse provision underwent different versions before its adoption in the CLND Act. Section 17(b) of the *Original Bill* tabled before Parliament, expanded the right of recourse provision to the extent “if the supplier or his employee causes damage through *gross negligence or a willful act, or . . .*”⁷¹

The Parliamentary Committee Report, reviewing this *Original Bill*, took into account various expert observations, including: (1) adding s. 17(b) may not be in compliance with the CSC as it would be a novel ground; (2) contractual clauses with regard to the right of recourse by the operator against the supplier would tend to be “vague and opaque” to hide supplier deficiencies; and (3) a “willful act” as proposed in the Bill would be difficult to prove in a court of law.⁷² The Parliamentary Standing Committee ultimately concluded⁷³ that “the Bill being a domestic legislation should

⁶⁸ See e.g. Prof. Dr. Michael G. Faure and Dr. Tom Vanden Borre, *Study on the Influence of Plant Lifetime Extension (PLEX) on Nuclear Liability*, 2013, p. 125, available at: <<http://www.greenpeace.org/france/PageFiles/300718/Study%20%20PLEX%20nuclear%20liability.pdf>>; and Evelyne Ameye, “Channeling of Nuclear Third Party Liability Towards the Operator: Is it Sustainable in a Developing Nuclear World or Is There a Need for Liability of Nuclear Architects and Engineers?”, (2010) 19 *European Energy and Environmental Law Review*, Issue 1, pp. 33-58.

⁶⁹ See PLBS, (2010), “Addendum to a Briefing Document on the Civil Liability for Nuclear Damage Bill, 2010”, at pp. 5-6, (hereinafter PLBS Addendum), available at: <http://www.vidhilegalpolicy.in/Docs/PLBS_Addendum%20on%20Civil%20Nuclear%20Liability%20Bill.pdf> at pp. 5-6, based on the study of Official Records IAEA (describing how India along with Argentina, Brazil and the UAE initially supported the insertion of a third ground in the right of recourse provision — which encompassed the fault of a manufacturer of supplying materials, equipment or services in connection with design, construction, repair or operation of a nuclear installation or who transported nuclear material — but which India ultimately did not vote in favour of.

⁷⁰ IAEA, Explanatory Texts, *supra* note 67.

⁷¹ Emphasis added. For a copy of original CLND Bill, see PLBS site: <<http://www.prsindia.org/billtrack/the-civil-liability-for-nuclear-damage-bill-2010-1042/>>. Note how the current version of the South Korean Act on Compensation for Nuclear Damage, 1969, reflects an enlarged right of recourse provision precisely along those lines, whereas the Hungarian Act on Atomic Energy, 1996, has lowered the bar even further by allowing a right of recourse when the nuclear damage is the result of a willful destructive act or negligence (not gross negligence). See for a more detailed analysis: PLBS Addendum, *supra* note 69 at p. 11.

⁷² See Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests, 212th Report on “the Civil Liability for Nuclear Damage Bill, 2010”, adopted 18 August 2010, (hereinafter Parliamentary Standing Committee Report), at pp. 6-7, available at the PRS Legislative Research website: <<http://www.prsindia.org/uploads/media/Nuclear/SCR%20Nuclear%20Liability%20Bill%202010.pdf>>.

reflect Indian interests”, while at the same time it had to ensure that the provisions of the law should be in consonance with the IAEA convention so that India could join it when required. More specifically, it felt that “willful act or gross negligence” is too vague a term in the context of a nuclear incident, and that it would be very difficult to prove this, “hence, there should be clear cut liability on the supplier of nuclear equipment material in case they are found to be defective” and using *mens rea* language of willful intent and gross negligence, may be fit for taxation or criminal cases, but would be “grossly inadequate and misplaced” in compensation cases. Its overall recommendation was that s. 17(a) and s. 17(b) be connected with the word “and”. It immediately linked this to its next recommendation that the “operator must secure his interest through appropriate provisions in the contract with the supplier”.⁷⁴ It further recommended that s. 17(b) should be modified as: “the nuclear incident has resulted as a consequence of latent or patent defect, supply of sub-standard material, defective equipment or service, *or* from the gross negligence on the part of the supplier of the material, equipment or services”.⁷⁵ In short, in this version the “product liability language” was placed *in addition to* the eventuality of “gross negligence”.

