

India-US Civil Nuclear Cooperation
– Contentious Problems for NPT and Nuclear Disarmament –

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Prologue

An agreement for cooperation between India and the United States concerning ‘peaceful uses of nuclear energy’ was signed in Washington, DC, on 10 October 2008 by Indian Minister of External Affairs Pranab Mukherjee and US Secretary of State Condoleezza Rice. The US is to be allowed to sell India items of material and equipment, and/or related technology for use in civil nuclear facilities of India. The Indo-US agreement is a total reversal of the US nuclear nonproliferation policy taken after India’s nuclear test in 1974.

Back in 1963 the US and India concluded an agreement on peaceful nuclear cooperation, under which the US supplied India with two light-water reactors at Tarapur and the enriched uranium to fuel the two plants. In the meantime, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force in 1970. Under the treaty, India is not acknowledged as a nuclear weapon States — ‘one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967’. India has remained a non-signatory to the NPT ever since.

In its 1974 nuclear test India was regarded as having used the nuclear material produced by a Canada-supplied nuclear reactor (CIRUS: Canada-India Reactor United States) which used as moderator heavy water supplied by the US under a 1956 contract. The US then took an initiative in 1974 to establish a Nuclear Suppliers Group (NSG), an informal body of the countries that have agreed not to transfer nuclear material and sensitive nuclear technology to non-nuclear weapons states. In

addition, the US itself enacted the Nuclear Non-Proliferation Act of 1978, which was incorporated into the US Atomic Energy Act of 1954. By that legislation the US administration may export nuclear material and technology only to those non-nuclear weapon states which placed all their nuclear activities under the full-scope safeguards of the International Atomic Energy Agency (IAEA). As the result, the US nuclear cooperation with India, including nuclear fuel supplies to Tarapur, ceased in 1980, and the 1963 agreement terminated in 1993.⁽¹⁾

In 1998 India resumed a series of nuclear test explosions, immediately followed by Pakistan, also a non-adherent to the NPT. In the wake of these nuclear tests, the US stood on the forefront of applying sanctions against India and Pakistan under the United Nations Security Council Resolution 1172. The resolution, calling on the two countries, among other things, to put an end to their nuclear weapon development programmes, to cease development of ballistic missiles capable of delivering nuclear weapons and any further production of fissile material for nuclear weapons. The UN Security Council encouraged all states to ‘prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles’. The Security Council resolved that in accordance with the NPT ‘India or Pakistan cannot have the status of a nuclear-weapon State’. The resolution urged the two states, and all other states that have not yet done so, to become parties to the NPT and the Comprehensive Nuclear Test Ban Treaty.

The Indo-US nuclear deal of 2008 has caused contentious problems to the NPT regime and to the prospects for nuclear disarmament: problems created by one of the NPT’s original sponsors setting out in collaboration with one of its non-adherents in a manner quite unexpected under the existing NPT regime. This essay traces how and why this state of affairs has been allowed to take place and makes some critical remarks about the effects of the Indo-US nuclear cooperation agreement on security of the global community of nations free of nuclear weapons.

US-India Strategic Partnership in the 21st Century

In South Asia during the Cold War and in a decade after it was brought to an end, the US had relations with Pakistan closer than those with India which was relatively friendlier with the Soviet Union and then Russia. However, a rapprochement had taken place between India and the US, even before the September 2001 attacks on the US, as witnessed in 'a new shift' in US policy beginning to view India as an important ally in South Asia. In 2001 the US lifted the sanctions it had imposed on India after its 1998 nuclear tests, possibly as an acknowledgement of India's support in the fight against terrorism.⁽²⁾

In the 12 January 2004 statement announcing the 'Next Steps in Strategic Partnership with India', President Bush recalled that in November 2001 he and then Prime Minister Vajpayee had committed the US and India to 'a strategic partnership'. Now the US and India, Bush stated, 'agree to expand cooperation in three specific areas' which include 'civilian nuclear activities, civilian space programs, and high-technology trade'.⁽³⁾

The two governments resumed joint military exercises in 2002 and moved towards strategic cooperation which included potential arms trades. India had been wary of the US support of the Pakistani government in exchange for Pakistan's support for the US war in Afghanistan. Although India supported the US war on terrorism, it was suspicious of US unilateralism and opposed its war in Iraq. Nevertheless, the US seems to have recognised India as a 'stabilizer' in the Indian Ocean region.⁽⁴⁾

Then the "New Framework for the U.S.-India Defence Relationship" was signed between the US Secretary of Defence and the Indian Minister of Defence on 28 June 2005, to facilitate joint exercises, expanded defence cooperation and information sharing, and greater opportunities to jointly develop technologies and address security and humanitarian issues. The two defence ministers' agreement also included expanded 'collaboration relating to missile defense'.⁽⁵⁾

Exceptional Status for India in Nuclear Cooperation

It was against the background as such that Prime Minister Manmohan Singh of India and President George W. Bush issued a joint statement in Washington, DC, on 18 July 2005, declaring their resolve to transform the relationship between their countries and establish 'a global partnership'. The prime minister and the president agreed that the completion of the Next Steps in Strategic Partnership (NSSP) initiative, launched on 12 January 2004, provided the basis for expanding bilateral activities and 'commerce in space, civil nuclear energy and dual use technology'.

The US president welcomed the Indian legislation on weapons of mass destruction (WMD. 'Prevention of Unlawful Activities Bill'), and building on the strengthened nonproliferation commitments undertaken in the NSSP, assured that certain Indian organisations would be removed from the US Department of Commerce's 'Entity List'.⁽⁶⁾

Bush stated that 'as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other such states'. He told the Indian prime minister that he, Bush, would work to achieve 'full civil nuclear energy cooperation with India' as it realised its goals of promoting nuclear power and achieving energy security. For this purpose, the US president would 'seek agreement from Congress to adjust U.S. laws and policies' and would also work with friends and allies to 'adjust international regimes to civil nuclear energy cooperation and trade with India', including but not limited to expeditious consideration of 'fuel supplies for safeguarded nuclear reactors at Tarapur' in India.

Prime Minister Singh stated that India would reciprocally agree that it would be 'ready to assume the same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology'. These responsibilities and practices meant: 'identifying and separating civilian and military nuclear facilities and programs in a phased manner' and filing 'a declaration regarding its civilian facilities' with the International Atomic Energy Agency (IAEA); taking a decision 'to place voluntarily its civilian nuclear facilities under IAEA

safeguards'; signing and adhering to 'an Additional Protocol with respect to civilian nuclear facilities'; 'continuing India's unilateral moratorium on nuclear testing'; working with the US for the conclusion of 'a multilateral Fissile Material Cut Off Treaty'; 'refraining from transfer of enrichment and reprocessing technologies' to states that do not have them and supporting international efforts to limit their spread; and ensuring that the necessary steps have been taken to secure nuclear materials and technology 'through comprehensive export control legislation' and 'through harmonisation and adherence to Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG) guidelines'. The US-India Civil Nuclear Cooperation Initiative (CNCI) was thus launched.⁽⁷⁾

On the occasion of Bush's reciprocal visit to New Delhi in March 2006, he and Prime Minister Singh issued a joint statement highlighting efforts by the two governments in some areas. On nuclear cooperation for 'Energy Security and a Clean Environment', the two leaders welcomed 'the successful completion of discussions on India's separation plan', and looked forward to 'the full implementation of the commitments' expressed in the July 2005 Joint Statement. 'For Global Safety and Security', Bush and Singh welcomed the increased cooperation between the two countries in the defence area, since "the New Framework for the U.S.-India Defence Relationship" was signed in June 2005.⁽⁸⁾

The agreement on nuclear cooperation 'turned on American acceptance' of an Indian plan to 'separate its civilian and military nuclear programs'. India agreed to permanently classify 14 of its 22 nuclear power reactors as civilian facilities which would be subject to IAEA's inspections for the first time. The other 8 reactors, plus a prototype fast-breeder reactor, would remain as military facilities, not subject to inspections.⁽⁹⁾

