Q. The implications of the 123 Agreement for Pakistan as a nuclear state

Introduction

This essay intends to explore Pakistan’s legal position vis-a-vis the 123 Agreement. It will focus on whether the 123 Agreement between the US and India violates the terms of the Nuclear Non-Proliferation Treaty (NPT) and how this affects Pakistan. It will also look at whether it poses other international legal problems. In order to understand the underlying concerns, a concise overview of the compatibility of the 123 Agreement with the NPT will be given. Once these have been acknowledged, the legal setbacks which have arisen from the 123 Agreement will be identified in order to see how far these have affected Pakistan and why. The benefits India has acquired through the 123 agreement will also need to be delved into in order to seek how Pakistan, which is also a nuclear State, is losing out on a similar deal and the implications thereafter. Once the implications of the 123 agreement for Pakistan have been addressed the essay will briefly discuss the affects it has had on other aspiring nuclear States such as Iran and North Korea.

(1) Is the 123 Agreement compatible with the Non-Nuclear Proliferation Treaty?

The 123 agreement was signed on 8 October 2008; the legislation is formally titled the “United States-India Nuclear Cooperation Approval and Non-proliferation Enhancement Act.” This is the result of an agreement made in 2005 when the US and India agreed on a programme for civilian nuclear cooperation. India agreed to separate its military sector of its nuclear program from its civilian sector and to place it under IAEA safeguards. The US had to in turn lift its restrictions on nuclear trade with India from domestic law and it also had to seek an exception from the NSG Guidelines. This agreement is exceptionally advantageous for India as it enables it to trade nuclear technology without having to accept full-scope safeguards and it is not party to the Non-nuclear proliferation treaty. Hence there is a need to analyse how India has been able to reverse a 34 year old nuclear trade ban and effectively “end an era of nuclear trade restrictions.”

The 123 Agreement has been met with mixed reactions with some scholars suggesting it was a “rehabilitating blow to the non-proliferation regime” whereas others felt it could strengthen the regime by integrating India.

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1 Rabia Akhtar, The Nuclear Debate in Pakistan, Post Indio-Us Deal, No 17, CBRN 2009
The NPT was introduced in order to limit the spread of nuclear weapons. Currently 189 States are party to the treaty, five of which are the Nuclear Weapon States themselves namely, the US, Russia, the UK, France and China. There are four sovereign states which are not party to the treaty namely, India, Israel, Pakistan and North Korea.

The NPT does not universally prohibit the possession of nuclear weapons but it divides the world into non-nuclear weapon states and nuclear weapon states. The latter may ‘develop, produce, and stockpile nuclear weapons’. The reason why Pakistan and India have been left out of such trade is because according to the NPT they are defined as NNWS\(^2\) even though it is well known that they are nuclear states but because they conducted nuclear tests after January 1 1967 they are not part of the “haves”.

The NPT has been described as having 3 main pillars namely, non-proliferation, disarmament and the right to peacefully use nuclear technology.

In order to tackle the first pillar, the five states which are recognised by the NPT as nuclear weapon states have vowed not to transfer “nuclear weapons or other nuclear explosive devices”\(^3\) and not in any way to assist, encourage, or induce a non-nuclear weapon state (NNWS) to acquire nuclear weapons. The NNWS on the other hand who are party to the treaty have agreed not to “receive” manufacture or acquire nuclear weapons or seek to receive any assistance in the manufacture of nuclear weapons.\(^4\) The NNWS have also agreed to accept safeguards by the IAEA to authenticate that they are not diverting nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.\(^5\) Thus accordingly the US is indirectly “assisting” a non-nuclear weapon state, India. India is not party to the NPT or the IAEA and it still has its military sector and can if it wills transfer materials to that sector. India according to the NPT is a NNWS and the agreement is hence contrary to US obligations under Art I of the NPT. These discrepancies show that India is being treated as a nuclear weapon state whereas Pakistan is not. The US are breaking and helping break the purpose and very existence of the Non-proliferation Treaty.