The revised language s. 17(b) in the CLND Bill presented to Parliament — which did *not* contain the connecting term “and” between s. 17(a) and (b), read as “the nuclear incident has resulted as a consequence of an act or supplier or his employees, *done with the intent to cause nuclear damage, and such act* includes supply of equipment or material with patent or latent defects or sub-standard services . . .”.⁷⁶

In Parliament, one found a lot of criticism on the recommendation by the Parliamentary Committee to connect s. 17(a) and (b), which was anyway not retained in the revised version of the Bill presented to Parliament, as well as on the new inclusion of the “intent” element in the final version of the Bill, although several references were made to this being similar to the South Korean legislation.⁷⁷ If one were to summarise the observations from various parties regarding s. 17(b), it would be that the government should

⁷³ *Ibid* at pp. 13-17.

⁷⁴ *Ibid* at p. 16.

⁷⁵ *Ibid*.

⁷⁶ Italics added to emphasize the portion which was not retained in the final CLND Act.

⁷⁷ Lok Sabha Debates, August 25, 2010, available at: <<http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=3128>> (last accessed on September 6, 2014) (*inter alia*: “When the original Clause was amended further and when there was a suggestion in the Standing Committee for strengthening Clause 17, what the Government did surreptitiously was that they added one word ‘and’, and this particular word ‘and’ changed the entire meaning of that Clause. When there was hue and cry, uproar outside Parliament, then the Government removed the word ‘and’ and put another word ‘intent’ which further weakened that Clause. If that word ‘intent’ remains in the Clause, how can anybody prove the intent of the supplier?”).

not all together absolve the supplier from liability, and, consequently, the “intent” qualification was vehemently opposed by most as it “substantially nullifies the supplier’s responsibility”.⁷⁸

During the parliamentary debates a suggestion was raised to do away with the ambiguity of whether or not there would be a contractual right of recourse provision, triggered by the s. 17(a) versus s. 17(b) debate, by making it simply “*mandatory* to have an express provision of right of recourse in the agreement” between the operator and the supplier. But, this proposal was not further elaborated upon.⁷⁹

Other suggestions put forward to the Parliamentary Committee reviewing the Original Bill, consisted of enlarging the right of recourse in terms of the *actors* who could rely on such a recourse.⁸⁰ Given that India has adopted a capped liability structure for the operator,⁸¹ with the remaining compensation amount to be paid to the victims to be provided for by the Central Government, it was proposed that the *Central Government* should also be entitled to rely on this right of recourse provision against the supplier for the differential amount.⁸² This does tend to show that in fact a rather innovative review of the notion of recourse against the supplier itself took place during the public debate phase of the CLND Act.

Most parliamentarians were made aware that there were only a few countries with an extended right of recourse provision and that this could impede their accession to standard third-party civil liability agreements, in particular the CSC, which the government may want to join at some point. However, the joining of the CSC was not seen as a priority and many felt India could not be rushed or bullied into doing so. In short, it was felt that the compatibility of the CLND Act and the CSC would be dealt with if and when India would need to cross that bridge. Some went as far as stating that it ultimately was a “buyer’s market”, and India should have the courage to dictate its terms.⁸³ Only some lone voices expressed a concern that the law should not be made so stringent as to scare away investors altogether,⁸⁴ but that possibility didn’t seem to carry the weight it now does.

If the above discussions were not controversial enough, perhaps, it is worth noting by way of historical addendum that several parliamentarians discussed the possibility of adopting an unlimited liability regime; or place the liability amount at a much more significant level. Nevertheless, the

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ See PLBS Addendum, *supra* note 69 at p. 16.

⁸¹ See Article 6(2) of the CLND Act, according to which “the liability of an operator for each nuclear incident shall be — (a) in respect of nuclear reactors having thermal power equal to or above ten MW Rupees one thousand five hundred Crores”.

⁸² See Article 7 of the CLND Act.

⁸³ See: Lok Sabha Debates, *supra* note 77.

⁸⁴ *Ibid.*

proposed amendment to place the liability amount as high as Rs. 10,000 Crores (USD 1.65 billion) was ultimately voted against by a vast majority.⁸⁵

In light of the above parliamentary debates, which went at great length in defining the precise contours of the right of recourse provision, courts when faced with an interpretation of s. 17(b) and relying on “external aids” would necessarily need to conclude that Parliament — at the end — wanted to both expand and disconnect s. 17(b) from the existence of any contractually agreed upon right of recourse provision. That is, it would need to apply it, even if the parties had decided not to insert a contractual right of recourse clause as per s. 17(a). Moreover, one can but conclude that Parliament had wanted to do away with any *mens rea* language and stick as closely as possible to the lower “product liability” type threshold.