As for breeder reactors, US negotiators attempted over several months but in vain to persuade the Indian counterpart to include such reactors in the civilian facilities. Although the technology of a breeder reactor is still in its primitive stages, it is considered that in its mature stage a breeder reactor would be capable of producing nuclear weapons fuel and India could build as many such reactors in the future under

military control.⁽¹⁰⁾

Shortly after meeting the US president, Prime Minister Singh outlined some salient elements of the civil-military 'separation plan' in the Indian Parliament (Lok Sabha) on 6 March. His statement included:

- India would be negotiating with the IAEA for 'an India-specific' safeguards agreement.
- India will identify and offer for IAEA safeguards 14 thermal power reactors (out of 22 such reactors in operation or under construction) between 2006-14 . The 14 will be placed under safeguards by 2014 'in a phased manner'. The choice of specific nuclear reactors and the phases in which they would be placed under safeguard is 'an Indian decision'.
- India would 'not accept safeguards on the Prototype Fast Breeder Reactor and the Fast Breeder Test Reactor' both located at Kalpakkam.
- India will place under safeguards 'all future civilian thermal power reactors and civilian breeder reactors', with its Government retaining 'the sole right to determine such reactors as civilian'.
- The CIRUS reactor at the Bhabha Atomic Research Centre will be shut down in 2010. The Apsara reactor, the fuel core of which was purchased from France, will be shifted from the Bhabha Centre to make it available for placing under safeguards in 2010. The decision to take these steps was made 'rather than allow intrusive inspections in a nuclear facility of high national security'.
- Reprocessing and enrichment capabilities and other facilities associated with the fuel cycle for India's strategic programme have been 'kept out of the Separation Plan'.
- India has received the US commitments for 'the reliable supply of fuel to India for reactors ... offered for safeguards'.
- 'If despite these arrangements, a disruption of fuel supplies to India occurs, the United States and India would jointly convene a group of friendly supplier countries to include such as Russia, France and the United Kingdom to pursue such measures as would restore fuel supply to India'.

The prime minister added that the separation plan ensures adequacy of fissile

material and other inputs to meet the current and future requirements of India's 'strategic programme', based on its 'assessment of the threat scenarios'. No constraint has been placed on India's 'right to construct new facilities for strategic purposes'. The integrity of India's 'Nuclear Doctrine' and its 'ability to sustain a Minimum Credible Nuclear Deterrent' is adequately protected. India's nuclear policy will continue to be guided by 'the principles of restraint and responsibility'. The prime minister emphasised that the significance of the Bush-Singh joint statement of 18 July 2005 is the prospect it offered for 'ending India's nuclear isolation'.⁽¹¹⁾

On 17 August 2006 Prime Minister Singh replied to discussion in Rajya Sabha (House of the State, the Upper House) and referred to certain delicate questions regarding India's status under the NPT. He said that his joint statement of July 2005 with the US president did not refer to India as a Nuclear Weapons State 'because that has a particular connotation in the NPT'. But the statement 'explicitly acknowledged the existence of India's military nuclear facilities'. It also meant, continued Singh, that 'India would not attract full-scope safeguards' applied to the Non-Nuclear Weapon States adherent to the NPT. Instead, 'India would be very much on par with the five Nuclear Weapon States who are signatories to the NPT', the prime minister stated. 'As a country with nuclear weapons, there is no question of India agreeing to a Safeguards agreement or an Additional Protocol applicable to non-nuclear weapon states of the NPT', the prime minister assured.

The prime minister also explicitly stated: India has made clear to the US that 'India's strategic programme is totally outside the purview of the July [2005 joint] Statement'. 'The integrity of [India's] 3-stage nuclear programme will not be affected'. The agreement with the US 'in no way affects the requirements of our strategic programme', he stated. 'Nuclear weapons are an integral part of our national security and will remain so, pending the global elimination of all nuclear weapons and universal non-discriminatory nuclear disarmament'. The nuclear agreement with the US will 'not be allowed to be used as a backdoor method of introducing NPT type restrictions on India'. (Response 1, to the group of nuclear scientists.)

To the point raised by the same group that while '[s]afeguards are

understandable where external assistance for nuclear materials or technologies are involved', safeguards should be 'strictly restricted to those facilities and materials imported from external sources', the prime minister replied: 'Sensitive nuclear technology facilities have not been covered in the Separation Plan. Therefore, there is no question of putting them under safeguards or under external control'. (Response 2.)

With regard to IAEA safeguards, Prime Minister Singh assured, India would 'accept only [such safeguards] in a phased manner ... only when all nuclear restrictions on India have been lifted'.

Concerning an additional protocol, Singh stated: 'The question of an additional protocol will arise only after the India specific safeguards agreement is in place. As a country with nuclear weapons, there is no question of India agreeing to a Safeguard agreement or an Additional Protocol applicable to non-nuclear weapon states of the NPT'. (Response 7 to the Left parties).⁽¹²⁾

When the prime minister refers to the integrity of India's 'three-stage nuclear programme', he means its guiding principle, a blueprint first mapped out by Homi Bhabha, a father of India's nuclear programme, late in the 1940s after India's independence, based on the grim reality that India's uranium reserves are extremely limited whereas its thorium reserves are rich. According to the blueprint, the first stage would be the construction of power generating thermal reactors which use slow or thermal energy neutrons to fission uranium-235 (a naturally occurring fissile isotope). In the second stage, spent fuel from thermal reactors would be reprocessed to separate plutonium for fuelling breeder reactors to breed more plutonium. In the third stage, plutonium thus obtained would fuel reactors that would irradiate thorium to make uranium-233 which could be used to power nuclear reactors and provide the fissile material for nuclear weapons.

Indigenous uranium supplies over these years have fallen to about 300 tons annually, a decrease due to inadequate planning in the uranium mining and milling sectors and opposition from environmentalist movements. The current total annual demand of uranium is about 475 tons both for the civilian and military reactors: about 430 metric tons for the former, and about 45 metric tons for the latter (about 35 metric

tons for the CIRUS and Dhruva weapons-grade plutonium-production reactors, in addition to about 10 metric tons for nuclear-powered submarines and for the uranium-enrichment facility at Mysore). Whereas electricity production has been curtailed, two weapons-grade plutonium reactors have been kept fully fuelled during the last several years. If India is able to import uranium from the US for the safeguarded reactors, it may be able to reduce somewhat current dependence on indigenous supplies of uranium.

If the thorium fuel cycle could be developed, India could provide an estimated 155,502 gigawatt-years of electrical energy (GWe-yr). This could be compared with the potential for 328 GWe-yr from indigenous thermal reactors; 10,660 GWe-yr from indigenous coal (currently accounting for 69 per cent of India's electricity); and 42,231 GWe-yr from plutonium breeder reactors. India has about one-third of world's thorium supplies. Although the thorium cycle may have the potentiality to provide 'a huge portion of India's projected electricity needs for several hundred years', full commercialisation of the thorium cycle is estimated to be feasible only after 2050 at the earliest because of high costs and technical hurdles involved.⁽¹³⁾

Nuclear and Arms Business Lobbies

In the months following the Bush-Singh joint statement in July 2005, it seemed that the task of convincing Congress to approve a new Indo-US nuclear cooperation agreement or, for that purpose, to amend the Atomic Energy Act of 1954 might 'prove difficult'. Senate Foreign Relations Committee Chairman Richard Lugar did not appear at the time eager to embrace the Bush-Singh joint declaration. In a September 2005 hearing of the House International Relations Committee, Representative Jim Leach said, '[F]ew, if any, members appear to have been clamoring in these dangerous and uncertain times for the administration to peremptorily rewrite the rules of the global nonproliferation order that have well-served U.S. interests for over three decades', and that 'the timing as well as the reasoning underlying this agreement appear to many on

Capitol Hill as hurried and perhaps unrealistic'.⁽¹⁴⁾

However, moves were beginning to take place primarily in the business communities in favour of increasing business relations with India, and especially amending the Atomic Energy Act of 1954 and thereby approving the Indo-US nuclear deal.

