# Atomic Insurance for Atomic Insecurities

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by Nikhil Desai

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## I. Introduction

In this essay, Nikhil Desai explains the fears of anti-nuclear activists in India regarding its government's alleged violation or weakening of the Indian law on civil nuclear liability as part of the Prime Minister's visit to Washington, DC the weekend of 27th September 2013. He argues that the government's opponents refuse to accept the reality of nuclear trade and operations, and should be more concerned about the institutional competence of India to manage the nuclear enterprises, civil or otherwise.

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## II. Policy Forum by Nikhil Desai

**Atomic Insurance for Atomic Insecurities**

Much fretting and fuming went on in India for a week, from 19th to 26th September 2013. The following week, the fury was doused. The nuclear bets were back to normal deception of a casino. The crux of the rancor was fly-sized civil financial liability limits for nuclear incidents that could cause elephant, or whale-sized damages or worse. Anti-nuclear activists in India seem to be happy that they were able to create a storm in a chai-cup rather than ashamed that they had been deceived legally.

There was an "exposé" by a TV channel that the Attorney General of India (AGI) had given a written opinion requested by the Government of India (GoI) on interpreting the 2010 Act on civil nuclear liability. This opinion in turn formed the basis of a "Note" presented to the Cabinet Committee on Security (CCS) allegedly to approve "overriding nuclear liability for Westinghouse to seal a nuclear agreement with the US corporations" during Prime Minister Manmohan Singh's visit last weekend to Washington (27-28 September 2013). The contents of the AGI opinion or the CCS Note are not public. Their existence has not been denied; whether the GoI "diluted" the provisions of the Indian law and if so how and by how much is unknown. Dr. Singh was blasted by some for carrying a "gift" to US companies, in particular Westinghouse. He was called "pliant", giving in to pressure by the Obama administration, and worse.

There was a "preliminary agreement" between the Nuclear Power Corporation of India (NPCIL) and Westinghouse during Dr. Singh's trip to Washington, just before the US Government Shutdown of non-essential activities. An "early works agreement" was signed, covering "preliminary regulatory and site-development work" for a planned six-unit power reactor complex on the coast of the western state of Gujarat, near a village called Mithi Virdi ("sweet stream"). The GOI denied that any "dilution" of "civil liability" – whereby, under the said Act, a nuclear supplier can be sued for providing patent or latent sub-standard equipment or service – just yet.

This was the first commercial agreement for a new nuclear power plant – even a "preliminary" one, of limited value – between India and private US nuclear suppliers, some 50 years after a fixed-price contract with General Electric (GE) for the supply and startup of two first-generation commercial Boiling Water Reactors (BWRs), still running near Mumbai at a de-rated level. It was also the first after much-ballyhooed "Indo-US Nuclear Deal" five years ago, whereby India, not a signatory to the Nuclear Non-proliferation Treaty, was essentially forgiven for its past nuclear sins and errors and its nuclear weapons activities were exonerated, blessed, and left unaccounted for. After all, there were presumably worse – depending on the point of view – outlaws in the nuclear underworld, including India's neighbors.

And with this cementing of so-called "civilian" partnership – which, as such things go, facilitates the military uses of nuclear technologies by India – came serious, real value bargains on the military side. Details are not available, but China and Pakistan could not have failed to appreciate the understated implications of the Obama-Singh joint statement, possibly the last for the two men for their countries.

Oh, yes, and by-the-way, they also discussed greenhouse gas emissions (HFCs, to be covered by the Montreal Protocol, since the Kyoto Protocol does not apply to the US or India) and India made some commitments. The instability and unpredictability of international agreements – whether the Kyoto Protocol or the NPT, or bilateral agreements that cover matters of state or business – is caution enough to read too much into governments' intentions or actions.

To return to the subject, the "civil nuclear" part of this "partnership" is surreal, no matter what Dr Singh may have "given away" – no evidence yet – and what happens to NPCIL orders from Westinghouse or GE or for that matter any civilian nuclear deals in the future. Cooperation, complicity, and formal or silent acquiescence in military matters is likely to be the more far-reaching

issue.

The Atomic Enterprise – like the Starship Enterprise – is a fantasy. For some, a heavenly dream, for others a hellish nightmare. The risks are real, whether from power reactors or from the rest of the fuel cycle, including diversion to weapons or other forms of violence; what is legalized and who is held liable for what is a murky area. The law may exist only in order to increase comfort levels for those who invest their own money; governments will be left holding the bag if needed.

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In 2008, the Indian Parliament approved the so-called historic US-India deal on nuclear cooperation. The Bush Administration – as a part of a strategic policy shift that impacted worldwide nuclear activities and regimes – sold this deal to critics in the US in the name of huge commercial potential for US nuclear vendors. After all, it was then widely anticipated that "new, improved, fortified, tastier, scientists-endorsed" nuclear power would stage a renaissance in the industrial world, emerging as the savior of mankind from climate change.

The circumstances around the 2008 approval were murky if not outright dirty, but then corruption is business-as-usual worldwide. The 2010 law on civil liability was seen by some as creating a new path in the world, incorporating a right for a nuclear operator in India (NPCIL or other government enterprises) to sue the supplier entity – Russian or Chinese, American or French, public or private – for damages.

The precise wording of several sections of the law is open to interpretations, but the relevant facts of the Act are, simply, that i) the operator's civil liability is capped at 300 million SDRs per incident, and that ii) the operator, *after* he has paid compensation for damages, *may* sue the supplier of goods and services for sub-standard, blatant or latent defects. The right to sue *may* be incorporated in contractual agreements, or may rise otherwise.

