

Second Prof. N. R. Madhava Menon SAARC Mooting Competition, 2017.

SAARC ROUNDS

This Moot Proposition has been formulated under the guidance of Adv. R. Venkataramani: Senior Advocate Supreme Court of India & Former Member Law Commission of India, by Mr. M. P. Ram Mohan: Associate Professor, Teri University and Mohit Abraham: Advocate on Record, Supreme Court of India for the SAARC Round of Second Prof. N. R. Madhava Menon SAARC Mooting Competition, 2017. This Moot Proposition has been formulated solely for the purpose of SAARC Mooting competition furthering the academic exercise.

People's forum for Nuclear Justice v. Union of India

And

People's forum for Nuclear Justice v. Suppliers and Vendors

1. India has a long history of successful civilian nuclear energy programme, with as many as close to 20 domestic nuclear power plants in operation across many states. Nuclear Power Corporation of India Limited (NPCIL), a central government owned and operated company is the sole legal entity authorised under the *Atomic Energy Act, 1962* to undertake nuclear energy activities. Atomic Energy Regulatory Board (AERB) is an independent regulatory body that reviews and enforces safety of NPCIL's nuclear power plant operations and also all radiation related activities in India. AERB regulates through several safety and operational codes/guidelines/rules that all nuclear and radiation facilities are bound to abide by. Over the years, India has had to ramp up its energy production in order to sustain its economic growth and meet the electricity demands of its growing population. Owing to these, many states in the country supported by Central Government are ramping up its energy production to sustain the economic growth as well lifestyle changes of its people. The Central Government also believes that nuclear energy would help meet India's obligations to reduce carbon emissions.
2. Vihara is a large state in India and is known to be one of India's most progressive states with a variety of heavy industries. The liberal economic policies adopted by the State have also led to a lot of foreign investment in major infrastructural projects across the State. Owing to the expansion of various power consuming industries, and even service sectors, increase in population and of changes in the public's lifestyle, Vihara was having troubles in meeting the high electricity demand on rational basis. Vihara started facing a situation of acute power shortage which also witnessed several hours of power cuts. This led to new investments and initiatives being gradually shifted

to other states and a corresponding loss of jobs and effect on economic activities and revenue losses. There was also a direct decline in agricultural production. All of these factors gradually resulted in diverse forms of social unrest and demand for urgent governmental interventions to provide alternatives to the crisis in the power sector. Vihara also did not have benefit of other sources of energy production viz. hydro-electric or coal.

3. In order to deal with the above multifarious problems and to improve the power situation in the State of Vihara, Central and State Governments jointly agreed to setup a large nuclear energy park hosting several reactors. As the power requirement was substantial and owing to domestic capacity constraints, NPCIL was tasked to import high capacity foreign nuclear reactors. The cost-benefit studies as well as other possible impacts were also analysed.
4. After much due diligence, NPCIL decided to import nuclear reactors made by the Stratton Nuclear Company located in the Republic of Oakmont. Oakmont is a highly advanced industrial country internationally known for its nuclear technology and technical capabilities. The Republic of Oakmont owned 51% shares of the Stratton Nuclear Company. Under the domestic law of Oakmont, in such circumstances the Government of Oakmont can be subjected to liability, provided, such liability can be invoked only if any nuclear incident occurs within the Republic of Oakmont. After long negotiations, India and Oakmont governments signed a Memorandum of Understanding to import 4 reactors of 1500MW each to be setup at the nuclear park in Vihara. The reactors that have been imported have also been certified by Oakmont's Nuclear Regulatory Commission and there are few similar reactors that are in operation in Oakmont.
5. Since the nuclear project requires lot of water for cooling, a sea side project site was chosen. Additional water resources around viz., huge rain fed lakes, were also identified. The area chosen was surrounded by fertile lands, in the periphery of 10 Kms. However, this distance was treated to be a safe buffer zone. The site was evaluated by the site selection committee of AERB and found

to be the most suitable from all angles. The project was thereafter formally announced.