Qualifying Section 46 of the CLND Act

Nestled in the miscellaneous chapter, s. 46 states that the provisions of the CLND Act “shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the *operator* from any proceeding which might, apart from this Act, be instituted against such *operator*”.⁸⁶ In fact, s. 46 of the CLND Act underwent no change when compared to the very first Bill presented to Parliament and reviewed by the Parliamentary Standing Committee. Significantly, on the day of the final parliamentary debates of the adoption of the CLND Act, an amendment was proposed to expand the meaning of s. 46 by adding the term “supplier” next to that of “operator”, but it didn’t carry the necessary persuasiveness and was put aside.

As a consequence, courts, when interpreting the scope of s. 46, would not altogether be able to set aside the qualifying terms of this provision linked to the *operator*, and the fact that an expansion to include the supplier in its ambit was ultimately not upheld by Parliament. In other words, this would offer good grounds to establish that Parliament intended s. 46 to specifically and exclusively target the operator, not the supplier.

Reflections on the Right of Recourse – an Active Notion, but Dormant Clause?

As we have seen, a significant part of the Parliamentary debates and expert submissions were devoted to molding the notion of the right of recourse of the operator against the supplier. While it was noted that expanding the right of recourse provision may not be in line with what is generally prescribed in international treaties on civil liability for nuclear

⁸⁵ *Ibid* (merely 25 representatives vote in favour; and 252 against this proposed amendment).

⁸⁶ Emphasis added. See PLBS Addendum, *supra* note 69.

damage, the more persuasive common ground across party lines was that an operator should effectively be placed in a position to sue a supplier if it could be established that he would have supplied subpar equipment or services.

Some of this debate is reminiscent of the original discussions which took place before the adoption of the Vienna Convention in 1963, in which India took part where it initially supported a version of the right of recourse provision where the operator could exercise the right of recourse “against any person who has manufactured materials or equipment for, or who has furnished materials, equipment or services in connection with the design, construction, repair or operator of a nuclear installation, or who has transported or stored nuclear material, for fault of such person”.⁸⁷ As is known, this version did not see the light of day, and other concerns, particularly pertaining to the spiraling cost and multiplication of insurance premiums, were more persuasive at that time.⁸⁸ Remarkably, these financial implications for the suppliers, or the nuclear sector more generally, merely formed a vague background in the Indian parliamentary debates, and not a single elected representative defended this economic point of view, and, thus, was almost entirely ignored. This is in stark contrast with the focus of the *Harvard Report* which was adopted in 1959 and has since cast such a persuasive shadow on international nuclear civil liability law.⁸⁹ The Report being undertaken as a joint collaboration between the nuclear industry and academia,⁹⁰ in its foreword admitted that it “inevitably reflects its American origin by its emphasis upon the special problems of the US supplier . . .”.⁹¹ The discussions in the Indian Parliament, almost 65 years after the publication of the *Harvard Report*, clearly placed the public interest on the forefront,⁹² and arrived at an entirely different outcome in terms of the burden to be shouldered by a supplier in the nuclear sector.

In fact, the more direct implications of s. 17(b) for the suppliers were never really analyzed, and many may not have fully grasped that *in fact* suppliers worldwide have never had to take out an insurance for their services/deliveries to a nuclear operator. Indeed, as has been highlighted by

⁸⁷ See for detailed analysis and quote from original source: PLBS Addendum, *supra* note 69 at pp. 5-6.

⁸⁸ *Ibid.* See for further detailed analysis: Prof. Dr. Michael G. Faure and Dr. Tom Vanden Borre (at paras. 70-73); and Evelyne Ameye, *supra* note 68.

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 66, the Harvard Report was undertaken as “A Study under the Auspices of Harvard Law School and Atomic Industrial Forum Inc.”.

⁹¹ The foreword further states: “Moreover, we believe that the examination of the subject as it appears to the US supplier in the light of American law will be of value in other nations which will be dealing with US suppliers in coming years.”

