“THE INDO-US CIVILIAN NUCLEAR AGREEMENT: THE TANGLE OF POLITICAL PRESSURES, SECURITY CONCERNS AND ECONOMIC INTERESTS LOOSELY BOUND BY LAW”

WRITTEN AND RESEARCHED BY:

DAVID BURGESS LLB (HONS)
**INTRODUCTION**

The Indo-US 123 agreement\(^1\) (herein after '123 Agreement') is a ground breaking agreement between the nations for so many reasons. When writing on this topic, one is mindful to the extent it is possible to comment on the agreement and the intense political process on either side of the agreement. This paper aims to take a slightly different perspective on the matter. Instead of examining the situation starting from the agreement itself, the investigation and analysis intends to examine the formation of the agreement and the realisation of the interests of both parties. Primarily, we will attempt to comprehend the objectives, expectations and constraints placed upon each party when entering into the agreement. The essay shall examine the position of each party in turn; affected third parties examine the legal mechanisms that enact the political and economic desires of the parties. The investigation shall attempt to examine the agreement itself, academic comments and general debate forming a deductive approach to each individual provision of the agreement. Following this understanding of the exact content and underlying reasoning it shall examine the legal method and enforceability of such clauses, while relying strongly on reasoning in the alternative to provoke discussion and the possibility of differing methods. Before reaching a position where we can fully analyse the position of all parties affected by the agreement, it is of the writer's opinion it would be of use if the current situation was contextualised with reference to the countries past development and possible concerns arising from them. Using this understanding, we shall proceed with this critical analysis and investigation to truly grasp the concerns, political and economic desire all contained within the agreement.

**THE HISTORY**

*(a) Prior To The Agreement*

The agreement signed into law by President Bush was significant in so many ways; ending the claimed 'nuclear apartheid India had been subject to in the last three decades'\(^2\), impacting on the current framework regarding nuclear non-proliferation and possibly laying the pathway for similar agreements involving members of the Nuclear Suppliers Group\(^3\). However, the

---

conditions that existed prior to the formation of the 123 agreement will do much to orientate this essay.

Much of what is written and discussed on the agreement is on the relationship it has with the 'Nuclear Non-Proliferation Treaty'\(^4\) (‘NPT’). The treaty itself was designed to prevent, as the name would suggest, the spread of nuclear weapons to states who wish to acquire them. At the time of writing, there are 189 signatories to the treaty. Five of these states are recognised as 'Nuclear Weapon States' (‘NWS’): China, France, Russia, United Kingdom and the United States having all conducted nuclear tests prior to 1\(^{st}\) January 1967.\(^5\) These states are then designated as NWS and are given certain obligations under the treaty. Primarily, not to transfer ‘to any recipient whatsoever nuclear weapons or other nuclear explosive devices’ or in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons’.\(^6\) In addition and more importantly in the context of this paper, these NWS states are in agreement not to transfer ‘fissionable material, to any non-nuclear weapon state for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article.’\(^7\) India is a non-signatory to the NPT and if it were part of the agreement it would be classed as a non-nuclear weapon state having tested a nuclear device after the cut off date for the treaty. We shall discuss further how the 123 agreement impacts on the NPT later, but for this section of the paper it is sufficient to acknowledge that a transfer of nuclear material from the United States to India would breach these obligations at that time as India is both a non-signatory and a non nuclear weapon state.

India’s nuclear history is somewhat chequered. It is worthwhile establishing as an initial, and perhaps obvious point, that the NPT recognises the ‘the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes’ and that all parties may benefit from the ‘exchange of materials, equipment […]’\(^8\).However, India has demonstrated its nuclear will through a number of nuclear tests, such as the test in 1974 attracting a number a number of world-wide sanctions in the field of science and technology.\(^9\) Despite this period of isolation India successfully conducted five more successful nuclear tests in

---


\(^5\) As defined in Article IX Para 3, Treaty on the Non-Proliferation of Nuclear Weapons

\(^6\) Article I, Treaty on the Non-Proliferation of Nuclear Weapons

\(^7\) Article III Para 2(b) Treaty on the Non-Proliferation of Nuclear Weapons

\(^8\) Article IV Paras 1 & 2 respectively, Treaty on the Non-Proliferation of Nuclear Weapons

May 1998\textsuperscript{10}. Despite the detonation, because of the definition of a NWS in the NPT, India (if they were signatories) would still not be classed as a state with nuclear weapons, rather as Singh claims, simply a ‘responsible state with advanced nuclear technology’\textsuperscript{11}.