6. Once the nuclear energy project was announced, there were many protests by local communities. They feared loss of livelihood due to resettlement and most importantly local community feared that radiation and high outlet water temperature from nuclear power plant would destroy their crops and fish-stocks. Some public hearings were conducted. Officers with considerable technical expertise endeavoured to allay the apprehensions of the people. Both the Central and State Governments pressed into service all efforts to convince the agitating public that the project was absolutely safe, and that the reactors which have been imported were of advanced category with an impressive track record of safety. Further, it was made clear that all the relevant laws including *Atomic Energy Act, 1962; The Civil Liability for Nuclear Damage Act, 2010* and all safety compliances mandated by the AERB and other regulatory bodies in India and international technical bodies would be scrupulously enforced while setting up of the project. Moreover, AERB would regularly audit and review the progress of the construction according to the laid down procedures.
7. Several official publications were circulated, quoting both technical and other information. For instance, the following political statements made in the past, in other countries were cited:
"The exploitation of atom's energy has become a realistic requirement, and is preconditioned by interests of the human civilization progress. West German chancellor Helmut Kohl told a national television audience, abandoning nuclear power could spell the end of the Federal Republic as an industrialized nation. Energy secretary Peter Walker of the United Kingdom said, if we care about the standard of living of generations yet to come, we must meet the challenge of the nuclear age and not retreat into the irresponsible course of leaving our children and grandchildren a world in deep and probably irreversible decline."
8. India has also ratified the *Convention on Supplementary Compensation (CSC)*, an international nuclear liability convention. India maintains that its domestic

law is in full compliance with CSC model law. During the project negotiation, the Government of Oakmont however raised concerns about the possible expansive interpretation with respect to *The Civil Liability for Nuclear Damage Act, 2010 (CNLD Act)* especially Section 17 relating to supplier's liability and Section 46. The concerns were also raised by the vendors of Stratton Nuclear Company such as *Gaul & Co* and *Mongari Technicals* stating that the news reports from India suggest that as vendors (the sub-suppliers of equipment to the main Supplier) of Stratton Nuclear Company they will also be covered under the liability Act. India held out that the *Civil Liability for Nuclear Damage Act, 2010* conformed to the internationally accepted nuclear liability principles and that there could be no lesser regime, different from one obtaining at the international level. It was thus able to politically and commercially convince Oakmont and Oakmont based companies to commence their operations. Following this both the Government of India and the Government of Oakmont committed to follow the prevailing law of India with respect to the project. A formal understanding to this effect was also reduced to writing, endorsing the contract between NPCIL and Stratton Nuclear Power Company. It was understood this declaration between the two countries will be part of the contract referred to above. However, it was stipulated that, any action on the part of government of India to indirectly render the Republic of Oakmont liable to any nuclear incident, for any reason whatsoever, may be resisted by the Republic of Oakmont. It could also initiate appropriate legal action against any such measure by government of India.

9. As the construction of the first reactor project started, taking advantage of the local unrest, many non-governmental organisations and anti-nuclear groups became part of the protests criticising both the project and also the existing liability law. One of these organisations is the *People's Forum for Nuclear Justice (PFNJ)* which is led by activist Mr. AdiAvaran. PPNJ is an anti-nuclear organisation that was established under Indian law with the purpose of shutting down the nuclear park in Vihara. PPNJ occasionally had financial support from local religious groups such as Churches etc., for provision of food and water to

the protesting people. PFNJ argued that the under construction nuclear power plant has many technical flaws and should be converted to a thermal power plant. AdiAvaran studied renewable energy in Gerstria, a highly industrialised country in Ursala Bloc (a group of developed countries) known for its Green Party and shutting down nuclear energy programmes. Gerstrian Government also supports a world-wide ban on all nuclear programmes including nuclear power programmes as well. He cited the statement of the Foreign Minister of Austria when he addressed the 1986 IAEA meeting:

"For us the lessons from Chernobyl are clear. The faustian bargain of nuclear energy has been lost. It is high time to leave the path pursued in the use of nuclear energy to the past, to develop new alternative and clean sources of energy supply and, during the transition period, devote all efforts to ensure maximum safety. This is the price to pay to enable life to continue on this planet."

10. India being a developing country with massive power requirements, the expansion of nuclear energy programme in India has not been taken well by Gerstria. AdiAvaran during his several speeches spoke praising Gerstria as a "wonderland of renewable energy" where there existed "peace, jobs and prosperity without the constant threat of nuclear energy going wrong". Thus there was this indirect influence from across the borders.
11. Many times, Vihara had to use police force to deal with agitations and also take legal measures to quell the civil unrest. This also included filing of criminal cases against the activists and also the arrest of Mr. AdiAvaran under sedition charges. This led to a cross section of the communities doubting the government's commitment in engaging with the public on informed and objective basis while establishing a project of this massive scale. In the past, the State Government had made statements to the effect that it believed that the local public had been provoked by the well-funded NGOs and anti-nuclear groups to slow down India's economic progress thereby affecting India's anti-poverty programmes and employment opportunities for its lakhs of youths. National sovereignty issue began to be raised in different ways and voices.

