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Assessing the Viability of India's Nuclear Liability Law in the Current Context: Key Issues and Challenges

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The world has witnessed enormous development taking place at a skyrocketing pace over the past few years. For development to occur, the availability of energy sources is vital, and till now, the world has relied on conventional forms of energy like- fossil fuels, coal, etc. However, as modern technological developments are taking place, various non-conventional forms of energy, like geothermal, wind, nuclear, etc., are coming to the surface. This article aims to explore various dimensions related to the need for nuclear energy in India and analyses India's nuclear laws with international laws and other municipal laws. The author has tried to analyze the present-day nuclear regime in India critically, Civil Liability Nuclear Damage Act, 2010, exploring its shortcomings and conflicts with international laws. This article aims to explore the background of nuclear energy regimes around the world, international conventions and the currently existing nuclear regime in India. Then the article draws a comparison of India's Nuclear Regime with other Foreign Jurisdictions. It analyses the viability of the current nuclear regime in India with reference to the recent growth in the Indian Nuclear Industry. Finally, the article concludes by providing solutions to the current problems and challenges in the Indian nuclear industry. The author has tried to establish continuity throughout the article while exploring the vast ocean of possibilities in the field of nuclear energy in India and how the present-day regime can be reformed to meet the requirements of the time.

Keywords: nuclear energy, nuclear laws, nuclear power growth, civil liability.

INTRODUCTION

Energy is the epicenter from where the waves of human development rise. Humans have usually relied upon traditional forms of energy, but as time changes, newer forms of energy sources come to the surface. There is enormous potential for growth in nuclear energy; at the same time, it also becomes expedient to ensure that the same is well-regulated and protected. The laws related to nuclear energy are divided into two broad paradigms: International Laws and Municipal Laws. Around the world, the concept of 'channeling' is used to attract more investment in nuclear power. As per the concept of channeling, the operator will be absolutely and entirely liable, irrespective of whose acts or omissions are responsible for the actual accident.¹ All the international conventions in the field of nuclear power, such as - the Convention of Third-Party Liability in the field of Nuclear Energy (Paris Convention) 1960², Brussels Supplementary Convention 1963³, Vienna Convention on Civil Liability for Nuclear Damage 1963⁴ and Convention on Supplementary Compensation for Nuclear Damage 1997⁵ follow the same principle of 'legal and economic channeling'.

On the other side, a tectonic shift occurs on transitioning from the Indian to the International nuclear regime. In India, the law that governs the nuclear industry is known as the Civil Liability for Nuclear Damage Act 2010.⁶ This law is in stark contrast to the principle of 'channeling' as Section 17(b) of CLNDA Act 2010⁷ provides operators the 'right to recourse' to the suppliers in case of a nuclear accident.

¹ Sidhant Chandalia, 'International and Indian Civil Liability Regime for Nuclear Damage - Operator's Liability v Supplier's Liability' (2013) 2(1) Kathmandu School of Law Review 87
<<https://kslreview.org/index.php/kslr/article/view/1032>> accessed 07 October 2023

² Convention of Third-Party Liability in the field of Nuclear Energy (Paris Convention) 1960

³ Brussels Supplementary Convention on Nuclear Liability 1963

⁴ Vienna Convention on Civil Liability for Nuclear Damage 1963

⁵ Convention on Supplementary Compensation for Nuclear Damage 1997

⁶ Civil Liability for Nuclear Damage Act 2010

⁷ Civil Liability Nuclear Damage Act 2010, s 17(b)

HISTORY OF NUCLEAR ENERGY AROUND THE WORLD

After the Second World War, the potential of nuclear energy came to the forefront, with the United States of America becoming a pioneer in the field of Nuclear Industry.⁸ As America had used nuclear energy for military purposes during the Second World War, as is evident from the dropping of atomic bombs at Hiroshima and Nagasaki, its lobbying power was the highest concerning the use of nuclear power. In those times, only the government ran the nuclear plants, reactors, and facilities.⁹ Hence, only the government was liable for any type of damage or injury arising out of nuclear industries. However, in 1954, the government of the United States decided to open the doors for the entry of private entities in the field of nuclear power.