Nuclear technologies however, both civilian and nuclear, are not mutually exclusive; there is a degree of overlap in materials, expertise and personnel. The nuclear tests conducted by India were by and large a result of misuse of civilian nuclear material. The 6kg of plutonium used in the detonation was produced by the CIRUS heavy water reactor at BARC, whereby the supply of material was agreed between Canada and India on the understanding of peaceful use following their agreement in 1956\textsuperscript{12}. In debating a potential deal with India opinion has been divided on this issue with Senator Byron Dorgan calling the deal a “grievous mistake”\textsuperscript{13} and that it rewarded previous bad behaviour effectively granting a licence to “misuse American nuclear technology and secretly develop nuclear weapons”\textsuperscript{14}.

It was clear that any potential agreement between the two nations would attract a great deal of attention from politicians concerned not only with the interests of their own country, but the security of others and the nuclear ambitions of India; a state with emerging nuclear capability.

\textit{(b) The Agreement}

One must be quite clear as to what this section aims to establish. This is by no means the bulk of the analysis on the agreement, rather a glance at how historically the agreement meshes with pre-existing situations. In the later part of this paper we shall examine how the 123 agreement is viewed critically in the political sphere and assess how effective the legal mechanisms are in achieving its goals, whatever they may be.

The agreement was signed into law by President Bush on 8\textsuperscript{th} October 2008, which was a continuation of the vision seen by Bush and Prime Minster Singh on July 2005.\textsuperscript{15} Rajagopalan describes the deal as a 'framework agreement' which enables '[later] engagement in nuclear commerce'.\textsuperscript{16} The process however, was not as simple as merely signing the agreement. Existing

\begin{thebibliography}{100}
\bibitem{10} http://news.bbc.co.uk/1/hi/world/south_asia/8272354.stm Accessed on: 10\textsuperscript{th} January 2010
\bibitem{11} Sing B.B., \textit{“The Hyde Act 2006: India’s Nuclear Dilemma”},1(4) Atoms for Peace: An International Journal 307, at p.308
\bibitem{12} Article III, Agreement on the Canada-India Colombo Plan Atomic Reactor Project 1956, http://www.nci.org/06nci/04/Canada-India\%20CIRUS\%20agreement.htm Accessed on 2\textsuperscript{nd} January 2010
\bibitem{13} http://www.nytimes.com/2008/10/02/washington/02webnuke.html?hp Accessed on 5\textsuperscript{th} January 2010
\bibitem{14} http://www.globalpolicy.org/component/content/article/154/25758.html Accessed on 5\textsuperscript{th} January 2010
\bibitem{15} http://www.thaindian.com/newsportal/world-news/bush-signs-n-deal-law-today-123-to-follow-at-some-point_100104679.html Accessed on: 3\textsuperscript{rd} February 2010
\bibitem{16} Rajagopalan R., \textit{“Indo-US Nuclear Deal: Implications for India and the Global N-Regime”}, 62 Institute of Peace
\end{thebibliography}
US domestic law would provide a stumbling block for the 123 agreement in certain areas along with required agreements with both the Nuclear Suppliers Group (‘NSG’), the International Atomic Energy Agency (‘IAEA’) and the Indian Nuclear Separation Plan. For the Bush administration to effectively sign an agreement with India to facilitate trade of material, a change of US law was needed. The ‘Henry J. Hyde Act’\(^\text{17}\) paved the way for any deal between India and the US by ‘exempt[ing] from certain requirements of the Atomic Energy Act of 1954 a proposed nuclear agreement […] with India’\(^\text{18}\).

The agreement with the NSG is just as vital as the agreement itself. The NSG is an important cog in the non-proliferation machine, ensuring adherence to a set of guidelines for exports and as discussed earlier owing to the possible dual use of nuclear material.\(^\text{19}\) The guidelines developed deal with the items on a two tier basis; ones which relate to the dual-use items, so called Guidelines II, which may possibly contribute towards weapons building and other materials that are in general linked to peaceful use which are dealt with in Guidelines I.\(^\text{20}\) These mechanisms are designed not only to prevent non-proliferation, but attempt to recognise the right of a nation to pursue a peaceful nuclear programme separating the two types of materials where possible. While the writer acknowledges the problems with an artificial separation between a civilian use and uses that involve proliferation problems when the dividing lines with some technology is not at all clear, the separation represents a regime aimed at preventing proliferation while not stifling trade to the extent it impacts upon the possible civil uses of nuclear power. For a nation to receive Guideline II type material it must be subject to full International Atomic Energy Agency (‘IAEA’) safeguards while a nation dealing in items subject to Guideline I require a degree of protection also.\(^\text{21}\) Therefore, India would need to be subject to IAEA safeguards to receive this technology. In respect of transferring nuclear material to a non-NWS, guidelines state that only states who have obtained a NSG exception and subject to full scope IAEA. What sort of precedent this sets is arguable, Ntoubandi argues that this sort of arrangement paves the way for agreements of a similar kind resulting in a large scale proliferation of nuclear goods resulting in