⁹² See, e.g. Mr. Prithviraj Chavan presenting the CLND Act: “I would like to take this opportunity to clarify one thing. While the limits of compensation are primarily for taking insurance, you cannot have insurance with no limits, but the compensation is, in fact, unlimited. I want the House to note this fact, whatever the compensation the Commissioner or the Commission will set, that compensation will be paid.”

several authors, industry reality indicates that a contractual right of recourse clause is never inserted in the contractual arrangement between a nuclear operator and its suppliers, whether bilateral agreements between countries exclude such a possibility or other dynamics drive this reality.⁹³

This raises the more poignant question whether the right of recourse concept itself attracts sufficient review in international fora regarding its true function, aim, utility, and ultimately underlying policy? Whether or not one agrees with its implications, at least the Indian parliamentary debates have the advantage of having given the right of recourse notion a contemporary review, based on the assumption that the Indian operator would very often not have the contractual upper hand when negotiating this particular clause with a supplier.

Scholars such as Pelzer have, even 15 years back, called for a “further reflection” on the right of recourse provision (particularly in the case of unlimited liability amount resting on the operator), where “a claim could be established against the supplier acting with negligence. This claim should be limited to the value of the supply, including possible profit. This is certainly a risk which can be borne and should be borne by suppliers, because it is a calculable risk.”⁹⁴ This is precisely the line of thought that has been carried forward in the CLND Act and related Rules,⁹⁵ and may very well be driving the informal discussions currently taking place between Indian and foreign counterparts to resolve the current nuclear trade impasse, as will be touched upon below in part 3.

Right of Recourse Provision Under the Annex of the CSC Offers Flexibility

It is rather beyond doubt that the CLND Act fully incorporates the basic nuclear liability principles, to know: (1) legal channeling of liability on to the operator; (2) strict liability of the operator; (3) limitation of liability in amount; (4) limitation of liability in time; (5) congruence of liability and coverage; (6) non-discrimination; and (7) exclusive jurisdiction.⁹⁶

⁹³ See PLBS Addendum, at p. 13, *supra* note 69; and Evelyne Ameye, *supra* note 68 at footnote 2 (the author conducted a detailed study by sending questionnaires to about 50 operators and 50 designers/constructors worldwide to collate their views on liability allocations in the nuclear sector).

⁹⁴ Norbert Pelzer, “Focus on the Future of Nuclear Liability Law” in *Reform of Civil Nuclear Liability*, International Symposium Budapest, 1999, pp. 421-451, at pp. 428-429, available at: < <https://www.oecd-nea.org/law/legislation/nea2188-liability.pdf> > .

⁹⁵ For a more detailed discussion on Rule 24 of the CLND Rules, 2011, see references *supra* footnote 3.

⁹⁶ See, *inter alia*, IAEA, Handbook Nuclear Law, at pp. 109-115, and IAEA, Explanatory Notes, p. 1; *supra* note 67.

As explained by Ben McRae when reflecting upon the CSC negotiations, not each CSC provision was intended to be equally mandatory, albeit that for “some provisions and definitions, however, it was determined that their treatment needed to be exactly the same in all member countries in order to support an effective and protective global regime. These provisions and definitions (relating primarily to compensation, jurisdiction and the definition of nuclear damage) were included in the body of the CSC so that all member countries must comply with them.”⁹⁷ Conversely, for other provisions it was understood that there could be domestic variations and would not need to be identical. Similarly, the IAEA’s Explanatory Text to the CSC when touching upon the need to adopt national legislation clearly distinguishes the different clauses in the Annex, many of which cannot be treated as self-executing. More specifically, when referring to Article 10 of the CSC on the right of recourse, the chapeau of which reads as: “*National law may provide that the operator shall have a right of recourse only . . .*”⁹⁸ which gives each Annex State “the faculty to complement, or derogate from the Annex’s provisions; in these cases, it is for each Contracting Party, nuclear or non-nuclear, to decide whether or not it is its interest to exercise this faculty”.⁹⁹ Therefore, there is an embedded treaty flexibility when approaching the right of recourse provision when adopting national law. It would not appear legally sound that a contracting party would merely be given the right to exercise this choice domestically, while at the same time seeing this flexibility limited to merely copying/or not copying the language used in Article 10 of the CSC Annex, given that a faculty to “complement” some of these CSC Annex provisions in domestic law was clearly foreseen. Indeed, there are grounds to argue that the right of recourse provision (Article 10) of the Annex to the CSC is not only non self-executing but would give flexibility to Contracting Parties to adopt it in line with its domestic requirements. This is a very significant distinction, and although this would go beyond the scope of this paper, even under public international law it is recognized that not all treaty provisions carry the same weight and must be specifically assessed in each instance.¹⁰⁰

⁹⁷ Ben McRae, “The Convention on Supplementary Compensation for Nuclear Damage: Catalyst for a Global Nuclear Liability Regime”, *Nuclear Law Bulletin*, (2007/1), pp. 17-35, at p. 24, available at: <<http://www.oecd-nea.org/law/nlb/nlb-79/017-035%20-%20Article%20Ben%20McRae.pdf>> .