12. One of the major issues with the protesting NGOs and anti-nuclear groups was the safety of the project. Citing examples of two or three accidents in advanced countries in the recent past, protesters are arguing that the project is demonstrably risky and accidents can happen on a high probability. They challenged the claims regarding technology advances made after the Chernobyl incident. They are supported by few political parties as well. Demands regarding higher quantum of compensation, in the event of a nuclear incident, were also being raised, particularly addressing the issue with respect to, the supplier's liabilities under the 2010 Act.
13. In the midst of the debates and protests, the construction of the first plant was completed in 2008, strictly as per the procedures and technical standards laid down by the AERB. After full technical evaluation AERB recommended commencement of the operation of the plant. The technical experts from the Republic of Oakmont also carried out an inspection. Accordingly, the plant in Vihara was successfully synchronised and connected to the grid for electricity supply in 2009. After 5 years of successful operation, the 6th year witnessed two freak or rare weather related occurrences. Vihara suffered due to lack of adequate rainfall in the previous year. The temperature in the summer months in the 6th year rose to several degrees above the highest ever recorded temperature. This heat was beyond human endurance. Several industrial units using furnaces, were shut down, amidst reports of signs of accidents. It was also mooted that the nuclear installations may thus need special supervision and watch. But soon, when the monsoons commenced there was incessant rain for about two months. This led to breaches of the lakes near by the plant and a virtual inundation of nuclear park. This inundation lasted for more than 2 weeks and there was no scope for any anticipatory action. The plant and its operations were to be intermittently suspended but internal sources revealed that there could be serious concerns. Even while the deluge was waning, the Vihara nuclear plant suffered a major accident. All the back-up emergency systems failed, and the accident was rated as level 6 at the International Nuclear Events Scale of the International Atomic Energy Agency (IAEA). It was

speculated that the extreme heat hither too unrecorded, followed by the deluge, had apparently led to the unforeseen effects, and that the systems could also not be revived owing to the lack of availability of external assistance supports, as the deluge had affected many aid measures.

14. As per the procedure, AERB notified the accident as a major accident. Several hundred people in the villages in and around Vihara Plant were said to be exposed to high levels of radiation requiring specialised treatments. Large scale resettlement of villagers was also undertaken. Radiation plumes have also been noticed in neighboring states causing major environmental and health concerns. The extent of damage and radiation effect, required urgent study. NPCIL being the operator of the plant paid the statutory mandated compensation of 1500 crores under Section 6 of the 2010 Act. NPCIL and AERB have constituted their own technical teams to do a complete investigation of the accident.

15. In the meanwhile, the Government of India constituted an independent fact finding technical committee consisting of one expert from IAEA, Director of Indian Institute of Technology, Director of Indian Institute of Science, Secretary of Department of Science and Technology, Government of India and Director of All India Institute of Medical Sciences to study the technical reasons of the accident and its medical, health and other consequences. The report of the committee unanimously opined and recommended:

- (i) That Considering the gravity of the accident, the central government and the Government of Vihara should make provisions to pay higher amount of compensation, without being bound by the statutory limits, as the damage could be grave. (the instance of Bhopal Gas Leak case was cited)
- (ii) The Operator viz, NPCIL, was exonerated of any operational fault or negligence within the scope of section 5 of the Act of 2010.
- (iii) The equipment supplied by Suppliers and their vendors were faulty having latent defects within the meaning of Section 17 (b) of the Act. The investigation found the cause of accident was related to bursting of coolant channels, and non-working of sensitive leak detection systems and accident warning

instruments. The report concluded that these important safety instruments were found to be technically defective, and that no blame could be laid on external factors, such as weather factors.

- (iv) Immediately shut down all the Oakmont supplied nuclear reactors, and demanded AERB to review all the operational parameters and test all equipment of its patent and latent defects, and,
- (v) Commanded safety of the public and safe operation of nuclear plant in case it is not to be shut down was of utmost importance.

16. NPCIL has decided not to invoke its right of recourse as it found that the supply contract did not specify the class or kind of defects which may relate to the right of recourse. Even though the contract was in terms of international practice, there were certain omissions. Invoking Section 17 of the Act was thus not advised. In light of these developments, the Peoples Forum for Nuclear Justice filed two writ petitions before the High Court of Vihara.

17. The first writ petition was against the Government of the India, NPCIL and Stratton praying for a direction against the NPCIL to seek right of recourse against suppliers and their vendors in relation to the Rs. 1500 crores already paid.

18. The second writ petition was against Stratton and Stratton's vendors such as Gaul & Co and Mongari Technicals seeking compensation to the tune of 5 billion US Dollars for providing faulty equipment that caused the major accident resulting in irreparable human and environmental damage. It prayed that the money be deposited with the Central Government so the Claims Tribunal under CNLD Act can further apportion the money.