In 2005, India received 10 congressional delegations from the US – quite a record for both countries. Reasons for this increased interest in India seem to have included: growing strategic importance of India for a US administration to check China's influence in Asia; the lure of the Indian market for American business firms, and the emerging Indian-Americans as an increasingly engaged political bloc across the US. For New Delhi, approval of an Indo-US nuclear cooperation deal by the US Congress was extremely important.⁽¹⁵⁾

Corporate leaders of the two countries formed 'a different sort of pact' of business cooperation, along with the Indo-US nuclear cooperation initiative. When President Bush paid a visit to New Delhi in 2006, he and Prime Minister Singh on 2 March received a report from chief executives of five US corporations and ten Indian companies on ways to improve investment and commercial links. The corporation executives stressed that the greater US investment could help India to further develop its infrastructure, and American technical expertise could be helpful for India to upgrade its low-cost manufacturing.⁽¹⁶⁾

India's target to construct nuclear power plants is to generate 40,000 megawatts of electricity by 2020 — an aim proclaimed by Prime Minister Singh. If the contract with the US is successful, 'India will have access to the global nuclear technology market', said S. K. Jain, chairman of Nuclear Power Corp. of India. In addition, once the deal with the US is successful, supplies of enriched uranium would be 'included in contracts to install reactors', Jain added.⁽¹⁷⁾

US Vice President Richard B. Cheney, in an address to the 31st Anniversary Leadership Summit of the US-India Business Council of the US Chamber of Commerce in June 2006 in Washington, DC, emphasized that 'a new and realistic approach to nuclear energy' was required for the US-India strategic partnership in the

21st century. There was no cooperation for decades between India and the US, because India had developed nuclear power as a non-signatory to the NPT whereas the US never departed from the basic stance it took during the Cold War. Now 'it's time to update [US] policy and bring it into line with modern realities'. That is the 'prime purpose of the civil nuclear initiative' that the president and the prime minister agreed to. Some points Cheney pointed out as the logic of the US-India deal included that nuclear power is critical to meeting 'India's energy needs', while also creating 'new business opportunities' for U.S. firms, which translates into 'new jobs for American workers'. The second key factor, the US vice president said: 'India will enter the international nonproliferation mainstream by separating its civil and military nuclear programs'.⁽¹⁸⁾

US company representatives met weekly to 'devise lobbying strategies' since late 2005, according to Ron Somers, head of the U.S.-India Business Council of the US Chamber of Commerce. Top executives of major American companies, including JP Morgan Chase, General Electric, and Boeing, were among those who lobbied strongly for the legislation of the Indo-US nuclear cooperation. India, currently 'the world's 11th-largest economy and most populous democracy', may one day be 'second only to Israel' among international interests able to influence US policy makers, said Robert Hoffman, a lobbyist for Oracle, which has a majority interest in an Indian software maker.

The Indo-US nuclear agreement was 'a coming-out party of sorts for the India lobby', Hoffman said. According to the US Chamber of Commerce, the US-India nuclear cooperation might generate '\$100 billion in energy sales' for US companies. In the view of Stephen Biegun, vice-president for international government affairs for Ford Motors (formerly an adviser to Secretary of State Condoleezza Rice when she was President Bush's national security adviser), the US-India relationship has 'enormous long-term potential' because it is anchored in so many different elements of the American power structure, including business, strategists, and politics. US company executives writing to lawmakers in favour of the Indo-US nuclear deal included: William Harrison (chairman of JP Morgan); James McNerney (chief executive officer

of Boeing); and James Reinsch (president of Bechtel's nuclear power division.

Lobbyists never missed approaching Representatives and Senators. Barack Obama (a Senate Foreign Relations Committee member [at the time]), is quoted as saying that there appears to be 'a very coordinated effort' to have every Indian-American person that he knows contact him and that 'prominent investment bankers' also called him.

The Indian government hired 'the biggest Republican lobbying firm', Barbour Griffith & Rogers, in which Robert Blackwill, former US ambassador to India is employed. Indian-American executives have formed 'political committees' which have boosted their political donations. A 'House India Caucus' with 185 members has been in action, along with its Senate counterpart with 40 members. Stephen Biegun of Ford is quoted as saying that the nuclear agreement is the 'linchpin to cementing the U.S.-India relationship', helping sales of his company and other American companies.⁽¹⁹⁾

Unique 'commercial and strategic imperatives' began to drive 'a bipartisan swell of support' for the Indo-US nuclear deal. The economic incentives for the US are 'huge', and so is India's 'growing strategic value' in a rapidly changing Asia. Reasons for the importance of India to the US include both 'intrinsic and extrinsic', pointed out Ashley Tellis, senior associate at the Carnegie Endowment for International Peace and a former adviser to Nicholas Burns, the US under secretary of state for political affairs and the major negotiator of the Indo-US nuclear agreement. For 'intrinsic' he means that India is a large and rapidly growing country providing for a market for American goods, and a country sharing a common values with the US. 'Extrinsically' India is a growing power 'in the context of where Asia is evolving'.

Senator Joseph Biden Jr., incoming chairman [at the time] of the Senate Foreign Relations Committee, is quoted as pointing out the various aspects of India's importance in the future including: 'as a counterweight to China, as a rising military power, as an energy consumer, as an economic force, as a bulwark against terrorism and extremism, as a cultural beacon throughout Asia and the world'.

In November 2006, India received the largest trade delegation from the US

which naturally included nuclear equipment companies. The US-India Business Council of the Chamber of Commerce predicted that the new US law on nuclear cooperation with India would 'yield a bounty of opportunities' for the two countries. K. Subrahmanyam, a foreign policy analyst and chairman of Indian Government's Task Force on Global Strategic Developments, was quoted as saying that American interests and India's interests are 'at present, different', apparently in mind the differences between the two countries over the relations with Iran, Myanmar, and Pakistan. He pointed out that it would take time for the differences to be 'harmonized', but added that 'the door has opened'.⁽²⁰⁾

Secretary of State Condoleezza Rice wrote Henry Hyde, Chairman of the House Committee on International Relations, in the final stage of coordination between two different bills of the House and the Senate into a single version, suggesting him some changes in the provisions so as to 'avoid disadvantaging American business' and not to 'add commercial complications for U.S. industry'.⁽²¹⁾

As India overhauls its largely Soviet-era military arsenal, India is regarded as spending 'as much as \$40 billion over the next five years'. In addition, India has potential market in civilian aviation, shipping, and infrastructure, as well. The Indian Ministry of Defence in late August 2007 called for bids to fill an order for 126 fighter jets, a contract worth \$10.2 billion. Foreign companies asked to bid included: Lockheed Martin and Boeing of the US; Saab which makes the Gripen fighter; the European team building the new Eurofighter jet, and the Russian Aircraft Corporation (RAC) which owns the developer of the MiG fighter jets currently operated by the Indian Air Force. India, however, is anxious to create a domestic defence industry and requiring foreign suppliers to match any bids they win with a sizable commitment to manufacture goods in India. The winning bidder needs to promise to produce components in India worth half the jets' price. Since Russia is still India's principal arms supplier and is negotiating for some \$10 billion in contracts, including a countrywide air defence system, according to many defence industry analysts, winning big orders in India would be 'a slog' for the American companies. Still, arms contractors are scrambling to profit.⁽²²⁾

US Atomic Energy Act amended for US-India Nuclear Deal

As President Bush promised Prime Minister Singh in their joint statement of July 2005, the first item of his agenda to be dealt with in materialising an Indo-US civil nuclear cooperation was to seek Congressional amendments of the US Atomic Energy Act (AEA) of 1954 which governs US nuclear cooperation and exports. In 1978 it was amended with the adoption of the Nuclear Non-Proliferation Act (NNPA), in the wake of India's 1974 nuclear test, by adding nuclear non-proliferation to the criteria for US export of nuclear material and equipment.

Three relevant sections of the AEA, as amended, would restrict US nuclear cooperation with India: Sections 123 a. (2), 128, and 129. Section 123 a. (2) provides for full-scope nuclear safeguards by the IAEA for approval of an agreement on nuclear cooperation; Section 128 provides for the same for licensing nuclear exports; and Section 129 provides for termination of export if a non-nuclear weapon state detonated a nuclear device after 1978.

These are requirements that India does not meet and, as a state with nuclear weapons, would be unlikely to meet for the foreseeable future. Because, although India has nuclear weapons, the NPT recognises only five nuclear weapon states — China, France, Russia, the United Kingdom, and the USA.