⁹⁸ Article 10 Annex to CSC continues with: (a) if this is expressly provided for a by a contract in writing; or (b) if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent.

⁹⁹ IAEA, Explanatory Texts, *supra* note 67 at p. 71, and footnote 237.

¹⁰⁰ By way of contemporary example: at the 2001 Doha Ministerial Conference, WTO members agreed to negotiate on the relationship between WTO rules and the multilateral environmental agreements (MEAs), particularly those that contain “specific trade obligations” (STOs). See more at: <http://www.wto.org/english/tratop_e/envir_e/envir_neg_meas_e.htm> .

Although it is submitted here that India's CLND Act has incorporated all nuclear liability principles, and that the Annex to the CSC offers just enough flexibility to Annex countries such as India to adapt the right of recourse provision according to its contemporary public policy requirements, the fact cannot be denied that from a *business* perspective the Indian nuclear market has become a whole lot less attractive. Ultimately, business concerns are key and must also be considered, as without players, there is no game. Consequently, several options are currently being explored within government corridors to end this debacle, short of any further tinkering with the CLND Act or its Rules, which is perceived as politically unviable (even with a necessary parliamentary majority).¹⁰¹

Developments in 2014: Inching Forward

There are indications that rather than a legal denouement, a techno-commercial solution may resolve the nuclear trade impasse. For instance, during the March 2014, visit by the US Energy Secretary to India, it was hinted at that the state-owned General Insurance Company (GIC) is devising a "package" for an insurance pool, backed by international reinsurers, which could be "rolled out" shortly "for all nuclear suppliers" as well.¹⁰² Statements by government officials in September 2014, confirm that this line of thinking is being pursued by the newly elected government as well.¹⁰³ Discussions with GIC representatives indicate that the prime focus would be on generating the necessary pool availability in a first instance, and that a formula-based allocation between operators and supplier would follow suit. More specifically, such a proposal could include "providing premium rates for specific parts of a power reactor so that the actuarial burden of any direct or indirect liability after an accident can be quantified and factored into any price negotiation".¹⁰⁴ From within the nuclear sector, efforts are undertaken to link NPP site maps to specific supplies and possible risks, which in turn can be used as a base for such a quantification. Though placed in the different context of US domestic legislation implementing the CSC,¹⁰⁵ some of the elements identified as part of the

¹⁰¹ The Bharatiya Janata Party (BJP) controls the lower house, Lok Sabha, but does not have the majority in the upper house, Rajya Sabha, at least not for the next two years.

¹⁰² See "India Gives US Insurance Plan for Nuclear Plants", Times of India, March 13, 2014.

¹⁰³ See "N-liability: Centre Asks GIC to Work on Insurance Plan", Business standard, September 14, 2014, available at: <http://www.business-standard.com/article/pti-stories/n-liability-centre-asks-gic-to-work-on-insurance-plan-for-114091400505_1.html> .

¹⁰⁴ See "Insurance-type Approach May Help End Nuclear Law Row over Civil Liabilities: Ernest Moniz, US Energy Secretary", Economic Times, March 13, 2014.

¹⁰⁵ See more generally: Michael Faure and Tom Vanden Borre, "Compensating Nuclear Damage: A Comparative Economic Analysis of the US and International Liability Schemes", William & Mary Environmental Law and Policy Review, volume 33, Issue 1, at p. 268. The US retrospective risk pooling program applicable to suppliers has also led Mohit Abraham to take this model as a starting point to envisage a more international

“risk-informed assessment formula” which would underpin the retrospective risk pooling program resting on the US suppliers for non-Price Anderson incidents abroad “for the allocation among nuclear suppliers of the contingent cost”, could be relevant as part of this novel modeling exercise as well. Some of the risk factors identified under the US *Energy Independence and Security Act, 2007*, as part of this risk-assessment formula include: (i) the nature and intended purpose of the goods and services supplied by each nuclear supplier; (ii) the quantity of the goods and services supplied by each nuclear supplier; and (iii) the hazards associated with the supplied goods and services if the goods and services fail to achieve the intended purpose; etc.¹⁰⁶