---

18 \textit{Ibid}, from Preamble
20 As explained in: Ntoubandi F., “Reflections on the USA-India atomic energy co-operation”, 13(2) Journal of Conflict & Security Law 273, at p.281
21 \[http://www.armscontrol.org/factsheets/NSG\] Accessed on 16\(^\text{th}\) February 2010
greater pressure to build strategic stores of weapons\textsuperscript{22}, in effect 'upping the ante'.

The agreement itself was subject to criticism. Not only due to the subject matter at hand and criticisms relating to non-proliferation duties, but to the underlying subtext and policy statements relating to India's 'assistance and co-operation to efforts to dissuade, isolate, and, if necessary, sanction and contain Iran for its efforts to acquire weapons of mass destruction'\textsuperscript{23}. We shall discuss this matter in greater in the section that aims to extract not only the obvious raison d'etre for the agreement but other products and advantages the US are expected to gain; whether they be incidental or an unintended by-product.

The above text forms the basis for argument in this paper while attempting to summarise the key issues of the agreement. Following on from this the paper aims to extract the underlying subtext from the agreement by examining political stances and the choice of wording, legal mechanism adopted and room left within any agreement for future development.

\textbf{THE UNITED STATES: ESTABLISHING LUCRATIVE BUSINESS, STRATEGIC PARTNERSHIPS AND MAINTAINING WORLD STANCE}

(a) 'Lucrative Business'

The primary outcome of the agreement was of course an established nuclear supply route between the US and India. However, it is of the writer's opinion that the US stands to gain a great deal more from the agreement.

It is clear the US stands to make a monetary gain from the agreement. Various articles value the potential gain quite differently, however, much of the literature refers\textsuperscript{24} to the "$40 billion deal"\textsuperscript{25}. In addition, Custer claims that the deal in place is also poised to capitalise on the future Harpoon anti-ship missile order, purchasing of multi-role combat aircraft and observational helicopters. Indeed he cites an order already tendered and accepted for eight Boeing aircraft. While the writer does understand Custer's submissions; it is doubtful that simply because of an order of eight planes, from a supplier that may have been an automatic choice due to the supplier's grasp on the market, it does not automatically mean that all future ordinance orders from India will be fulfilled by the US. Undoubtedly however, there is a possibility of future fulfilment by the US purely as a result of the mutual beneficial relationship they have forged for themselves.

\textsuperscript{22} Op Cit 20, p. 283
\textsuperscript{23} Hyde Act, Section 103 (b) (4)
\textsuperscript{24} Custers P., 'A Different Perspective on the US – India Nuclear Deal', \url{http://monthlyreview.org/090901custers.php} Accessed on 10\textsuperscript{th} January 2010
\textsuperscript{25} Laxman S., “N-Trade: It's a $40 Billion Opportunity,” Times of India, September 11, 2008
Let us turn to the agreement itself and examine the provisions, particularly those relating to the fiscal benefits we have discussed, to understand and discuss the underlying reasoning.

The 123 Agreement refers to the need of both parties to 'facilitate nuclear trade between themselves in the mutual interests of their respective industry' and the need to ensure a smooth system not fraught with constant interruption. One would assume any clause relating to the need for a constant supply is related to the subject matter at hand. India has placed most of its power supply problems firmly on the shoulders of nuclear energy, projecting that the current 2.5% supplied by nuclear facilities would be at 25% by the year 2050 and to have an intermittent supply would result in domestic power issues.