The wording of Article IV questionably imposes only a vague obligation on all the NPT signatories to move in the general direction of total nuclear disarmament. This article does not strictly require all signatories to actually conclude a disarmament treaty. Moderately, it only requires them to “negotiate in good faith”\(^6\)

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\(^2\) Non-nuclear Weapon States
\(^3\) Article 1 of the Non-Proliferation Treaty
\(^4\) Article 2 of the Non-proliferation Treaty
\(^5\) Article 3 of the Non-proliferation Treaty
\(^6\) Article IV of the Non-proliferation Treaty
However, some governments belonging to the NNWS interpret Article VI as constituting to a formal and specific obligation on the NPT which is for nuclear weapon States to disarm themselves of nuclear weapons. These governments argue that these States have failed in their obligations. Such failures provide justification for the NNWS to quit the NPT and develop their own nuclear arsenals.

In the 6191 Security Council meeting, President Museveni quite rightly said, “possession of nuclear weapons is the main cause of other countries wanting to acquire them. It is not logical to say that a few of us should possess nuclear weapons and others should not.”

If States possessing nuclear weapons are required to disarm themselves, it is up to the five powers to start the procedure for other states such as Pakistan, India, and North Korea to follow pursuit. According to Pierre Goldschmidt\(^7\) there is a need for both ‘disarmament and a stronger non-proliferation regime.’\(^8\) He feels that these steps can be achieved by the P-5 ratifying the Comprehensive Test Ban Treaty (CTBT), agreeing on a Fissile Material Cut-off Treaty (FMCT), implementing the Trilateral Initiative between the USA, Russia and the IAEA, and finally re-emphasis the value of nuclear weapons. Once the P-5 have signed and ratified these treaties only will the NPT be successful in its objectives.

Israel, Pakistan and India have argued that the NPT creates a club of “nuclear haves” and “nuclear have not’s” by restricting the legal possession of nuclear weapons to those states that tested them before 1967, but the treaty does not make clear on what moral grounds such a distinction is valid. The main reason India cites for not signing the NPT and for possessing nuclear weapons is that China is one of the “nuclear haves”. India’s external affairs minister Pranab Mukherjee said during a visit to Japan in 2007, “If India did not sign the NPT, it is not because of its lack of commitment for non-proliferation, but because we consider NPT as a failed treaty and it did not recognise the need for universal, non discriminatory verification and treatment.” China and India have a longstanding border dispute including a border war in 1962. However, the point will need to be stressed upon again that despite India not being party to the NPT it is dodging all major treaties and procedures and acquiring nuclear gains. This does not send a clear and concise message to all States that they are being treated equally once this is apparent States may decide to produce their own nuclear arms i.e. Iran.

\(^7\) Non-resident Senior Associate at Carnegie Endowment for International Peace, and former Deputy Director General of the International Atomic Energy Agency, Head of department of Safeguards.

\(^8\) Prepared Testimony by Pierre Goldschmidt to the House of Representatives Foreign Affairs Subcommittee on Terrorism, Non-proliferation and Trade, “Saving the NPT and the Non-proliferation Regime in the Era of Nuclear Renaissance”, July 24, 2008
(2) The benefits derived from the 123 agreement by India and the consequences for Pakistan

The Indo-US agreement recognises India as a major power and has acknowledged India’s non-proliferation record. Critics in the US have felt that the Bush Administration has given away too much and made “an India exception” to the NPT. Robert Einhorn, former Assistant secretary of State for Non-proliferation, maintained that India had managed to get it all “acquiring the ability to import uranium and nuclear reactor technology, obtaining recognition for India’s status as a nuclear power, and preserving all of India’s strategic options, particularly the ability to increase substantially its production of plutonium for nuclear weapons”

By India acquiring this deal it has had obvious implications on neighbouring country, Pakistan. Pakistan feels left out and wants to pursue similar deal and have said that they also have increasing energy needs. Hence, it is clear that this deal is ultimately having an adverse effect on States, a point that United States representatives Edward Markey and Barbara Lee made, an India-specific exemption would be seen as “creating incentives for other countries to withdraw from the NPT.” This is working against the very purpose of trying to deter states such as Iran and N. Korea from pursuing their nuclear weapons programmes.

By adopting double standards in regards to not treating India like the other States not party to the NPT this could create dangerous precedent for other States to follow. Pakistan like India was kept out of nuclear trade deals and agreements since its tests in 1974 and it is eager to commence trade particularly with China. It does not seem fair to keep Pakistan out of such deals and the US should have been aware that if they were going to make this deal with India other States particularly Pakistan, would want the same deal due the long standing rivalry between the two countries.