Nevertheless, the US president may exempt an agreement for cooperation from any of the requirements of section 123 in such a case when it is decided that if any such requirement is included in an agreement for cooperation, it would be 'seriously prejudicial to the achievement of the United States non-proliferation objectives' or otherwise 'jeopardize the common defense and security'. Similar presidential waivers also are provided for Sections 128 and 129. An exempted agreement, however, would become only effective, under the 1985 Export Administration Amendment Act, after both the House of Representatives and the Senate approve it.⁽²³⁾

Additional restrictions are imposed on international civil nuclear commerce by the Guidelines of the Nuclear Suppliers Group (NSG) which permit such trade with countries only when the receiving state has full-scope safeguards agreement with the IAEA on all source and special fissionable material in its peaceful nuclear activities now and in the future.

The Bush administration on 9 March 2006 submitted its proposed legislation to the chairmen of the House Committee on International Relations and the Senate Committee on Foreign Relations. The proposed legislation would provide waivers of relevant provisions of the AEC, thereby allowing a nuclear cooperation agreement with India to enter into force without a vote from Congress. The Bush administration sought to provide for a process of congressional consideration of an agreement with India, similar to that reserved for states that do have full-scope safeguards so that a nuclear cooperation agreement with India would come into force automatically unless disapproved by a joint resolution passed by both Houses of Congress.

This measure by the administration was regarded by Congress as an attempt by the administration to secure 'excessive latitude' in negotiating an agreement with India. In addition, both the House International Relations Committee and the Senate Foreign Relations Committee were 'troubled by the lack of consultation by the Administration with Congress', before the Bush-Singh Joint Statement of July 2005 and the US-India Declaration of March 2006. The two Congressional committees believed that the Bush administration's proposal 'did not provide for appropriate congressional oversight' over what was an unprecedented nuclear cooperative relationship with India, and 'rejected' the administration's approach. Instead, the two committees respectively considered their own bills in late June 2006 that 'reverts to existing procedures laid out in the AEA for approval of 123 agreements that do not meet the criteria of section 123 a'.

However, both the House and the Senate concurred with the Bush administration regarding 'the need for relief' from the requirement in section 123 a.(2) of the AEA, because the administration would be unable to meet the standard in existing law for exempting a US-India agreement from its requirement that failure to

make the proposed exception/waiver would be ‘seriously prejudicial to the achievement of the United States non-proliferation objectives’ or otherwise ‘jeopardize the common defense and security’ [as quoted above]. They, therefore, recommended allowing the President to exempt an agreement with India from the requirement in section 123 a.(2) of the AEA without making this determination. Instead, the President is required to submit to the appropriate congressional committees his determination on the following points, along with a report regarding the determination with information describing all pertinent details:

- (1) India has provided the US and the IAEA with a credible plan to separate civil and military nuclear facilities, materials, and programs, and has filed a declaration regarding its civil facilities and materials with the IAEA.
- (2) India and the IAEA have concluded all legal steps required prior to signature by the parties of an agreement requiring the application of IAEA safeguards in perpetuity ... to India’s civil nuclear facilities, materials, and programs....
- (3) India and the IAEA are making substantial progress toward concluding an Additional Protocol consistent with IAEA principles, practices, and policies that would apply to India’s civil nuclear program.
- (4) India is working actively with the US for the early conclusion of a multilateral treaty on the cessation of the production of fissile materials for use in nuclear weapons or other nuclear explosive devices.
- (5) India is working with and supporting US and international efforts to prevent the spread of enrichment and reprocessing technology to any state that does not already possess full-scale, functioning enrichment or reprocessing plants.
- (6) India is taking the necessary steps to secure nuclear and other sensitive materials and technology, including through —
 - (A) the enactment and effective enforcement of comprehensive export control legislation and regulations;
 - (B) harmonization of its export control laws, regulations, policies, and practices with the guidelines and practices of the Missile Technology Control Regime (MTCR) and the NSG; and

(C) adherence to the MTCR and the NSG in accordance with the procedures of those regimes for unilateral adherence.

(7) The NSG has decided by consensus to permit supply to India of nuclear items covered by the guidelines of the NSG. The House and the Senate agreed to 'grant(s) the President the ability to waive' the relevant criteria of the AEA for a future US-India agreement for civil nuclear cooperation. Any such agreement, however, cannot enter into force until it has been submitted to the Congress, along with:

- a completed IAEA-India safeguards agreement and other documents, and
- Presidential determinations such as a Nuclear Proliferation Assessment (required by the AEA and by the new legislation....), and approved by both Houses according to the existing procedures of Section 130 (i) of the AEA.

Furthermore, the President's ability to waive existing provisions of section 129 of the AEA, which mandates the termination of US civil nuclear exports to a country because of infringement of certain criteria, is limited to any such activities India engaged prior to 18 July 2005. The legislation, therefore, provides that for other conduct that would result in termination of cooperation, section 129 would continue to apply.

In the course of these processes, the House passed H.R. 5682 on 26 July 2006. The Senate incorporated the text of its amended version into the House version and passed it on 16 November 2006. Hence, conferees of the two chambers met at the conference to integrate the two bills into one version and compiled a conference report, including the Act and "Joint Explanatory Statement of the Committee of Conference" on 7 December 2006, to which the House and the Senate agreed respectively on 8 and 9 December 2006.

After all, Congress cooperated with the Bush administration and approved authority for the president to waive certain sections of the Atomic Energy Act of 1954, with regard to a US-India civil nuclear cooperation agreement. Justification of Congressional action is explained in several points in the 'Sense of Congress', described prior to legal terms of the Hyde Act, which, among other points, include: It is in the interest of the US 'to enter into an agreement for nuclear cooperation

arrangement' pursuant to section 123 of the Atomic Energy Act of 1954 'with a country that has never been a State Party to the NPT if ... the country has demonstrated responsible behavior with respect to the nonproliferation of technology related to nuclear weapons and the means to deliver them', if 'the country has a functioning and uninterrupted democratic system of government, has a foreign policy that is congruent to that of the United States, and is working with the United States on key foreign policy initiatives related to nonproliferation'. The US and India 'share common democratic values and the potential for increasing and sustained economic engagement'. Commerce in civil nuclear energy with India 'represent[s] a significant change in United States policy regarding commerce with countries that are not States Party to the NPT, which remains the foundation of the international nonproliferation regime'.⁽²⁴⁾

The Hyde Act was signed into law (PL 109-401) by President Bush on 18 December 2006.⁽²⁵⁾

India-US Agreement on Nuclear Cooperation

In August 2007, more than half a year after US Congress approved the Hyde Act and Bush signed into law in December 2006, New Delhi and Washington published a text of the agreement (also called: "123 Agreement"). Shown below are certain points abridged from the text, along with excerpts from Prime Minister Singh's remarks made after the text of the agreement was released.⁽²⁶⁾

Article 2 — Scope of Cooperation

4. ...the purpose of the agreement is to provide for peaceful nuclear cooperation and 'not to affect the unsafeguarded nuclear activities' of either Party. The implementation of the agreement shall 'not hinder or otherwise interfere with in other activities involving the use of nuclear material, non-nuclear material, equipment, components, information or technology and military nuclear facilities produced, acquired or

developed by them independent of this Agreement for their own purposes’.

Singh: ‘We have not consented to any provision that mandates scrutiny of our nuclear weapons programme or any unsafeguarded nuclear facilities’.

Article 4 — Nuclear Trade

1. provides that the Parties facilitate such trade between themselves in the mutual interests of their respective industry, utilities and consumers and also, where appropriate, trade between third countries and either Party of items obligated to the other Party.

Article 5 — Transfer of nuclear material, Non-Nuclear Material, Equipment, Components and Related Technology

1. Any special fissionable material transferred ‘shall be low enriched uranium’.
2. ‘Sensitive nuclear technology, heavy water production technology, sensitive nuclear facilities, heavy water production facilities and major critical components of such facilities may be transferred ... pursuant to an amendment to this Agreement’. Transfers of ‘dual-use items that could be used in enrichment, reprocessing or heavy water production facilities will be subject to the Parties’s respective applicable laws, regulations and licence policies’.
5. [Notwithstanding paragraph 1] ‘Small quantities of special fissionable material may be transferred for use as samples, standards, detectors, and targets’....