While the author acknowledges the agreement is a framework set up, when reading the agreement as a whole, one can be sure as to the main objectives of the agreement just with a glance at the length of the sections. For instance, the section relating to environmental protection is little more than a few lines and gives fairly general guidance on how both nations will follow 'best practices'. In addition, rather than 'hard law' enforceable immediate stop clauses should India not comply with provisions of the agreement, the agreement prefers to use 'consultation' with a view to resolving the dispute. Whist it is possible to understand this option in terms of a purely financial agreement between two institutions, it is of the author's opinion that the material involved in the agreement demands more affirmative action that a consultation. One may question why this is the case and it is suggested that it is in the interest of neither parties that the agreement be brought to an end and consultative agreements may best facilitate this, however, how in line with security and proliferation concerns this policy is remains to be seen. Moreover, contained within Article 14(2) is another curious clause of the agreement. The article deals with cessation of the agreement and how the parties must behave in this eventuality. It places soft guidance using phrases such as 'agree to consider circumstances' which may have lead to the termination, perhaps a 'changed security environment'. While this part of the agreement gives rise to a great deal of flexibilities between the parties, persons external to the treaty may be discontent that there is no automatic break clause to the agreement and should India and US wish to continue it would take a rather large externality to prevent continuation.

What we can extract from this is an underlying theme of the agreement. Where possible, the

---

26 Article 4(1), US-India Nuclear Agreement
28 Article 11, US-India Nuclear Agreement
29 Article 13(2), US-India Nuclear Agreement
agreement has avoided hard law mechanisms. Instead, it imposes obligations of conduct to resolve issues and behave in certain manner to resolve issues, such as the conditions in Section 14(2) requiring the terminating party to take into account a possible ’security concern’ the other party may hold. We shall discuss exactly what this provision means in terms of the wider scope of the agreement in a later section.

For the purpose of this section however, it further strengthens the point that neither party want any factor, be it internal to the agreement or external, to disrupt the agreement and the flow of trade that results. The drafting effectively makes a complete breach of the agreement extremely difficult, requiring consultation and omitting out trigger clauses which would case an automatic cessation demonstrating a deal both parties wish to continue. Politically, the BJP were more than keen to retain and incorporate India's right to test.\(^{30}\) Note here, the agreement is mute on a trigger of cessation should India test, rather clouds the water by insisting on a contextualised analysis of the current security condition, despite the inevitable international opposition outside the agreement should a weapons test be conducted. This is an interesting contrast to sections 129 of the Atomic Energy Act and 104 of the Hyde Act which provide a sterner outlook on an Indian test.

While one cannot be sure that the reason for this extremely flexible drafting is purely due to the potential financial gain and political will of both parties, the content of the document indicates that it certainly may be a consideration.

(b) Strategic Partnerships and Maintaining World Stance

The relationship is clearly financially beneficial to the US and provides an valuable economic benefit. However, while the main benefit from the agreement is clearly tangible, there is much to be said about the intangible benefits the US will gain.

To start this analysis we need to look back to the text of the Hyde Act. It expresses in the 'Statement of Policy' section that India will help to 'dissuade, isolate and [...] sanction Iran for its efforts to acquire weapons of mass destruction’\(^{31}\) and to seek to 'halt the increase of nuclear weapons arsenals in South Asia and promote their reduction’\(^{32}\). Before advancing, it is worthwhile noting that these statements are by way of advisories, there is no formal legal


\(^{31}\) Section 103(b) (4), Hyde Act

\(^{32}\) Section 103(b) (5), Hyde Act
mechanisms to enforce them as Rajagopalan points out.\textsuperscript{33}

One must consider what we can extract from this detail. Typically the Asian countries have undergone exponential growth and have come to be regarded as major players in world markets. Notably, both India and China have emerged as main powers, modernising military, general infrastructure upgrades and strengthening their economies.

It has been claimed that the agreement, strategically, is a shrewd move allowing the US to 'solidify India as a US-friendly counterweight to China in Asia'\textsuperscript{34} and investment in India is seen as an 'investment in a democratic alternative to Chinese economic hegemony in Asia'. One can find this view most persuasive when viewing both the agreement and statements of general policy found in the Hyde Act, relating to Iran and Asia in general. The agreement strikes a strong partnership between the two nations, providing India with valuable tools for growth and development and the US with a valuable partner in Asia combined with a lucrative trade route.

\textbf{\textit{India's Position in the Global Nuclear Regime}}

Much of what has been discussed relating to the US need not be reiterated in this section. Suffice it to say, the nuclear apartheid India found itself in following tests and impacts of the NPT has been eased by its deal with the US. The agreement has somewhat thrust India onto the world stage. Perhaps an indication of the strategic importance can be seen within a similar deal that follows directly after the Indo-US agreement between Pakistan and China.\textsuperscript{35}

Akhtar’s article\textsuperscript{36} talks of the 'snubbing' Pakistan has experienced with regard to the nuclear deal. She also adds that this deal accentuates the military differences between Pakistan and India, causing further tension.