19. Before the High Court both NPCIL and the Central Government took the stand that the High Court cannot issue a mandamus directing the parties to invoke section 17 of the 2010, Act, providing for operator right of recourse. While the Central Government is bound to act in safeguard of the interests of the citizens, it cannot authorize NPCIL to invoke section 17 of the Act, as that would be acting outside the scope of the law. It also contended that the suppliers have questioned the correctness of the conclusions and the report drawn by the High

Power Committee and they have called for an enquiry by an international panel. As Stratton Nuclear Company is partly owned by the Republic of Oakmont, the Central Government cannot act unilaterally and disrupt the comity of nations and international relationships.

20. The Suppliers challenged the maintainability of the writ petition on the ground that they are not liable to be sued in the courts in India and the extent of their liability if any, can only be to the extent agreed upon in the contract in question between NPCIL, Stratton Nuclear Company and other suppliers. They also seriously question the technical correctness of the conclusions drawn by the High power committee, particularly that the reactors have latent defects. Since these are matters of high scientific and technical nature, it was contended that the High Court cannot within the limited scope of its enquiry competence, deal with these questions.
21. The High Court of Vihara found that section 17 of the *Civil Liability for Nuclear Damages Act, 2010*, has not been challenged. On perusing the contract between the parties, the High Court found serious limitations on the part of the NPCIL to invoke section 17 of the Act. The High Court also opined that courts have limited role to play in evaluating or condemning public policy decisions by Government which have several implications. The High Court was of the view that much more than technical factors, the nuclear incident might have been the result of unforeseen and erratic weather events. Consequently, the High Court concurred with the Central Government that diplomatic parleys and negotiations are the appropriate avenues and thus dismissed the petitions. The High Court was partly persuaded in this view by certain observations made by the Supreme Court in a case relating to the wisdom of pursuing nuclear power as an energy resource. However, the High Court issued a direction to the central Government to amend Sections 5, 6, 7 and 17 of the Act and also to pursue the matter of higher compensation through international and other diplomatic sources. The High Court required the Central Government to complete the task within six months. In the meanwhile, the Central Government was directed to set up a special task force to look into the provision of medical

and other services. The central government was under tremendous pressure both domestic as well as international, to convince the Republic of Oakmont to share the burden of compensation as a measure of responsibility for the acts of its agent. The central government, was advised by its top law officer, to pursue multiple courses of action, including negotiations with the Republic of Oakmont. The media carried this news. The Republic of Oakmont, responded by drawing attention to the understanding between the two countries, and questioned the wisdom of any action against it. It also contemplated proceedings, if necessary in the International court of justice.

22. On the application moved by the Petitioners, the High Court of Vihara granted a certificate of fitness stating that the case involves substantial questions of law of general importance both of domestic and international law and that the said questions needed to be decided by the Supreme Court.
23. The Petitioners before the High Court are aggrieved by the High Court declining to issue appropriate directions to the Central Government and NPCIL. The Petitioners feel that the high court should have adopted a rights based approach and consider that several legal and governance issues are involved.
24. The Central Government is also aggrieved by the directions issued by the High Court, as it feels that such directions are beyond the jurisdiction of the High Court, and in view of the reactions of the Republic of Oakmont.
25. Both the parties have filed petitions of appeal under Art. 133 of the Constitution of India. The Writ Petitioners have also filed a petition under Art. 32 of the Constitution challenging the vires of Section 5, 6, 7 and 17 of the *Civil Liability for Nuclear Damages Act, 2010* on the ground that the Act not having provided for due process of law in relation to mandatory public hearing to be held and mandatory sharing of information at all stages, there can be no limitation on liability. The Central Government has responded at the threshold stage, contesting the maintainability of the writ petition.
26. The Supreme Court is set to hear both the appeals and the Writ Petition. Parties will address arguments on the legality of the judgment of the High Court, the several directions issued by it and also on the issues raised in the

writ petition, including questions of jurisdiction, maintainability, new developments in the tort liability of multinational enterprises.

This Moot Proposition has been formulated under the guidance of Adv. R. Venkataramani: Senior Advocate Supreme Court of India & Former Member Law Commission of India, by Mr. M. P. Ram Mohan: Associate Professor, Teri University and Mohit Abraham: Advocate on Record, Supreme Court of India for the SAARC Round of Second Prof. N. R. Madhava Menon SAARC Mooting Competition, 2017. This Moot Proposition has been formulated solely for the purpose of SAARC Mooting competition furthering the academic exercise.