Singh: The US has ‘a longstanding policy of not supplying to any country enrichment, reprocessing and heavy water production facilities. This Agreement provides for such transfers to India only through an amendment. Forward-looking language has been included for dual use transfers of enrichment, reprocessing and heavy water production facilities. We hope transfers will become possible as cooperation develops and expands in the future. It is important to note that no prohibition that is specifically directed against India has been included in the Agreement’.

6. (a) In line with the US ‘commitment to the reliable supply of fuel to India’, consistent with, and as part of its implementation of the July 2005 Joint Statement, the US is ‘committed to seeking agreement from the U.S. Congress to amend its domestic

laws and to work with friends and allies to adjust the practices of the Nuclear Suppliers Group to create the necessary conditions for India to obtain full access to the international fuel market, including reliable, uninterrupted and continual access to fuel supplies from firms in several nations’.

(b) ‘To further guard against any disruption of fuel supplies’, the US is prepared to take additional steps:

i) The US is ‘willing to incorporate assurances regarding fuel supply in the bilateral U.S.-India agreement ... under Section 123 of the U.S. Atomic Energy Act’ ... to be submitted to the US Congress.

ii) The US will ‘join India in seeking to negotiate with the IAEA an India-specific fuel supply agreement’.

iii) The US will ‘support an Indian efforts to develop a strategic reserve of nuclear fuel....’

iv) If a disruption of fuel supplies to India occurs, the US and India would ‘jointly convene a group of friendly supplier countries to include countries such as Russia, France and the United Kingdom to pursue such measures as would restore fuel supply to India’.

(c) ...‘India will place its civilian nuclear facilities under India-specific safeguards in perpetuity and negotiate an appropriate safeguards agreement to this end with the IAEA’.

Article 6 — Nuclear Fuel Cycle Activities

i) Within the territorial jurisdiction of either Party, ‘enrichment up to twenty percent in the isotope 235 of uranium transferred pursuant to the agreement, as well as of uranium used in or produced through the use of equipment so transferred, may be carried out’.

ii) ‘Irradiation ... of plutonium, uranium-233, high enriched uranium and irradiated nuclear material transferred pursuant to this Agreement or used in or produced through the use of equipment so transferred may be carried out’.

iii) ... the Parties grant each other ‘consent to reprocess or otherwise alter in form or content nuclear material transferred pursuant to this Agreement and nuclear material

and by-product material used in or produced through the use of nuclear material, non-nuclear material, or equipment so transferred'. ... India will establish 'a new national reprocessing facility dedicated to reprocessing safeguarded nuclear material under IAEA safeguards'....

Singh: 'A significant aspect of the Agreement is our right to reprocess US origin spent fuel. This has been secured upfront. We view our right to reprocess as a key element of a closed fuel cycle, which will enable us to make full use in our national facilities of the energy potential of the nuclear fuel used in our reactors. This important yardstick has been met by the permanent consent for India to reprocess'.

Article 9 — Peaceful Use

The items transferred pursuant to the agreement and nuclear material and by- product material used in or produced through the use of the items so transferred 'shall not be used for any nuclear explosive device, for research on or development' of such device 'or for any military purpose'.

Article 10 — IAEA Safeguards

2. 'India agrees that nuclear material and equipment transferred to India by the US pursuant to the agreement 'and any nuclear material used in or produced through the use' of the items so transferred 'shall be subject to safeguards in perpetuity in accordance with the India-specific Safeguards Agreement between India and the IAEA' ... and 'an Additional Protocol, when in force'.

Singh: As agreed in the March 2006 civil-military Separation Plan, 'India has accepted only IAEA safeguards that will be reflected in an India-specific Safeguards Agreement with the IAEA'.

Article 14 — Termination and Cessation of Cooperation

1. Either Party 'shall have the right to terminate' the agreement 'prior to its expiration on one year's written notice' to the other Party, providing 'the reasons for seeking such termination'....

4. Following the cessation of cooperation, either Party 'shall have the right to require the return by the other Party' of any item transferred and 'any special fissionable

material produced through their use’.

Singh: Cessation of cooperation can be sought by the US ‘only if it is prepared to take the extreme step of termination of the Agreement. India’s right to take “corrective measures” will be maintained even after the termination of the Agreement’. India and the US have ‘agreed to consider carefully the circumstances that may lead to termination, including a party’s concerns about a change in the security environment or response to similar actions by other states that could impact on national security’.

Article 16 -- Entry Into Force and Duration

1. The agreement shall ‘enter into force on the date on which the Parties exchange diplomatic notes’....
2. The agreement ‘shall remain in force for a period of 40 years’, and ‘continue in force thereafter for additional periods of 10 years each’. Each Party may, by giving 6 months written notice to the other Party, terminate the agreement ‘at the end of the initial 40 year period or at the end of any subsequent 10 year period’.

India-IAEA Agreement for Application of Safeguards to Civilian Nuclear Facilities

Mandated by the Hyde Act of 2006, two hurdles had to be cleared prior to US Congressional ratification of the Indo-US agreement: the conclusion of a safeguards agreement between India and the International Atomic Energy Agency (IAEA) and the approval of an exception to the application of the Nuclear Suppliers Group (NSG) Guidelines with respect to nuclear commerce between the NSG members and India. As the US president had promised the Indian prime minister, the Bush administration had to work hard to comply with the two conditions.

US Ambassador Gregory L. Schulte, Permanent Representative to the IAEA, remarked, after the draft Safeguards Agreement was presented on 9 July 2008 to the IAEA Board,

that the draft was carefully negotiated by IAEA safeguards and legal experts following the safeguards approach in INFCIRC/66, the approved IAEA safeguards system 'appropriate for states like India not under NPT full-scope safeguards'. Under the draft agreement, safeguards on civil nuclear facilities in India would 'resemble very closely those applied to other such facilities around the world'.⁽²⁷⁾

An 'India-specific' safeguards agreement is based on the IAEA's facility-specific safeguards (INFCIRC 66/Rev. 2), some arms control specialists in the US pointed out, but contains a number of 'India specific' modifications. It should be understood 'in the context of India's nuclear weapons status, its history, and the broader proposal for relaxing restrictions on civil nuclear trade with India' first proposed by Singh-Bush joint statement of July 2005. IAEA's safeguards 'at a handful of foreign-supplied reactors and nuclear facilities and nuclear materials' would be 'leaving its unsafeguarded military nuclear sector free' to do its activities. India is estimated to possess 'enough separated fissile material for 60-100 nuclear warheads' and potentially 'far more if foreign nuclear fuels supplies allow it to devote its limited domestic fuel supplies exclusively for weapons purposes', they analyzed.

As one of the key issues, these critics pointed out, the India-IAEA safeguards agreement does not contain a declaration of the facilities, items, and materials to be placed under safeguards. While Article 13 of the draft safeguards agreement states that upon entry into force of the agreement, and a determination by India that all conditions conducive to the accomplishment of the objectives ... are in place, 'India shall file with the Agency a Declaration, based on its sovereign decision to place voluntarily its civilian nuclear facilities under Agency safeguards in a phased manner', the document does not include a declaration of facilities. Although India recently circulated its separation plan (INFCIRC/731 dated 25 July 2008) listing the facilities that it proposes to place under safeguards and the years when it intends to place each facility on the safeguards inventory, India appeared reserving the right to amend or adjust the list or to delay the dates on which it promises to place facilities on the safeguards inventory, depending on India's 'access to the international fuel market, including reliable, uninterrupted and continuous access to fuel supplies from companies in several

nations....’, the US critics pointed out.⁽²⁸⁾

On 1 August 2008 the IAEA at its meeting of the Board of Governors (35 states of the 144 member states) approved by consensus the draft “Agreement Between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities”. The text was finalized after several rounds of negotiations from November 2007 between India and the IAEA. The agreement requests the IAEA to verify that ‘certain declared Indian nuclear material and facilities are used only for peaceful purposes’. The agreement is set to enter into force once the IAEA receives notification that India’s statutory and/or constitutional requirements have been met. An ‘umbrella arrangement’ of the agreement will ‘allow India to add facilities over time to be placed under IAEA safeguards.’⁽²⁹⁾