This proved out to be a blessing in disguise for the American nuclear industry as the entry of private actors opened up infinite possibilities. However, the boon came with a heavy toll on the growth of the nuclear industry as it created a situation of legal uncertainty in the market.¹⁰ As private entities are allowed to enter, the liability of third-party actors, apart from the operator, shifted to the private entities, resulting in massive disinvestment in the industry. The private entities, including operators and third-party actors like suppliers, engineers, etc. saw it increasingly unfavorable as it imposed liability for any damage arising from nuclear accidents. At the same time, the American nuclear industry wanted to expand and extend its ambit by ensuring its presence in Western Europe.¹¹ However, it faced many difficulties and hindrances as the officials sitting in corporate cabins in the United States wanted to avoid liability for accidents that might take place in far distant lands.¹² One of the significant hurdles for private actors to operate was insurance, as they would be held solely liable in case of an accident arising

⁸ Nathalie L J T Horbach, 'Assistance Programmes of the International Atomic Energy Agency to CEEC/NIS' (1999 17(3) *Journal of Energy & Natural Resources Law*

⁹ Arya Hariharan, 'India's Nuclear Civil Liability Bill and Supplier's Liability: One Step towards Modernizing the Outdated International Nuclear Liability Regime' (2011) 36(1) *William & Mary Environmental Law and Policy Review* 223 <<https://scholarship.law.wm.edu/wmelpr/vol36/iss1/8>> accessed 08 October 2023

¹⁰ *Ibid*

¹¹ Isabelle Wildhaber and Christina Winter, 'Civil Liability in Europe for Terrorism-Related Risk' (2017) 8(3) *European Journal of Risk Regulation* 606 <<https://www.jstor.org/stable/26363834>> accessed 09 October 2023

¹² *Ibid*

out of the nuclear industry.¹³ It also became extremely tedious to quantify the insurance premiums because of the low profitability and high risk involved in the nuclear power industry.¹⁴

Therefore, to solve problematic labyrinths and create certainty in the nuclear power industry, the Price-Anderson Act of 1957 came into effect.¹⁵ It is where the roots of 'economic channeling' lie under which the operators agreed to bear the onus of strict liability in return for limitation of liability over time on insurance coverage, manageable premiums, capped damages etc. As per the well-renowned Harvard Report¹⁶ the third-party actors, like suppliers, designers, engineers, etc., have no control over their goods or services once the ownership is transferred to the other party and it would be unjust to hold them liable for any accident arising in the course of the future. It was decided that the complete liability should be shifted with the transfer of ownership to the other party. Therefore, it was held that operators would be liable for any damage caused by an accident arising out of the nuclear industry.

INTERNATIONAL CONVENTIONS ON NUCLEAR ENERGY

There are many international conventions related to the nuclear power industry worldwide. Some of them are –

1. Convention on Third-Party Liability in the Field of Nuclear Energy (1960)¹⁷ - It was one of the first nuclear conventions, passed by the Nuclear Energy Agency in 1960 and came to be known as the Paris Convention. It covered all damages or injuries arising out of nuclear accidents in nuclear installations. The convention specifically mentioned that the claim can be brought only against the nuclear operator or operator's insurer and not against other third

¹³ Evelyne Ameye, 'Channelling 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(1) European Energy and Environmental Law Review 33 <<https://doi.org/10.54648/eelr2010003>> accessed 09 October 2023

¹⁴ *Ibid*

¹⁵ Horbach (n 8)

¹⁶ David F. Cavers, 'Improving Financial Protection of the Public against the Hazards of Nuclear Power' (1964) 77(4) Harv Law Review 644 <<https://doi.org/10.2307/1339137>> accessed 10 october 2023

¹⁷ Convention of Third-Party Liability in the field of Nuclear Energy (Paris Convention) 1960

parties like- suppliers, architects, engineers,etc. Also, the timeline under which the parties must bring the claim was fixed at ten years of the injury and under two years of reasonable discovery of the injury. It provided that the suits related to nuclear incidents would lie in the courts that have jurisdiction within the state in whose territory the incident occurred or where the operator was present. It also restricted the liability of the nuclear operator for damages caused by nuclear accidents to a maximum of 15 million SDR (Special Drawing Rights) and a minimum of 5 million SDR.

