Will the ‘Indo-US’ 123 Agreement lead to the demise of the Nuclear Non-Proliferation Treaty?

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Under the 1954 Atomic Energy Act of the United States, the laws governing the civilian uses of nuclear material are stipulated. Of which section 123 discusses ‘Cooperation With Other Nations’ and sets out a proposed agreement between the U.S. and another nation, that “shall include terms, conditions, duration, nature, and scope of the cooperation,”¹ for nuclear material cooperation used for civilian purposes. In August 2007, India had joined the list nations to hold a 123 agreement with the U.S. This particular agreement was ground-breaking on the basis that the U.S. had not previously entered into a nuclear cooperation agreement with a Nuclear Weapons State (NWS) that was not part of the Nuclear Non-Proliferation Treaty (NPT). Many have considered this act to undermine the non-proliferation regime.² However, since India does have nuclear weapons but is not a rogue state, the creation of ‘safeguards’ and waivers merely bring the state into the non-proliferation regime. Does the consideration of an India ‘exception’ diminish the NPT and its norms? To address this in the second half of the essay, the author will look at what effects the India-exceptions have on the NPT. Has it had an impact on the non-nuclear weapon states (NNWS)? If their membership isn’t affected then would the diminishing norms bring the non-proliferation regime to crumble? The exception granted to India would not have any effect on the NPT. Its members will still uphold its obligations towards the NPT for interests which go beyond that of military strategy, interests such as economic security or international prestige. Upon analysis of these questions raised and consideration of the exception of India, the non-proliferation regime will not be diminished, but merely enhanced.

*The treaty provisions, in the run up to the 123 agreement, that have created an ‘India exception’ waiver.*

The Indo-US 123 agreement could not have occurred if certain conditions had not been met. This included a change in the US domestic laws, a Nuclear Suppliers Group (NSG) waiver, an India-specific safeguard with the IAEA, and export controls mechanism for India.

¹ Atomic Energy Act, 1954, Sec. 123 (a)
² The non-proliferation regime consists of various treaties and agencies, such as the NPT and the International Atomic Energy Agency (IAEA). These bodies advocate among many aspects nuclear energy for peaceful purposes and non-acquisition of nuclear weapons.
The NSG waiver and India-specific IAEA agreement created an exception for India. They have both emphasised the use of nuclear trade for peaceful purposes, and have therefore contributed to the non-proliferation regime brought on India.

The application of the IAEA safeguards primary role is ‘deterring the proliferation of weapons by detecting early the misuse of nuclear material or technology, and by providing credible assurances that states are honouring their safeguards obligations’. This is because India is not a part of the NPT, so the safeguards that the IAEA did not automatically apply. However, for the US to undertake the 123 agreement with India, creating a specific safeguard for India was necessary. This would give further assurances to the conduct and use of the nuclear trade that is to occur. Creating an India specific safeguard does not hamper the non-proliferation regime. It opens the regime up to include the special case that is India, by applying the standards of conduct to India and the administering inspections. The Safeguards agreement strictly details provisions of nuclear trade for peaceful purposes only. Article VII stipulates ‘no material, equipment or device transferred to the Government of India or authorized persons under its jurisdiction pursuant to this Agreement, by sale, lease or otherwise, will be used for atomic weapons or for research on or development of atomic weapons or for any other military purpose’. The agreement emphasises the advocacy of each states inalienable right to nuclear energy production for civilian purposes.

The NSG is a group of nuclear supplying countries which seek to contribute to the non-proliferation regime. They set up controls in the exportation of nuclear weapons and nuclear devices. In the guidelines set for the NSG it is advocated that transfer of nuclear trade is only permitted for peaceful purposes. “The NSG guidelines facilitate the development of trade by providing the means whereby obligations to facilitate peaceful nuclear cooperation can be implemented in a manner consistent with international nuclear non-proliferation”. The NSG is thus complimentary to the NPT. India is not a member of either of these non-proliferation bodies but the United States is a member of both. The NSG allowed for peaceful nuclear trade, only if the state had been subject to IAEA safeguards and signatory to NPT. In order for the Indo-US 123 to go ahead, the NSG had to lift an embargo on India that barred it from peaceful nuclear trade with any country in the world. After much lobbying and US persuasiveness, an India-exemption waiver was granted by the NSG. The waiver given can be