Mohamed ElBaradei, Director General of the IAEA, explained in his introductory statement to the Board of Governors in session, that the text is an ‘INFCIRC/66-type agreement’ and is ‘not comprehensive or full-scope safeguards’ agreement. An ‘umbrella’ agreement, it provides for ‘any facility notified by India to the Agency in the future to become subject to safeguards.... Facilities will be notified by India to the Agency in stages’.⁽³⁰⁾

The agreement in the ‘preamble’ notes: an essential basis of India’s concurrence to accept Agency safeguards under ‘an India-specific’ safeguards agreement is the conclusion of international cooperation arrangements creating the necessary conditions for India to obtain ‘access to the international fuel market’, including reliable, uninterrupted and continuous ‘access to fuel supplies from companies in several nations’, as well as support for an Indian effort to develop ‘a strategic reserve of nuclear fuel’ to ‘guard against any disruption of supply over the lifetime of India’s reactors’. India may take ‘corrective measures to ensure uninterrupted operation of its civilian nuclear reactors in the event of disruption of foreign fuel supplies’.⁽³¹⁾

ElBaradei, however, said in his introductory statement cited above that the agreement should be read ‘as an integral whole’, and that the preamble provides for ‘contextual background and safeguards are implemented in accordance with the terms

of the agreement’.

Prime Minister Singh had often referred to a safeguards agreement with IAEA as ‘India-specific’. Jeffrey T. Bergner, Assistant Secretary of State for Legislative Affairs remarked in January 2008 that the Indian Government had not yet explained to the US what it meant by the term ‘India-specific’ safeguards agreement. While INFCIRC/153 type agreement is the basis for NPT safeguards agreements, INFCIRC/66-type agreements are not as rigidly determined by as Nuclear Nonproliferation Treaty safeguards agreements. This is because INFCIRC/66-type agreements ‘do not involve full-scope safeguards’, applied to all nuclear material in a state, but have been aimed at the application of safeguards to ‘specific supplied materials or facilities’, with ‘the scope of safeguards application is delineated uniquely in each agreement’. The Indian Government also has not provided the US with a definition of ‘corrective measures’.⁽³²⁾

India-specific Exception to the Nuclear Suppliers Group (NSG) Guidelines

The NSG is a group of countries (45 states at present) which are in a position to regulate supply of nuclear materials, technology, equipments, nuclear-related dual-use equipments and materials and related technology. They first met following India’s explosion of a nuclear device in 1974. The NSG, also known as the ‘London Club’, began to reconvene in 1990 and established a common set of guidelines for exports by the major suppliers to help prevent the spread of nuclear weapons. When it met in Warsaw on 3 April 1992, the NSG (27 states at the time) agreed on the Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Material and Related Technology (the Warsaw Guidelines) to control ‘dual-use’ items (which consisted of 8 main sections with 67 categories of equipment and materials. The NSG members unanimously agreed to require recipients of key nuclear facilities and materials to accept comprehensive IAEA safeguards, like those required under the NPT, as a condition of supply.⁽³³⁾

Prior to a consultative group meeting in Vienna on 22-23 March 2006, the US circulated a draft text for possible adoption by consensus of the 45 member states. The cardinal point in the US draft read in part: ‘...Participating Governments may transfer trigger list items and/or related technology to the safeguarded civil nuclear facilities in India as long as the participating Government intending to make the transfer is satisfied that India continues to fully meet all of the ... nonproliferation and safeguards commitments, and all other requirements of the NSG Guidelines’

There was no agreement at the March 2006 meeting, however, to place the US proposal on the formal agenda of the NSG plenary meeting scheduled in Brazil on 29 May - 2 June 2006. Then, on 6 August 2008, the US submitted its proposal (second draft) to Germany, then chair of the NSG for circulation among the NSG members who were scheduled to meet for an extraordinary plenary meeting on 21-22 August in Vienna. But the August meeting failed to reach a consensus decision.⁽³⁴⁾

The NSG resumed its work in Vienna on 4 September 2008 at its extraordinary plenary meeting, scheduled for two days but extended to a third. It discussed a third U.S. draft proposal on a statement on civil nuclear cooperation with India. Participating governments addressed ‘a series of questions concerning the draft and adopted the Statement on Civil Nuclear Cooperation with India by consensus’.⁽³⁵⁾

The participating governments, as summarised from various sources, have ‘taken note of steps that India has voluntarily taken’ with respect to certain ‘commitments and actions’, including: Decision to separate civilian nuclear facilities in a phased manner and to file a declaration regarding its civilian nuclear facilities with the IAEA; Obtaining approval by the Board of Governors on 1 August 2008 for an Agreement with the IAEA for the Application of Safeguards to Civilian Nuclear Facilities; Committing to sign and adhere to an Additional Protocol with respect to India’s civil nuclear facilities; Refraining from transfer of enrichment and reprocessing technologies to states that do not have them; Harmonising its export control lists and guidelines with those of the NSG Guidelines; and Continuing its unilateral moratorium on nuclear testing, and its readiness to work with others towards the conclusion of a multilateral Fissile Material Cutoff Treaty.

The NSG conclave in the end acquiesced in the US policy to secure a waiver for India from the longstanding NSG Guidelines. As a result, notwithstanding the conditions for transfer stipulated in the Guidelines such as the application of full-scope IAEA safeguards, participating governments may transfer trigger list items and/or related technology and nuclear-related dual-use equipment, materials, software, and related technology to India for peaceful purposes and for use in IAEA safeguarded civil nuclear facilities, provided that the transfer satisfies other provisions of the Guidelines. With a view to intensifying dialogue and cooperation with India, the Chairman is requested to confer and consult with India and keep the Plenary informed of these consultations.

Evidently, however, the NSG had a hard labour. Austria, Ireland, and New Zealand resisted US pressure 'the longest'. On 5 September, India's Minister of External Affairs Pranab Mukherjee, reiterated previous Indian positions to adhere to a unilateral nuclear testing moratorium and negotiate an additional protocol with the IAEA. The text of the approved NSG's waiver states that it is 'based on the commitments and actions' described by Mukherjee. New Zealand said in a 6 September statement: 'It is our expectation that in the event of a nuclear test by India, this exemption will become null and void'. Ireland and Japan offered similar statements. The waiver, however, does not contain any explicit provisions. In a 6 September statement, Ireland asserted its understanding, based on consultations with other governments, that 'no [participating government] currently intends to transfer to India any facilities, equipment, materials or technology related to the enrichment of uranium, or the reprocessing of spent fuel'.⁽³⁶⁾

US Congress Ratifies the 123 Agreement with India

The Bush administration submitted the 123 Agreement with India to Congress on 10 September 2008, following the actions taken by the IAEA and the NSG. The US Senate on 1 October 2008 ratified the agreement, following the House's approval on 27

September. The Senate action marked ‘a rare foreign policy victory’ to President George W. Bush in the twilight of his administration.⁽³⁷⁾

Epilogue

By concluding the 123 agreement both President Bush and Prime Minister Singh have achieved their aims. Bush succeeded in establishing a new strategic partnership with India while at the same time opening up lucrative business markets in the land of a populous rising power in Asia — aims so strong that his administration had attempted to achieve by complying with what India wanted most from the US. Singh attempted first and foremost to satisfy India’s pressing need to secure continued supply of nuclear fuel while at the same time opening up a new possibility of extricating itself from the global isolation in nuclear affairs. President Bush assured Prime Minister Singh in the July 2005 joint statement that he would work not only to obtain Congressional agreement but also cooperation of friendly countries and allies in adjusting international regimes to enable full civil nuclear energy cooperation and trade with India. Bush’s assurances are spelt out almost verbatim in the Indo-US agreement of 2008. The Indian prime minister asserted at the Parliament on 6 March 2006 that the significance of the July 2005 joint statement is ‘the prospect it offers for ending India’s nuclear isolation’.