The concept of channeling liability to the nuclear operator was laid down under this convention. It made it clear that – First, only the nuclear operator can be held liable for damage caused by any nuclear accident falling under the Paris Convention’s purview. Second, the nuclear operator can seek no recourse through any legal means and would be held liable absolutely. In the present case, this absolute liability of the operator came to be known as ‘exclusive liability’.

2. Brussels Supplementary Convention (1963)¹⁸ – The Brussels Supplementary Convention amended the original parts of the Paris Convention by adding additional grounds under which victims could avail damages. Under this convention, the liability amount of the installation state was increased ranging from 175 million SDRs (Special Drawing Rights) to 300 million SDRs. It increased such an amount by getting contributions from the state, with nuclear installations, that were party to the convention.

3. Vienna Convention on Civil Liability for Nuclear Damage (1963)¹⁹ - The Vienna Convention on Civil Liability was drafted and passed by the International Atomic Energy Agency in 1963. Even though it is almost similar to the Paris Convention, it has some additions– it has armed conflict as an exception and requires that nuclear operators are insured; it does not limit damage to the installation state’s territory. It also supports the provision of legal channeling to the single operator.

¹⁸ Brussels Supplementary Convention 1963

¹⁹ Vienna Convention on Civil Liability for Nuclear Damage 1963

4. The 1997 Protocol to Amend Vienna Convention²⁰ – It was the first amendment to the Vienna Convention after the Chernobyl Disaster. It brought many changes to the Vienna Convention, one being that now damages can be recovered from any economic loss arising from loss of life, personal injury, or property damage. However, other damages like damage to tourism, etc. were permitted only if mentioned in the civil law of the installation state. It also increased the geographical coverage as now the injury or damage can be caused by a nuclear accident from any place subject to the installation state's discretion. It also brought provisions for environmental harm, and damages can be recovered for the environmental destruction caused by the nuclear incident. However, like other conventions, it also followed the principle of 'channeling'.

5. Convention on supplementary compensation for Nuclear Damage (1997)²¹ – In 1997, this convention came as a means to provide supplementary compensation funds for signatories in case of damage caused by a nuclear incident. The fund was created with the collective contribution of all the signatory states. The contribution of each signatory state was determined based on the state's nuclear installation capacity and a rate assessment conducted by the United Nations. As per the convention, the installation state shall ensure the availability of 300 million SDRs in case of a nuclear accident. Even though it is presently unenforceable, as it must have five states with a minimum of 400 GW thermal of nuclear-installed capacity to rectify it, however, any state can follow it regardless of whether it is a signatory.

NUCLEAR POWER REGIME IN INDIA

With, the increasing growth of India's economy nuclear energy became an extremely lucrative market in the country. India, being one of the most populous countries, has a massive need for energy to sustain such a large population and undergo development. The esteemed Nuclear Supplier Group also decided to open its international vendor market in India in 2008.²² Since

²⁰ The 1997 Protocol to Amend the Vienna Convention 1997

²¹ Convention on supplementary compensation for Nuclear Damage 1997

²² Saira Bano, 'India's Nuclear Suppliers Group (NSG) Membership and the Nuclear Non-Proliferation Regime' (2014) 25 *Irish Studies in International Affairs* 117 <<https://doi.org/10.3318/isia.2014.25.2>> accessed 12 October 2023

then, India has signed numerous civil nuclear agreements with countries, especially the United States of America, France and Russia.²³ However, ironically, India was not part of any international convention regulating the nuclear market,²⁴ so the Indian Parliament drafted a bill that was afterward amended and enacted as the Civil Liability Nuclear Damage Act of 2010.²⁵

The CLNDA Act limited the liability for damages arising from nuclear incidents to 300 million SDR (Special Drawing Rights). At the same time, it also gave powers to the Union Government to specify any higher amount through notification. While the act reduced the total liability of an operator to five hundred crore rupees, under the same provision, the total liability of the operator can be raised to 1500 crore rupees.

The CLNDA empowered the Union Government to appoint one or more Claims Commissioners to adjudicate upon the compensation claims, under which they would adjudicate upon the matters related to compensation claims arising from nuclear incidents.