By India reaping all the benefits from the 123 agreement it is having severe implications on Pakistan. It is obvious that China will strike up a similar deal with Pakistan and why not? As Strobe Talbott suggested, there should be “equal treatment” for Pakistan. Both Pakistan and India remain out of the NPT and NSG so why should India get the better bargain of the deal.

The US has been reluctant to recognise Pakistan as a de facto nuclear weapon State, speculating about the security of Pakistan’s nuclear assets. Periodic reports in the media have stated that “military contingency plans for forcibly securing Pakistan’s nuclear weapons are
being and should be considered within Pakistan” and this has provoked protests within Pakistan. This has added to the mistrust between the two States.

Both Pakistan and India conducted tests in 1998 however India has been given full access to nuclear technology while the worldwide ban on civil nuclear cooperation with Pakistan remains. India stands de facto admitted to the league on the Nuclear weapon states while Pakistan’s programmes continue to arouse suspicion. This is an obvious case of discrimination on the part of the US. Despite being Pakistan’s “ally” on the “war against terror”, there is much distrust among both states and this deal is having severe implications for Pakistan’s security.

According to Rep. Edwards Markey (D) of Massachusetts, “the nuclear deal will boost India’s bomb making capacity seven folds, to as many as 10 a day.”

This is seen as a dangerous situation to be in for Pakistan and to add to this, the US congress voiced their concern that India would use foreign fuel to accelerate their nuclear programmes but passed it off by stating, “what India does on their strategic side” is “India’s business”

It is apparent that India is being treated as a NWS as mentioned before and Pakistan feel threatened by this. Pakistan argues that the special India specific safeguards may lead to an “arms race in the subcontinent.” This is a frightening prospect as Pakistan, India and China all possess nuclear assets and have some sort of conflict with one another. India has border disputes with both Pakistan and China. Pakistan will see the deal as a way forward to possibly increase their nuclear arsenals as they may have suspicions that India is doing the same under the 123 agreement. India has gained tremendously though this deal by receiving the NSG waiver, having a India-specific safeguard therefore they do not have to follow the safeguards the other States are required to do and there is nowhere in the agreement which asserts India cannot undertake nuclear tests as according to India they are not bound by any other legislation including the Hyde Act, they have only committed to the 123 Agreement. This deal seems like an excellent bargain India have not joined any treaty but have still gained all what they needed. Pakistan however is still in the same position they were in 34 years ago, the only State in the world to still have a ban of peaceful nuclear trade with other States. Hence we can see the immense implications this agreement is having on Pakistan.

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9 Adrian Levy and Cathy Scott-Clark, “Bush handed Blueprint to seize Pakistan’s Nuclear Arsenals” The guardian December 1, 2007 http://www.guardian.co.uk
10 Mir Khalil-ur-Rehman, The news, “Musharraf’s Nuclear Sell- Out”
11 Nick Burns, July 27, 2007
However, this deal could be creating a precedent as many States in India’s situation will argue to be treated the same and Pakistan is quite rightly doing so.

(2) (1) Why has Pakistan not been given a similar deal?

When the Bush Administration was questioned in the Lantos letter\(^\text{12}\) about whether they would strike up a comparable deal with Pakistan, it was indirectly inferred that Pakistan could not be trusted and that it would not be willing to make a deal with Pakistan. The US asserts that Pakistan is an “irresponsible” nuclear State having bad credentials as opposed to the “good non-proliferation record” of India.\(^\text{13}\)

Pakistan has been further held back from nuclear advancement due to concerns of safety and security raised by the international community. The chief rationale behind these setbacks are there is a threat of nuclear weapons falling into hands of jihadist, a rogue takeover by Pakistani army and also because of AQ Khan’s proposed illegal network of revealing sensitive information to various states on nuclear weapons. All these ‘factors’ make Pakistan further detrimental than India.