In the global arena, however, the Indo-US nuclear agreement has created contentious problems. The contradiction between India’s status as a *de facto* nuclear weapon state and its *de jure* status as a ‘non-nuclear weapon state’ under the terms of the NPT has not been brought up *per se* in any of the official US documents. Since the inconsistency itself cannot be rectified so long as India sticks to its *de facto* status, its partner, the US had to work to ensure that others concerned may become acquiescent somehow to the Indo-US nuclear partnership. Both President Bush and Prime Minister Singh and their government officials have been well aware of this inconsistency. Singh remarked that his joint statement with Bush of July 2005 ‘did not refer to India as a

Nuclear Weapons State' because that had 'a particular connotation in the NPT', but that the statement 'explicitly acknowledged the existence of India's military nuclear facilities'.⁽³⁸⁾

One rationale contrived by the Bush administration is 'bringing India closer to the [nuclear] nonproliferation mainstream'. Vice President Cheney referred to that point, as seen above.⁽³⁹⁾ Ambassador Gregory L. Schulte, US Permanent Representative to the IAEA said that 'bringing India into the nuclear nonproliferation mainstream' is 'a key benefit' of implementing the US-India Civil Nuclear Cooperation Initiative and allowing civil nuclear cooperation between India and interested countries in Europe and elsewhere.⁽⁴⁰⁾

The US House-Senate conferees on the Hyde Act of 2006 stated that India's commitments to secure its nuclear materials and nuclear and missile technology through comprehensive export control legislation and through harmonisation and adherence to the Missile Technology Control Regime (MTCR) and NSG guidelines are 'critical to bringing India closer to the nonproliferation mainstream, one of the benefits attributed to U.S. nuclear cooperation with India by the Administration'.⁽⁴¹⁾ Yet, the Hyde Act states: 'Nothing in this title [Hyde Act] constitutes authority for any action in violation of an obligation of the United States under the NPT'. (Sec. 105. United States Compliance with its Nuclear Nonproliferation Treaty Obligations).

This alleged rationale of the contentious status of India and the new US position makes problems more complicated. Former US president Carter writes that the Indo-US nuclear agreement 'undermines the global pact for restraint represented by the NPT. If India's unique demands are acceptable, why should other technologically advanced NPT signatories, such as Brazil, Egypt, Saudi Arabia and Japan, 'continue to restrain themselves?'⁽⁴²⁾

The Nuclear Non-Proliferation Treaty legalised the inequality of status between the nuclear weapon states and the non-nuclear weapon states. However, the NPT also provides that each of the parties to the treaty 'undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and

complete disarmament under strict and effective international control'. (Article VI.) This has been a consistent leitmotif running through positions taken by non-nuclear weapon states, ever since they accepted the NPT as a bargain with the nuclear weapon states.

Ever since the first review conference of the NPT in 1975, it has been clear that the nuclear weapon states consider the NPT 'as an end in itself', while all, or almost all, non-nuclear weapon states parties to the NPT have regarded the treaty 'as a transitional stage in a process of nuclear disarmament'.⁽⁴³⁾ The failure of the nuclear weapon states to work in accordance with the Article VI provision has allowed the US and India to conclude the 123 agreement.

India's position on nuclear disarmament and related issues has been expressed by Prime Minister Singh on various occasions. In his joint statement with Bush of July 2005 Singh expressed India's readiness to work with the US 'for the conclusion of a multilateral Fissile Material Cut Off Treaty' [FMCT]. In the Rajya Sabha on 17 August 2006, he said India is 'willing to join only a non-discriminatory, multilaterally negotiated and internationally verifiable FMCT', as and 'when it is concluded in the Conference on Disarmament, again provided our security interests are fully addressed'.⁽⁴⁴⁾ On an FMCT, however, the Bush administration had concluded in 2004 that it was not 'effectively verifiable', and therefore should not include a formal verification mechanism. This US position has been one of the major stumbling blocks for the Conference on Disarmament in Geneva to find an agreement on a FMCT.⁽⁴⁵⁾

In reference to India's position on the NPT, Singh stated in the Lok Sabha on 13 August 2007: 'Pending global nuclear disarmament, India has maintained an impeccable non-proliferation record. ... India will not be the source of proliferation of sensitive technologies'. Singh also emphasised: 'India's long-standing commitment to the noble ideas of nuclear disarmament and our refusal to participate in any arms race, including a nuclear arms race. Our commitment to universal, non-discriminatory and total elimination of nuclear weapons remains undiminished. It was the vision of a world free of nuclear weapons which [then Prime Minister] Shri Rajiv Gandhi put before the UN in 1988 and this still has universal resonance.'⁽⁴⁶⁾

IAEA's Director General Mohamed Elbaradei Spoke to international media on 1 August 2008 that if the world was to 'move forward toward strengthening non-proliferation to reduce the nuclear weapons arsenal, toward moving to a world free from nuclear weapons, that dialogue has to be universal and inclusive'. The world 'cannot exclude from that debate India or Pakistan or Israel', he added. ⁽⁴⁷⁾

Indeed, India might exert all-out efforts for complying with its commitment to universal, non-discriminatory and total elimination of nuclear weapons. Given that nuclear weapon states have not ever given a hint of global nuclear disarmament by themselves scrapping their nuclear arsenals, talks of 'pending global nuclear disarmament' seem to be a pretext for itself doing nothing or merely waiting for 'global nuclear disarmament' to take place some day miraculously. If its commitment to global nuclear disarmament is genuine, India should be in a position to work together with other states in mapping out such a programme with a plan of action, thereby helping create a situation in which it could play a major part in bringing about that goal.

Notes

(1) Fred McGoldrick, Harold Bengelsdorf, and Lawrence Scheinman, "The U.S.-India Nuclear Deal: Taking Stock", *Arms Control Today*, Vol. 35, No. 8, October 2005, pp. 6-7.

(2) Christer Ahlström, "Legal aspects of the Indian-US Civil Nuclear Cooperation Initiative", Stockholm International Peace Research Institute, *SIPRI Yearbook 2006*, Oxford: Oxford University Press, 2006 [hereafter: *SIPRI Yearbook (year)*], p. 671.

(3) Statement by the President, 12 January 2004. "Next Steps in Strategic Partnership with India" <<http://www.state.gov/p/sca/rls/pr/28109.htm>>

(4) Elisabeth Sköns, Catalina Perdomo, Sam Perlo-Freeman and Petter Stålenheim, "Military expenditure", *SIPRI Yearbook 2004*, pp. 334-5.

(5) Christer Ahlstrom, *op.cit.* (note 2), p. 669.

(6) The Bush administration introduced several amendments to the Export Administration Regulations (EAR) which became effective on 30 August 2005. Thus removed were some licence

requirements for exports and re-exports to India of items controlled unilaterally for nuclear non-proliferation reasons. And six entities of India were removed from the Entity List of the EAR.

Christer Ahlström, *op.cit.* (note 2), pp. 683.

(7) Bush-Singh Joint Statement of 18 July 2005 (note6).

(8) “U.S.-India Joint Statement”, New Delhi, 2 March 2006.

<<http://www.state.gov/p/sca/rls/pr/2006/62418.htm>>

(9) Elisabeth Bumiller and Somini Sengupta, “Bush and Singh reach nuclear deal: Agreement could essentially exempt India from non-proliferation accords”, in which Bush was quoted as saying that he and Singh concluded ‘an historic agreement today on nuclear power’. The agreement was reached after all-night talks and ‘only two hours before’ the two leaders announced it. *International Herald Tribune*, 3 March 2006, pp. 1, 4.

(10) Steven R. Weisman, “Bush to face tough questions back home on Indian pact,” *International Herald Tribune*, 4-5 March 2006, p. 8.

(11) “Prime Minister Manmohan Singh’s Statement to the Indian Parliament on the Civil-Military Separation Plan”, 6 March 2006.

<http://www.armscontrol.org/projects/india/20060306_Singh_Statement.asp>

<http://indianembassy.org/newsite/press_release/2006/Mar/sepplan.pdf> He presented “Implementation of the India-United States Joint Statement of July 18, 2005: India’s Separation Plan” to the Parliament on 7 March 2006. The plan was updated on 11 May 2006. Sharon Squassoni, “India’s Nuclear Separation Plan: Issues and Views”, Updated December 22, 2006. CRS Report for Congress, Congressional Research Service, p. 17.