The most peculiar feature of the CLNDA, 2010, is its provision of the right to recourse for nuclear operators. Unlike most of the international conventions and domestic legislations related to nuclear liability, Indian law, for the first time, differed on the concept of 'channeling of liability'. Under Section 17(b) of CLNDA, the act incorporates the provision of channeling the liability to suppliers in case of a nuclear incident.

Section 17(b) of CLNDA, 2010,²⁶ states that – *“Operator's right of recourse. –The operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with section 6, shall have a right of recourse where–*

(b) the nuclear incident has resulted as a consequence of an act of the supplier or his employee, which includes the supply of equipment or material with patent or latent defects or sub-standard services;”

²³ Horbach (n 8)

²⁴ Gorremutthu Mahith Vidyasagar, 'India's Nuclear Civil Liability Act: A Paradigm Shift from International Nuclear Civil Liability Regime' (2021) 4(3) International Journal of Law Management and Humanities 3080 <<https://doi.org/10.10000/IJLMH.11837>> accessed 12 October 2023

²⁵ Civil Liability for Nuclear Damage Act 2010

²⁶ Civil Liability for Nuclear Damage Act 2010, s 17(b)

So, under CLNDA, 2010, the operator is empowered to bring an action against the supplier if any act done by its employees or by the supply of any defective material gives rise to a nuclear accident. Hence, India has taken an independent stance on the global stage by incorporating an entirely novel concept of nuclear liability. However, the legislation is also fraught with various challenges and shortcomings that are responsible for India's sluggish growth in the Nuclear Industry in certain aspects.

MUNICIPAL LAWS RELATED TO NUCLEAR ENERGY AROUND THE WORLD-

1. South Korea - South Korea has two domestic nuclear-liability laws²⁷ governing the nuclear reactors in the country, namely the Act on Compensation for Nuclear Damage (Compensation Act) and the Act on Indemnification Agreements for Nuclear Liability.²⁸ The Compensation Act was amended in 2000 and became enforced on Jan 1, 2002. Also, some of the principles of the Vienna Convention were reflected in the newly amended act. Even though South Korea is not a party to the Vienna Convention, its municipal laws reiterate the principles of the amended Vienna Convention.

Some of the amendments that were brought are -

- The definition of nuclear damage includes environmental damage, preventive measures, and economic loss,
- It extended the geographical scope of South Korea's exclusive economic zone and recognized the principle of reciprocity,
- Grave natural disasters arising out of exonerations were excluded.
- It limited the nuclear operator's liability amount to 300 million SDRs.
- Increased financial security limit to 300 million SDRs.

²⁷ Patricia Goedde, 'In Search of a Civil Nuclear Liability Regime for North Korea' (2003) 27(1) Asian Perspective 225 <<https://www.jstor.org/stable/42704403>> accessed 14 October 2023

²⁸ *Ibid*

2. Canada - Canada follows the domestic regime on Nuclear Liability that is in consonance with the International Regime. Under Canada's Nuclear Liability Act,²⁹ the nuclear operators are subject to absolute liability; in that sense, it also follows the same principle of 'channeling' as is used in American Nuclear Liability Laws and International Conventions. The Canadian Legislation also restricts the total liability for which a nuclear operator can be held liable. There is a limit of 750 million Canadian dollars on the liability of a nuclear operator in case of third-party claims arising out of a nuclear incident.

3. Japan - In Japan,³⁰ unlike other countries, two legislations concerning the liability of operators are followed, namely:

(a) The Law Concerning Compensation of Nuclear Damage and

(b) The Law Concerning Nuclear Damage Compensation Indemnification Contracts.

The Law Concerning Compensation for Nuclear Damage aims to protect the general public from the hazards of nuclear incidents to encourage the development of the nuclear industry. Article 3 of the Compensation Act provides compensation for nuclear damage caused by a nuclear operator in the operation of a nuclear reactor. It also follows the principle of 'channeling' where the nuclear operators can be held liable, but at the same time, they also have a broad right of recourse.³¹ Apart from these, Japanese legislation on Nuclear Liability has some special provisions that are -

- In Japanese law, the principle of channeling does not apply in case of injuries to employees of nuclear operators.
- The law also provides for the liability of consignee operators, who shall be primarily liable for injuries from nuclear accidents occurring during the transportation of nuclear fuel material.