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3 International Atomic Energy Agency, see website.
4 Text Of The Safeguards Agreement Relating to The Bilateral Agreement Between India And The United States of America, article VI
5 Nuclear Suppliers Group, see website.
seen in the NSG ‘Statement on Civil Nuclear Cooperation with India’. Article 2 of the statement lists out positive benefits taken by India in regard to their commitments to non-proliferation. To separate the nuclear reactor plants and concluding in the negations with the IAEA are some of these in the list. The statement then notes ‘based on the commitments and actions mentioned above, as reiterated by India on September 5th, 2008, and without prejudice to national position thereon, participating Governments have adopted and will implement the following policy on civil and nuclear cooperation by Participating Governments with the IAEA – safeguarded Indian civil nuclear programme’. The Rubicon has been crossed and India had been given a special exception. India, due to its special circumstances should be considered separately. The fact that India had shown these non-proliferation actions with the added pressure of the US lobbying, the exemption waiver was given.

The exception granted was therefore not out of context. It had not been given to a state whose administration was questionable in terms of serious violations towards proliferation. It is not considered a ‘rogue state’ that possesses nuclear weapons. It may be argued by Robert Einhorn and others that in these exceptions ‘India has managed to get it all – acquiring nuclear trade, and preserving all of India’s strategic options’. Thus one could argue that the agreement has led to the demise in nuclear proliferation. However, this is refutable because India must be considered individually as an exception.

However, it should be mentioned that the start of India’s nuclear programme in the 1970s had been so spontaneous, that such aspirations were not pre-determined. It is important to assess what affect this ‘Indian-exception’ has to the non-proliferation regime. Or more importantly, has the exception hindered the significance of the non-proliferation treaty and its membership.

**The persuasive provisions within the NPT.**

The main objective of the NPT is concerned with ‘the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament’. A nuclear
A weapons state is understood as a state that has ‘manufactured and exploded a nuclear weapon or other nuclear explosive devices prior to 1 Jan, 1967’.\textsuperscript{10}

NNWS are mainly persuaded to join the NPT for national security interests. The international relations theory of neorealism suggests that larger states have more “power” in the international community.\textsuperscript{11} The possession of nuclear weapons then greatly advantages this powerful position of larger states. In times of conflict, possession of such power is extremely detrimental in determining the survival of the state. There is a ‘balance of power’ when two or more large states which have equal power are in conflict. This is very much a scenario that only involves those states with power. However, due to various situational setbacks that hindered development of most countries military capacity; not all states have the same military capabilities. Smaller states or underdeveloped states may not for one thing have had the necessary resources to pursue military objectives. Such states in international relations often aligned themselves with a larger state in the term ‘bandwagon’.\textsuperscript{12} Bandwagon can be seen during the Cold War where many states had aligned their foreign national policies for either the Soviet Union or the Western powers of the USA and its allies. Since the end of the Cold War however, the balance of power between states has been based on a unipolar system.

The existence of a super power suggests that more states are put at a disadvantage in the international community. Considering that power is based on a military advantage and the possession of nuclear weapons adds weight to this military advantage. Then ratifying and acceding a treaty that has a main objective of ‘cessation and nuclear disarmament’ would serve a vital national security interest. The NPT sets out provisions to prohibit any non-nuclear weapon state from acquiring nuclear weapons, or seek to acquire nuclear weapons.\textsuperscript{13} It also sets out that the nuclear weapon states should not undertake ‘any transfer to any recipient of nuclear weapons or nuclear explosive devices; and should not in any way assist, encourage, or induce any non-nuclear weapon state’.\textsuperscript{14} Most importantly the treaty undertakes ‘to pursue effective measures on 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

\textsuperscript{10} Ibid, article 9
\textsuperscript{11} Power: as defined in terms of military advantage of one state over another
\textsuperscript{12} Bandwagon: smaller states coordinating their foreign national policies with powerful states, and becoming allies.
\textsuperscript{13} NPT, article 1 and article 2
\textsuperscript{14} Ibid, article 1
effective international control’. These are the persuasive provisions for non-nuclear states to maintain their membership of the NPT. The persuasive provisions provide a basis for non-nuclear states or less powerful states to ‘balance out’ in the power struggle of the international system. NNWS are thus protecting their national interests. It could be said that there is a new form of ‘bandwagon’ occurring in the NPT. Smaller states instead of aligning with a major power, align together to cooperate with these persuasive measures.