On its face, the Act's open-ended "right to sue" cannot be interpreted as a license to burden all liability – which is limited to SDR 300 million, an atomic (small) sum for atomic risks, in the first place. It does not specify a time limit (though a later regulation set such limits), nor does it (or subsequent regulations) specify the standard of integrity, governing technical safety standards, or the burden of proof. The Parliament was unaware of Fukushima, of course, which alone is likely to cost SDR 1 trillion, and there is no provision for holding GE or other companies liable. The operator – TEPCO – is nationalized, and it is alleged his staff delayed some action during the early days of Fukushima crisis for fear of bankruptcy.

Indian power reactor deals so far have presumably been exempted from the provisions of the 2010 Act. For future orders, domestic or foreign, some suppliers may not care as much about its provisions. The Russian and French contenders are creations of their state and owned, implicitly and explicitly supported by their governments. These governments have taken trillion-dollar bets on their own people, and protecting their companies for some portion of a SDR 300 million would be "spare change" in the bigger, long-term view of the world.

This is not the case with US suppliers, and while it may be imprudent to discriminate among reactor suppliers, the technical and economic considerations in actual contracting will presumably matter more in reaching deals. The world nuclear industry is not dead, after all, and civilian and military deals together will keep it in business. That does not mean that any supplier would essentially grant a blank check to NPCIL – which can manage a SDR 300 million insurance, since it is sure to be bailed out and all the excess damage costs absorbed by the government.

The AGI, Goolam Vahanvati explained that exercise of a “right of recourse” for supplier liability is optional. This is the only valid interpretation of the law; a right is not an obligation, only an option.

Some commentator argued that this amounts to repudiating the right “to ensure that foreign suppliers don’t get away scot-free if a nuclear accident is traced back to ‘equipment or material with patent or latent defects or sub standard services.’” Another argued, "If American players get privileges that go against Indian laws then India will be very much be answerable to countries like France and Russia".

The ifs in such statements were happily ignored by anti-nuclear activists – seemingly as possessed, on their own, of the public interest as the pro-nuclear establishment, and seemingly equally given to self-deception and public deception as the enemies they despise. Some even screamed “brazen contempt for a democratically adopted Act by the sovereign parliament of India”. To them, this is nothing but “selling off Indian people’s lives and safety for nuclear profits”, and “unfortunate that India is choosing to miss the historic opportunity to go for sustainable, renewable decentralised and equitable forms of energy”, whatever that means.

For now, it is time for Indians to grow up to the obligations of global trade. No Indian software or pharmaceutical company is held liable for all the incidental or consequential damages due to its exports. To demand that a nuclear equipment supplier – whether in a turn-key mode or at any time during the operation of a power plant – be strictly liable is tantamount to demand that handgun vendors be liable for a customer’s suicide. The big question is whether the Indian power sector is viable, not whether nuclear power costs 10 or 20 US cents per kWh. All cost forecasts can go haywire within any time, and if the safety of nuclear power stations demands that they be shut down for changes, the replacement power cost alone can get far higher than the paltry damage liability cap. Even in the case of nuclear accidents, site selection, operational errors, and worse – ineffective disaster response by local authorities and the state/national governmental infrastructure – can multiply damages that no supplier can be legally held responsible for.

Or to reconsider whether nuclear disasters are worth the risk, whether they come from faulty power plant equipment or diversion of nuclear technology and material to mass destruction or threats.

The rhetorical excess of anti-nuclear activists combined resentment against the current coalition government and some of the opposition parties, against the US for all sins of commission and omission, against capitalism, against centralized power systems, against multi-national corporations, and perhaps against God (whose “acts” cannot be insured against).

As the joke goes among lawyers, “If you have the facts on your side, argue facts. If you have the law on your side, argue the law. If you have neither, pound the table and raise your voice."

Brazen ignorance is needed to charge the GoI with "brazen contempt". Tit for tat. Sometimes, nuclear zealots and anti-nuclear activists seem mirror images of each other when it comes to facts or laws. This is sad but not surprising – governments and scientists started the deception of nuclear power, and the activists may be only now waking up to the fact that double-speak combined with irrational faith are hallmarks of the nuclear establishment. To take an interpretation of the law that serves commercial interests is a policy choice, and GoI policy choice was predictable.

All hearsay and shouting from top of the roofs against civilian nuclear technologies is beside the point. The world is subject to civilian as well as military nuclear risks and will remain so for today’s children, even if their grandparents dream otherwise. The civil nuclear “dialogue” cannot go on where the government has all the powers, including information. The institutional fault that divides India – talking past each other, resorting to technical theories rather than establishing a framework

for examination on merits – is a reminder that even 50, 60, or 70 years later, India simply hasn't grasped how to live with its nuclear choices. The establishment merrily ignores the criticism, not because they are necessarily irresponsible but they are drugged on a fantasy of nuclear power being the responsible choice. Their self-delusion knows no limits, and they are protected by the police and the army.

Dr Singh may have done nothing improper - "dilution" or "gift" or "extravagance" – in the present instance. Still, in the broader scheme of things, with grassroots opposition at nuclear plant sites, the government may advance a few more steps toward a national security state, failure, and chaos, simply because it does not know how to manage its power sector.

> *Note: NPCIL is a public sector undertaking in possession and charge of India's nuclear power reactors and thus liable for damages in case of nuclear incidents. As with early histories of nuclear power in US or France fuel enrichment or spent fuel reprocessing or heavy water production are in the hands of a government agency (a department, in India's case). As with Russia or China still, nuclear fuel mining and power production are also in the hands of PSUs in India as of course the production and use of weapons-usable nuclear materials in the hands of the government, at least so far as anybody can tell.*

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## III. Reading


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## IV. NAUTILUS INVITES YOUR RESPONSES

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