²⁹ Canadian Nuclear Liability Act 2015

³⁰ Eiichi Hoshino, 'Nuclear Liability Legislation of Japan' (1963) 7 Japanese Annual International Law 38

³¹ *Ibid*

- The nuclear operators are liable without fault for nuclear damages arising out of the operation of a reactor, except when caused by a grave natural disaster of exceptional character or by a severe social disturbance.
- Japanese law imposes no financial cap on the liability of nuclear operators, thus providing for unlimited liability.
- The law mandates that nuclear operators must furnish financial security compensation injuries, and failure to do so is subject to penalties.

EVALUATION OF NUCLEAR REGIME IN INDIA-

Some of the merits of the Civil Nuclear Liability Law are:

Limits the possibility of inherent risk - The advocates of the current nuclear liability regime maintain the position that it would pave a similar trajectory as product liability. As it would allow suppliers to be liable for their faults or carelessness in designing, manufacturing, etc.³² So, the concept of channeling creates a situation where there would be no checks and balances on the acts of suppliers. In addition, even though channeling benefits the nuclear industrial players but it prejudices the victims by leaving them on the fringe of injustice.

Reflect Indian Interests - As India has faced some of the most horrific industrial accidents, like the Bhopal Gas Tragedy, the legislative intent while framing the domestic nuclear liability law was that it must reflect Indian interests. The concept of 'channeling of liability to operators' is profitable for the corporate officials sitting in their chambers in far distant places around the world but it is prejudicial to the common people of the country. From that matrix, the current civil nuclear liability law is advantageous as it creates a mandate for suppliers to maintain quality in their services. It also reflects the interests and well-being of ordinary people.

The incentive for companies to maintain compliance - When it comes to potentially hazardous industries like nuclear power, it becomes pertinent that the quality must be maintained throughout. A slight carelessness from either side can result in a catastrophe that no one would

³² Horbach (n 8)

have ever imagined. So, the CLNDA, 2010, is a welcome step as it provides a right of recourse to operators. Since the third-party actors like suppliers can be held liable for their negligence it would compel them to maintain quality in their work. In addition, the overall standard of quality would improve and it would act as an advantage for both the victim and the industry. It would minimize the potential of future nuclear accidents thus increasing the profitability of the nuclear industry ensuring the protection of common people.

However, some of the demerits of Civil Nuclear Liability Law are:

1. Concerns over the provision of supplier liability – Section 17(b) of CLNDA provides the right to recourse to the operators, has been fraught with concerns and controversies. The United of America first came up with the concept of ‘channeling of liability to operator’ to create certainty in the nuclear industry to assure the private actors.³³ As the private actors did not want to take the burden of liability and it would be unfeasible for them to undertake the burden of increasing insurance costs, the government channeled all the liability to the operator to increase investment in the nuclear industry. However, the CLNDA, 2010, is antithetical to the entire proposition of channeling provision, and it again leaves the private actors in the same state as that before the Anderson Act in America.

2. Insecurity for foreign third-party actors – As the present-day domestic legislation on nuclear liability provides for the liability of third-party actors in case of a nuclear incident, it creates a lot of insecurity for foreign third-party actors like suppliers. The corporate officials sitting in the United States do not want to take any uncertain future liability for an incident that takes place in far distant land. It ultimately ends up with the foreign investors not investing in the Indian Nuclear Industry. Even after being such a thriving market for the nuclear industry, there is a lack of foreign investment in India.

3. Barrier on Growth of the Nuclear Industry at the Incipient Stage – The CLNDA, 2010, came at a time when there were large prospects of impressive growth in the nuclear industry and industry. The foreign actors were looking forward to making India a hub of foreign investment

³³ Civil Liability for Nuclear Damage Act 2010, s 17(b)

in the nuclear industry. However, the CLNDA, 2010, brought uncertainty and insecurity in the minds of foreign investors that stalled the growth of the nuclear industry.

As India is the fastest-growing economy in the world and also has the second largest population base, alternative sources of energy have to be found. The country can no longer be dependent on non-conventional sources of energy. However, for that, there needs to be a large investment in the nuclear industry to create a stable nuclear base in India.