Authors such as Balachandran have calculated that based on the maximum capped liability of the operator at Rs 1,500 Crores (USD 246 million), which also caps the recourse amount which it can claim from the supplier after having paid the victims as per the award of the Claims Commissioner, and based on an assumption of a notional 0.2% rate of premium, the premium to be paid annually would be around Rs. 3 crores (USD 493,000). When extrapolating this further over the lifetime of a reactor, and taking into account the cost of an imported NPP, the cost of the lifetime premium “will hardly make any difference to the total costs of the NPP or its operating costs”.¹⁰⁷ This partly indicates that the reluctance from the supplier community is not based on a financial analysis *per se*, but is more principled in nature.

Other options being floated are the adoption of tailored Rules specific to s. 17(b), akin to rule 24 which tried to give more detailed meaning and set the boundaries of s. 17(a) of the CLND Act.¹⁰⁸ However, this process would still entail presenting the Rules before each House of Parliament, and the review by a Parliamentary Committee. Even for the current government which carries the necessary parliamentary weight to pass such modifications, such a route would not be preferred given that no party wants to be portrayed as giving into (foreign) industry lobby.

Of course, particular trade-offs may change this equation. One could think of significant strategic geo-political breakthroughs, whether it is in the form of a NSG membership,¹⁰⁹ more Asia-centric energy investments or

fund with combined contributions from States, operators as well as suppliers. See: Mohit Abraham, *supra* note 3 at pp. 26-27.

¹⁰⁶ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, s. 934(e)(2)(C), available at: < <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section17373&num=0&edition=prelim> > .

¹⁰⁷ G. Balachandran, “Should India Sign the Convention on Supplementary Compensation?”, ISDA Issue Brief, 2010, at p. 5, available at: < www.idsa.in/system/files/IB_IndiaCSV.pdf > .

¹⁰⁸ See for a more detailed analysis, references *supra* note 3.

¹⁰⁹ The issue of India’s membership was again being discussed during the NSG Plenary Meeting in Buenos Aires, June 26 and 27, 2014. See, *inter alia*: Reuters, “Nuclear Export

even climate change-related trade-offs, etc. But without a broader and more quintessential *quid pro quo*, this would seem rather unlikely. This is also because India has so many other pressing fault lines in its prime energy sectors which it needs to take up on a priority basis.¹¹⁰

On which fronts did India inch forward in the nuclear trade arena? On September 5, 2014, India and Australia signed a long-awaited bilateral safeguards agreement which would enable Australia to sell uranium to India for peaceful power generation.¹¹¹ This is all the more relevant since the available Uranium supply in India is estimated to only be able to support about 10GW of PHWRs for 40 years.¹¹² Noteworthy is also that the early September 2014, visit by the Indian Prime Minister to Japan did lead to the countries affirming “the importance of civil nuclear cooperation” between the countries, but without any immediate tangible outcome.¹¹³

Further, on July 25, 2014, the Additional Protocol to the Safeguards Agreement between India and the IAEA for the Application of Safeguards to Civilian Nuclear Facilities entered into force, but as Sood has observed this was rather the “low-hanging fruit” and doesn’t signify any progress in terms of its NSG membership or additional nuclear trade.¹¹⁴ At the end of September 2014, India’s Prime Minister will be visiting the US for a three-day visit, with speculations abounding about the deliverables that this new engagement between the two nations may bring. Understandably, a wide range of issues will be reviewed, from trade and investment, defence, clean energy, innovation, education, skill development, agro-processing, etc. Nuclear energy and the intertwined failure so far to translate this into commercial terms, is bound to be one of the discussion points, although the modalities which may be adopted to instill business confidence in the Indian market and its institutions are not yet quite apparent.

Group Divided Over Ties With India”, July 2, 2014, available at: <<http://uk.reuters.com/article/2014/07/02/nuclear-trade-india-idUKL6N0PC43620140702>> .

¹¹⁰ See for an excellent review of India’s energy sector and required reforms: Sunjoy Joshi, “Reforming Energy Policy and Pricing” in *Getting India Back on Track — An Action Agenda For Reform*, Random House India, 2014, p. 333 and at pp. 207-225.

¹¹¹ See e.g. “India and Australia Seal Civil Nuclear Deal for Uranium Trade”, Reuters, September 5, 2014, available at: <<http://timesofindia.indiatimes.com/india/India-and-Australia-seal-nuclear-deal-Abbott-meets-Modi/articleshow/41779635.cms>> .