<<http://legacy.armscontrol.org/projects/india.government.asp>>

(12) “Excerpts from Prime Minister Manmohan Singh’s Reply to Discussion in Rajha Sabha on Civil Nuclear Energy Cooperation with the United States”, New Delhi, 17 August 2006.

<http://www.armscontrol.org/projects/india/20060817_Singh_Statement.asp>

(13) Charles D. Ferguson, “Reshaping the U.S.-Indian Nuclear Deal to Lessen the Nonproliferation Losses”, *Arms Control Today*, Volume 38, Number 3, April 2008, pp. 17-20.

(14) McGoldrick, Bengelsdorf, and Scheinman, *op. cit.* (note 1), p. 11.

(15) Somini Sengupta, “For India and U.S., a delicate nuclear dance”, *International Herald Tribune*, 24 January 2006, pp. 1, 8.

(16) Sarithal Ral, "U.S. and Indian executives in tune on investment," *International Herald Tribune*, 4-5 March 2006, pp. 17, 19.

(17) Archana Chaudhary, "India prepares to pay billions for nuclear reactors," *International Herald Tribune*, 22 May 2006, p. 15.

(18) Vice President's Remarks to the U.S.-India Business Council's 31st Anniversary Leadership Summit, US Chamber of Commerce, Washington, DC, 22 June 2006. <<http://www.state.gov/p.sca/rls/rm/2006/68258.htm>>

(19) Michael Forsythe and Veena Trehan, "Friends in high places help India — Corporate America steps up lobbying for nuclear accord", *International Herald Tribune*, 18 July 2006, p. 17.

(20) Somini Sengupta, "Vast opportunity in U.S.-India pact — Economic and strategic incentives trump nuclear fears", *International Herald Tribune*, 11 December 2006, p. 3.

(21) Rice to Hyde, 30 November 2006. <<http://legacy.armscontrol.org/pdf/20061204-Hyde%20Conference%20Letter.pdf>>

(22) Heather Timmons and Somini Sengupta, "Foreigners scrambling to sell India new arms -- U.S. leads the charge into a huge market as Cold War ties fray", *International Herald Tribune*, 31 August 2007, pp. 1, 10.

(23) Sharon Squassoni, Specialist in National Defense, Foreign Affairs, Defense, and Trade Division, Congressional Research Service, to Representative Edward Markey, "Analysis of Proposed Legislation to Create an Exception for India from Certain Sections of the Atomic Energy Act", 23 March 2006. <<http://legacy.armscontrol.org/projects/india/documents.asp>>

(24) The act is titled: "UNITED STATES AND INDIA NUCLEAR COOPERATION", short title: "HENRY J. HYDE UNITED STATES-INDIA PEACEFUL ATOMIC ENERGY COOPERATION ACT OF 2006". And "Joint Explanatory Statement of the Committee of Conference". <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong-bills&docid=f:h5682enr.txt.pdf> The act is cited hereafter: "Hyde Act". (Henry J. Hyde was the bill's chief sponsor and the act was named after him.) The above descriptions in the text are based on the Act and "Joint Explanatory Statement..." For legislative processes, see Sharon

Squassoni and Jill Marie Parillo, "U.S.-India Nuclear Cooperation: A Side-By-Side Comparison of Current Legislation", Updated December 22, 2006, CRS Report for Congress, Congressional Research Service.

<<http://legacy.armscontrol.org/projects/india/crs/2006122CRSside-by-siderpt.pdf>>

(25) “Statement by President Bush on Signing the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006”, 18 December 2006.
<<http://state.gov/p/sca/rls/2006/77960.htm>>

(26) “AGREEMENT FOR COOPERATION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF INDIA CONCERNING PEACEFUL USES OF NUCLEAR ENERGY (123 AGREEMENT)”, released on 3 August 2007.

<<http://www.state.gov/r/pa/prs/ps/2007/aug/90050.htm>> “Excerpts from Prime Minister Manmohan Singh’s statement in the Lok Sabha on Civil Nuclear Energy Cooperation with the United States”, New Delhi, 13 August 2007. — this is a preliminary transcript that is yet to be corrected and matched with the official transcription from the Lok Sabha.

<http://legacy.armscontrol.org/projects/india/20070813_Singh_Statement.asp>

(27) Gregory L. Schulte, “The India Safeguards Agreement: Moving India Towards the Nonproliferation Mainstream” <<http://www.state.gov/p/sca/rls/rm/2008/109025.htm>>

(28) Background Memo by Daryl G. Kmball, Fred McGoldrick, and Lawrence Scheinman, “IAEA-Indian Nuclear Safeguards Agreement: A Critical Analysis”, 30 July 2008, <<http://www.armscontrol.org/node/3205>> “Draft Agreement Between the Government of India and the International Atomic Energy Agency For the Application of Safeguards to Civilian Nuclear Facilities”, GOV/2008/30, 9 July 2008.

<http://www.armscontrol.org/system/files/20080709_India_safeguard.pdf>

(29) IAEA’s Staff Report, Vienna, 1 August 2008.

<<http://www.iaea.org/NewsCenter/News/2008/brief010808.html>>

(30) Introductory Statement to the Board of Governors by IAEA Director General Dr. Mohamed ElBaradei, Vienna, 1 August 2008.

<<http://www.iaea.org/NewsCenter/Statements/2008/ebsp/2008n006.html>>

(31) India-IAEA Safeguards Agreement (note28).

(32) Jeffrey T. Bergner to Tom Lantos, Chairman, Committee on International Relations, House of Representatives, answering to Lantos’s 45 questions raised on 5 October 2007, released on 16 January 2008. <<http://www.armscontrol.org/node/3338>>

(33) Dunbar Lockwood and Jon Brook Wolfsthal, “Nuclear weapon developments and

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(34) Daryl G. Kimball, “U.S. Proposal for Changes to Nuclear Suppliers Group (NSG) Guidelines Circulated March 2006”, March 27, 2006; *idem.*, “U.S. Proposal for India-Specific Exempt from Nuclear Suppliers Group Guidelines Circulated August 2008”, 13 August 2008, both Arms Control Association. <<http://www.armscontrol.org>>

(35) NSG Public Statement, Extraordinary Plenary Meeting, Vienna, 4 – 6 September 2008.

<<http://www.nuclearsuppliersgroup.org/PRESS/2008-09-Press-Vienna.pdf>>

(36) Wade Boese, “NSG, Congress Approve Nuclear Trade with India”, *Arms Control Today*, Volume 38, Number 8, October 2008, pp. 27-28. NSG Guidelines <<http://www.nuclearsuppliersgroup.org/PDF/intcivc254r9p-071107.pdf>>

(37) Glenn Kessler, “Senate Backs Far-Reaching Nuclear Deal With India: Measure Goes to Bush, Giving the President a Rare Victory”, *Washington Post*, 2 October 2008, p. A17. Peter Baker, “Congress clears way for U.S. nuclear trade with India”, *International Herald Tribune*, 3 October 2008, pp. 1, 5.

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(39) Vice President’s Remarks, 22 June 2006 (note 18).

(40) Gregory L. Schulte, 24 July 2008 (note 27).

(41) “Joint Explanatory Statement of the Committee of Conference”, *op. cit.* (note 24), p. 19.

(42) Jimmy Carter, “India deal puts world at risk”, *International Herald Tribune*, 12 September 2008, p. 6.

(43) *SIPRI Yearbook 1976*. London: Taylor & Francis, 1976, p. 391.

(44) Bush-Singh Joint Statement of July 2005 (note. 6) and Prime Minister Singh’s Reply in the Rajya Sabha, 17 August 2006 (note 12).

(45) *SIPRI YEARBOOK 2008*, pp.361-362, fn. 165.

(46) Prime Minister Singh’s statement in the Lok Sabha on 13 August 2007 (note 26).

(47) Elbaradei’s remarks made after IAEA approval of the India-specific safeguards agreement. IAEA’s Staff Report (note29).