The institute for Science and International Security (ISIS) and Centre for Non-proliferation studies argued “increased instability in Pakistan could make Pakistan’s Nuclear weapons and stocks of nuclear explosive material dangerously vulnerable to theft by militant groups.” This statement is plausible nonetheless nuclear weapons are a topical issue in Pakistan and could be said to be the pride of its country, the military only know the whereabouts of such material it is dubious to consider that “terrorist groups” would have the intelligence and resources to discover “weapons of mass destruction.” It is a good pretext to use however every state will and should have concerns of “terrorists” somehow bizarrely taking over their nuclear weapons, not just Pakistan. Another basis for Pakistan’s denial of nuclear weapon State status is because of Abdul Qadeer Khan who had supposedly “traded nuclear secrets to Libya, Iran and North Korea for monetary reasons”\(^\text{14}\). Despite this A Q Khan was acting as an outworker and there was no breach of an international agreement or international law. There is no evidence to suggest the Pakistani government had a part to play in the leakage of nuclear information. All these factors are conceivable concerns for the US and international community however India is by no means a perfect model as they too in the past have used

\(^{12}\) United States Department of State Washington D.C 20520 “response to questions asked by letter concerning the US-India Agreement for peaceful nuclear cooperation”, Jan 16 2008

\(^{13}\) Rabia Akhtar, The Nuclear Debate in Pakistan, Post Indo-Us Deal, No 17, CBRN 2009

\(^{14}\) D. Suba Chndran, Ten Years after Chagai, The Nuclear Debate in Pakistan, No.6, CBRN June 2008
dubious tactics to acquire nuclear arsenals. India has broken solemn international agreements
by being the only State to have diverted nuclear fuel and technology received by it for
peaceful purposes. If it has done so in the past, there is nothing to stop it from doing the same
under the 123 Agreement.

Opinions in Pakistan in regards to whether nuclear weapons provide deterrence and security
to the country are mixed. A minority believe that Pakistan should give up its nuclear assets
and work towards global disarmament (puritans). Another group believe that nuclear
weapons do not provide security and that terrorism within Pakistan is more of a threat than is
India (pragmatists). Another sector believe the possession of nuclear weapons is a symbol of
pride and that if other States, Christian, Jewish and Hindu States can have nuclear weapons
then a Muslim State should be allowed also (The prestige section).

(2)(2) Nuclear State aspirants

Pakistan is not the only State affected by the 123 Agreement Iran and Israel have also voiced
concern over the Agreement. Dr Kaveh L Afrasiabi, argued the agreement will set a new
precedent for other states and he said “the agreement represents a diplomatic boon for
Tehran.” It is well known Iran wants to advance in nuclear technology hence is no surprise
if Iran tries to use this Agreement to reap their own benefits.

Israel has also cited the 123 Agreement as a precedent in order to alter the NSG rules to
constructs its first nuclear power plant in the Negev desert; it also wants its own trade
exemption.

Conclusion

The 123 Agreement has provided a step forward for India to be recognised as a nuclear
weapon State however it has had implications for the rest of the world. Many have cited this
agreement in order to receive similar deals. This is obviously advantageous for the States not
party to the NPT however the States who are party will feel inclined to create their own
nuclear arsenals. The deal seems very unfair for some States to be benefiting and others who
are actually cooperating with the NPT as “have not’s” are not gaining anything. This is
leading to a dangerous precedent as it is inconceivable to even think Pakistan will sit back
while India benefit from the 123 Agreement. Pakistan has always conditioned that it will join

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15 Afrasiabi:: Iran heartened by India’s Nuclear Vote
16 Hindustan Times, “Now Israel wants NSG rules changed”
the CTBT if India does. This goes to show Pakistan will not back down and give away its nuclear assets without India doing so as both countries have been competing with one another since the independence of Pakistan in 1947.

According to Pierre Goldschmidt there is a need to give the International Atomic Energy Agency “both the authority and capabilities to detect any undeclared nuclear related activity.” The India-specific safeguard should not have been given in the first place as many nuclear sectors evade the safeguards. Credible fuel supply guarantees need to be made to reduce the incentive for States to develop sensitive fuel cycle capabilities and all States including the P-5 need to ratify and enter into the CTBT to show that they are committed to have a nuclear-free world. If this is not done, there will always be States wanting to or trying to acquire nuclear weapons. In the world today, there are many problems and wars taking place particularly with Muslim States. I think Muslim States would feel they need some sort of nuclear assets in order to stand a fair chance of not being invaded. As argued by some if Iraq really had weapons of mass destruction the US would not have invaded it in the first place.
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