4. No limit on supplier's liability – Clause 17(b) of the CLNDA Act 2010³⁴ even though it allows for the right to recourse for operators but it sets no limit on supplier's liability. The suppliers are very concerned about the provision of Clause 17(b) that states that *“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”*.

5. Possibility of multiple and concurrent liabilities on the Suppliers – Section 46 of CLNDA,³⁵ states that the – *“The provisions of this 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”*. Therefore, the above-mentioned act opens the room for multiple and concurrent liability of suppliers in case of a nuclear accident. Adding to this, the intention behind this special legislation also provides for the provision that claims related to a nuclear incident, would come under the jurisdiction of the Claims Commission, thus excluding any jurisdiction of foreign courts.

RECENT GROWTH IN THE FIELD OF NUCLEAR POWER INDUSTRY IN INDIA

With the deficiency of fossil fuel resources and increasing population, it becomes expedient to utilize the energy sources optimally. Nuclear Power, being a conventional source of energy, is an environmentally friendly and sustainable resource. It also has a huge potential and its expansion will help the country to meet the goal of net zero economy.³⁶

³⁴ *Ibid*

³⁵ Civil Liability Nuclear Damage Act, 2010 (India), s 46

³⁶ Prachi Lokhande, 'Nuclear Energy Could Be the Answer to India's Energy Woes' (2021) 6 Liberal Studies 151

At present, the nuclear power capacity in India is 7480 MW which comprises of 23 operational nuclear power reactors.³⁷ The government aims to increase the present installed nuclear power capacity from 7480 MW to 22480 MW by the year 2031. In the year 2023, the share of nuclear power in the total electricity generation in the country was about 2.8% and it is expected to increase in upcoming future.³⁸ Also, at present nine nuclear power reactors are under construction that are to be completed by 2024-25.³⁹

However, foreign suppliers have put most of the plans on hold due to the possible enforcement of India's Civil Nuclear Liability for Nuclear Damage Act 2010 by the government. It is because many provisions under this act like Section 46, Clause 17(b) etc. make it extremely unfavorable for investors to think of investing in India.⁴⁰ Also, the private actors are concerned with the profit that they can earn and they would not invest in a country where there is less or no possibility to earn profits. There is a lack of enthusiasm among the foreign nuclear investors to invest in India considering its nuclear regime that is totally opposite of International Conventions.⁴¹ It would be extremely difficult for the country to flourish in the field of nuclear power if foreign investors are averse to investing in India.

CONCLUSION

India being one of the fastest developing economies, is in the quest of a viable source of energy to support its growing needs. Nuclear Energy is definitely a viable option for it to consider and it is also in synergy with India's environmental goals. Looking at the history, the CLNDA 2010 came at a time when nuclear energy in India was in its incipient stage. The bitter experiences of the Bhopal Gas Tragedy and other disastrous accidents compelled our legislature to frame a nuclear regime in such a way that the liability of private actors is maintained and the ultimate aim of public welfare is secured.

³⁷ 'Dr Jitendra Singh Says Nuclear Power Capacity Set to Increase from 7480 MW to 22480 MW by 2031' (*Press Information Bureau*) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1941010>> accessed 14 October 2023

³⁸ *Ibid*

³⁹ 'Proposals for New Atomic Power Plant' <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=187135>> accessed 14 October 2023

⁴⁰ *Ibid*

Ever since the Civil Liability Nuclear Damage Bill 2010 was drawn out, except for the initial amendment before it became an act, till now the legislature has made no amendments in the same. Even despite the changing paradigm of the nuclear industry, the legislature made no efforts to reform the nuclear liability law, to make it favorable to the changing needs of the time. India is standing at a juncture from where it has to undergo the transition from developing to developed state and expansion of nuclear energy is one way to make that transition easier.

So, in order to accelerate nuclear energy growth, the government must incorporate provisions that make India an attractive nuclear market, thus imploring foreign investors to make huge investments in India. Finally, the need of the hour is to carve the present nuclear regime in such a way that it serves the ultimate aim of public and environmental safety while being attractive enough to bring foreign investments into India.