¹¹² See: Integrated Energy Policy – Report of the Expert Committee, Government of India, Planning Commission, (August 2006), at p. 35, available at: http://planningcommission.gov.in/reports/genrep/rep_intengy.pdf; and The Final Report of the Expert Group on Low Carbon Strategies for Inclusive Growth, Planning Commission, (April 2014), at p. 88, available at: planningcommission.nic.in/reports/genrep/rep_carbon2005.pdf (hereinafter Low Carbon Strategies Report).

¹¹³ See e.g. “India, Japan continue talks on nuclear deal”, September 3, 2014, available at: <<http://www.world-nuclear-news.org/NP-India-Japan-continue-talks-on-nuclear-deal-0309144.html>> .

¹¹⁴ See: <<http://www.iaea.org/newscenter/news/2014/indias-addtional-protocol.html>> for a more historic and geo-strategic analysis, see: Rakesh Sood, “Agenda for Nuclear Diplomacy”, The Hindu, June 27, 2014, available at: <<http://www.thehindu.com/opinion/lead/agenda-for-nuclear-diplomacy/article6152407.ece>> .

We may also add that on the domestic front, in August 2014, it was announced that the *Atomic Energy Act, 1962*, would be amended to enable the licensing of three joint ventures between India's nuclear operator, the Nuclear Power Corporation of India Ltd. (NPCIL) and three other public sector undertakings for new projects based on the indigenous PHWR technology.¹¹⁵ Although, NPCIL has a healthy surplus of Rs. 12,000 Crores (close to USD 2 billion), the commitment by each of these three PSUs of approximately Rs. 10,000 Crores each (USD 1.65 billion) may generate renewed momentum to follow the well-trodden path of domestic PHWR construction.

From a macro-perspective, it is worth noting that as per India's current *Integrated Energy Policy* and the 2014 *Report of the Expert Group on Low Carbon Strategies*,¹¹⁶ nuclear energy not only forms part of India's long-term energy security strategy, but is also being earmarked as a vital element of its energy mix to achieve the target to have at least one-third of India's power generation to be fossil free by 2030.¹¹⁷ Remarkably, although nuclear energy has so far never been factored in under the UNFCCC regime as a means to achieve binding GHG reduction targets, what we clearly notice as a trend across various countries, including India, is that domestically nuclear energy is being pursued with at least a twin objective of reducing a nation's carbon footprint. Whether nuclear power would play a role in a post-Kyoto agreement expected to be concluded at the COP 21 in December 2015,¹¹⁸ remains to be seen,¹¹⁹ but it could certainly turn out to be one of the cards played during the long negotiations ahead, the prelude of which will be watched at the UN Climate Summit in New York end September 2014,¹²⁰ soon after followed by the Climate Change Conference (COP 20), at Lima, Peru, in December 2014.¹²¹

¹¹⁵ See: "Centre Plans Changes in Atomic Energy Law for NPCIL Ventures to Take Off", Indian Express, August 4, 2014, available at: <<http://indianexpress.com/article/business/business-others/centre-plans-changes-in-atomic-energy-law-for-npcil-ventures-to-take-off/>> .

¹¹⁶ See *supra* note 112.

¹¹⁷ Low Carbon Strategies Report, *supra* note 112 at p. 3.

¹¹⁸ See more at: <<http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/sustainable-development-1097/21st-conference-of-the-parties-on/>> .

¹¹⁹ See, *inter alia*, Daniel Weisser, Mark Howells, Hans-Holger Rogner, "Nuclear Power and Post-2012 Energy and Climate Change Policies", *Environmental Science & Policy*, II (2008), pp. 467-477.

¹²⁰ See also: Obama Pursuing Climate Accord in Lieu of Treaty, NY Times, August 26, 2014, available at: <http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?_r=0> .

¹²¹ See more at: <http://unfccc.int/meetings/lima_dec_2014/meeting/8141.php> .

Conclusion

The aim of this article has been to put the role and judicial decision-making approach of the High Courts and Supreme Court of India in perspective. Particularly, since many of the recurring concerns when interpreting the CLND Act, relate to assessing how courts in India would address a nuclear energy-related case. As we have seen, based on discernable patterns in environment and energy case law relating to large public infrastructure projects, courts tend to be reluctant to enter the policy sphere, particularly if no illegality or implementation paralysis can be ascribed to the executive branch. Conversely, environmental case law also clearly indicates that where no clear policy has been adopted by the government, or where the enforcement machinery has failed to fulfill its role, courts rather readily take up their role as “social engineers”.