Examining the implications from India, certainly the BJP along with certain other analysts, claim that India has become subservient to the US becoming a political pawn. Rajagoplan is quick to dismiss these claims attributing them to extremist parties\textsuperscript{37}. However, it is of the author's opinion that he fails to adequately examine the concerns of the BJP. While India has quite a vast amount of Thorium to be mined, it only has access to around 1% of minable Uranium.\textsuperscript{38} For India to

\textsuperscript{34} http://hir.harvard.edu/index.php?page=article&id=1363 Accessed on 14\textsuperscript{th} February 2010
\textsuperscript{35} http://www.commondreams.org/headlines06/0904-01.htm Accessed on 14\textsuperscript{th} February 2010
\textsuperscript{37} Op Cit. No. 33, at page. 7
\textsuperscript{38} Much of this claimed to be 'notoriously bad quality': http://www.npec-web.org/OpEds/20060626-Sokolski-NRO-UnconditionallyBad.pdf Accessed on 17\textsuperscript{th} January 2010
continue its expansion of nuclear power production, it is vital to maintain links with the US. In this respect, the US has the upper hand and it must have an effect on the political autonomy of India.

**NON PROLIFERATION CONCERNS**

There are certain aspects of the agreement with India that actually reinforce the notion of nuclear accountability and safety. As a result of the agreement, many of the installations in India are now subject to IAEA safeguards due to the requirements from the NSG. India had to undertake a plan of separation to ensure no possible cross contamination between civil and military installations, the so called separation plan. Basu and Albright have already written on the issue and one is mindful that a thorough analysis of the plan could never be contained with a page of analysis.39 One must question however, how 100% separation may actually be achieved. Cataloguing materials and stockpiles would result in strong physical separation, but there are intangible factors, such as expertise, that are not as easy to separate and it is of the opinion of the author that any attempt of separation will not result in a full separation and therefore may aid the construction of more weapons. From a more general point of view, one can see the effect of such agreements purely in relation to the Pakistan situation. Whilst one must acknowledge a nation's peaceful right to the use of nuclear power, this surely must be proportionally balanced with concerns of proliferation. Pakistan's agreement with China may result in a greater use of nuclear power for a developing country however, the Indo-US agreement simply sets the precedent for similar situations. An increasing number of agreements results in an ever increasing flow of material, which potentially, as history tells us may possibly result in the proliferation of nuclear weapons, as India and Iran have demonstrated.

**CONCLUSION**

The agreement itself provides a valuable utility to a country who needs to meet the needs of its people. However, the political reality of the deal has implications. The US have gained an ally and established a valuable trade route to them, gaining ground in Asia. The deal and process itself lends itself to an agreement designed to avoid cessation at all costs. Not only this, as a result of the precedent created by the deal, other similar agreements have been concluded. It is of the author's opinion that these agreements gradually detract from the primary goal of the NPT. While providing a valuable resource for countries who look to nuclear power to answer their

energy concerns, one must question the cost at which it does this and examine the further spread of nuclear material around the globe. The author acknowledges the difficulty in balancing the need to allow peaceful use of nuclear energy with ensuring the non-proliferation objectives are achieved, but respectfully submits the 123 agreement is piece of legislation which may detract from the objectives of the NPT, equipping more states with nuclear material.
BIBLIOGRAPHY

Legislation

Indo-US Civilian Nuclear Agreements

Treaty on the Non-Proliferation of Nuclear Weapons

*Henry J. Hyde United State- India Peaceful Atomic Energy Co-operation Act of 2006*

Article III, Agreement on the Canada-India Colombo Plan Atomic Reactor Project 1956

**Articles**


Ntoubandi F., “Reflections on the USA-India atomic energy co-operation”, 13(2) Journal of Conflict & Security Law 273


**Weblinks**


http://news.bbc.co.uk/1/hi/world/south_asia/8272354.stm

http://www.nytimes.com/2008/10/02/washington/02webnuke.html?hp

http://www.globalpolicy.org/component/content/article/154/25758.html


http://www.armscontrol.org/factsheets/NSG

http://monthlyreview.org/090901custers.php

http://www.world-nuclear.org/info/inf53.html

http://hir.harvard.edu/index.php?page=article&id=1363
http://www.commondreams.org/headlines06/0904-01.htm