We have also underscored the role parliamentary debates and reports may play as external interpretation aids based on recent case law. To provide a more meaningful background we have culled out the main exchanges which took place during the parliamentary debates which preceded the adoption of the CLND Act, as courts could very well rely on these to understand the underlying intent and boundaries of some key provisions of this law, including the right of recourse provision. As we have seen the parliamentary debates — across party lines — clearly indicate that public concerns took center stage, and the financial implications for the suppliers in the nuclear sector were only marginally addressed. This, quite clearly, is a paradigm shift from the tenets underlying the international civil liability treaties for nuclear damage.

The parliamentary debates specifically took into account the likelihood of an operator not being able to contractually insert such a right a recourse clause in its agreement with a supplier. Interestingly, it appears that *de facto* worldwide this has been the case, and such contractual right of recourse clauses which would entitle the operator to claim back at least some portion of the compensation it paid to the victims, are never inserted in operator-supplier contracts. Taking this reality into account, it may be worth from a “bottom-up” perspective to reinitiate the discussions in international fora on the true function, aim, utility, and ultimately underlying policy of the contractual right of recourse concept, and either strengthen it in a meaningful way or seize pushing it forward in its current form as a standard element to be adopted in domestic law.

The CSC — to its credit — actually offers a fair degree of flexibility to Annex Parties (not party to either the Vienna or Paris Convention) to adopt non self-executing provisions outlined in the Annex, once the basic nuclear liability principles (also contained in the body of the convention) have been incorporated in domestic law. As we have seen, Article 10 of the CSC Annex

pertaining to the right of recourse is such a provision where the faculty is provided to an Annex State to complement or derogate from the Annex provision. Quite possibly, from an international legal compliance view, India may ultimately not perceive it as an absolute prerequisite to amend its law to be part of the CSC regime.

It is also worth recalling that at the time of the adoption of the Vienna Convention in 1963, it was announced that the treaty “it will be seen, is designed only to establish minimum rules regarding civil liability for nuclear damage; it may thus well be described as a framework convention, the main provisions of which represent the essential common denominator acceptable to as many States as possible. It leaves wide scope for national legislation and regional arrangements with a view to implementing these provisions. The Convention does not purport to create a uniform civil law in this field, but it contains the minimum essential for protection of the public and forms the legal basis for uniform worldwide liability rules.”¹²² Hence, the way forward is clearly to focus on this common denominator, rather than presenting the right of recourse provision as India’s gateway towards international nuclear trade. Moreover, India’s CLND Act reflects all basic principles of nuclear liability law, which is truly the cornerstone towards the establishment of a “global regime with widespread adherence”.

That said, there is no denying that the *business* sentiment is such that there is a reluctance to meaningfully enter the Indian nuclear market. As a result, more techno-commercial solutions are currently being discussed to offer a breakthrough and restore suppliers’ confidence. These options — short of any amendment of the CLND Act and Rules which are not perceived to be politically viable — revolve around more accurately quantifying the insurance premium for specific parts of a NPP, so that it can be factored into the price negotiation between the Indian operator and its suppliers.

The year 2014 saw the rise of a new government in India, with a laundry list of priorities ranging from providing even the most basic of necessities to its millions of poor, to providing the necessary infrastructure to its citizens and businesses to enable growth, and which in turn would also require turning around the crippled energy sector, which is riddled with inefficiencies.

The 2014 *Report of the Expert Group on Low Carbon Strategies* adopted by the Planning Commission earmarks nuclear energy, alongside renewables, as a critical element of India’s energy mix and identifies it as a means to achieve the target to have at least one-third of India’s power generation to be fossil free by 2030. This confirms a recent worldwide trend where countries domestically pursue nuclear energy at least with the twin

¹²² See: IAEA, Publications, Bulletin, excerpt, at p. 19, available at: < <http://www.iaea.org/Publications/Magazines/Bulletin/Bull054/05405101719.pdf> > .

objective (apart from energy security concerns) to reduce its nation's GHG emissions. It remains to be seen how this domestic reality will be played out by the time a binding international agreement will be negotiated under the UNFCCC regime in December 2015, and whether this would have any spin-offs on investment opportunities in the nuclear sector in countries such as India.