However, India is major power player in the international system and it is not part of the NPT. The idea of states ratifying to these persuasive provisions on the basis of balancing out power is then thrown out of the window. The NPT makes a distinction between nuclear weapons for military purposes and the use of nuclear energy for peaceful purposes. The waivers shown in the previous section provide an argument that the safeguards given to India have brought them into the non-proliferation regime. The safeguards now have controlled the reactors under supervision so that any deviation toward military purposes would not be permissible. It limits a nuclear weapons state. This for many NNWS is an advantage.

States have joined the NPT no doubt for their own security reasons. These security reasons could be taken further than the mentioned realist theory of ‘state survival’. Domestic security reasons within a state could be of concern, that is, the domestic situation of a state may determine their support for a non-proliferation regime. The South African case provides a good example of domestic concerns that influenced their support of a non-proliferation regime. South Africa had possessed nuclear weapons, and chose to dismantle them under growing threat of radical groups. There was a fear that such groups, white extremists and radical xenophobic perhaps, may gain political power during turmoil in country and therefore be in possession of nuclear weapons. To dismantle the weapons and advocate non-proliferation universally meant more to the government than trying to balance the international military powers of the world. The NPT provides states with further assurances of international prestige and economic security which some states may be willing to pursue. These assurances may induce some states to join the NPT. The Ukraines’ is an example of such a state who had handed over its nuclear arsenal, for greater international prestige and possibly economic security. Professor Sagan highlights some objectives for the Ukraine to

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15 Ibid, article 6
16 This can be seen in the formation of the ‘Non-Aligned Movement’
17 NPT, art 4.
18 Sagan, S. Why do states build nuclear weapons? pg 71
19 It is not explicitly stated why the South African government choose to dismantle their nuclear weapons. Although this argument is thought to be part of their decision.
accede to the NPT. Firstly, the Ukraine regarded ‘NPT membership as a way of gaining independence from Moscow’. Secondly, the Ukraine did not want to associate its international prestige with non-conforming nuclear ‘rogue states’. Lastly, economic security was stressed by the US and NATO which had influenced the Ukraines decision.

From these two cases it is clear that states pursue their own objectives in decisions to join the nuclear non-proliferation regime. The India exception case provides a nuclear weapons state joining, at least partially, the non-proliferation regime. This is advantageous for states pursuing military security objectives. For states that may be influenced by other interests of the NPT are not affected by the case of India. Their domestic interests to join the NPT may still be applicable, or their economic security interest are still of concern. The India exception given therefore does not hinder the support NNWS give to the NPT and the non-proliferation regime.

The norm of the NPT is obviously non-proliferation and that no more than the permanent five are allowed to acquire nuclear weapons. If the membership of the NPT will not be affected by the Indo-US 123 agreement, will one of these norms not diminish? The fact that there is already existing nuclear states that are outside of the five suggest that the norm is already being eroded away. Robert Gallucci supports this argument in his testimony on ‘US-India Atomic Energy Cooperation’. Gallucci goes on to suggest other strict provision to be placed on India, for the deal to not affect the NPT norms. These he suggests will be set up by the non-proliferation bodies. However, the norm of non-proliferation has been upheld by considering India individually and bringing it into the non-proliferation regime. It could be argued that the non-proliferation bodies themselves are made up of powerful states that greatly influence the rules. Gerry Simpson describes this as great powers make and remake international law. Therefore although the norms are non-proliferation, great powers set what is considered non-proliferation. The exceptions granted for India illustrates the great powers position on considering India separate from other states. Other states would then need to bandwagon along with the policies or alternatively, become delinquent in proliferation and be regarded as a rogue state.

20 Sagan, S. Why do states build nuclear weapons? pg 81
21 Ibid, pg 82
22 Gallucci, R. Testimony on US-India Atomic Energy Cooperation, pg 3
23 Simpson, G. Great Powers and Outlawed States, pg 68
Conclusion

Finally, from these discussions it would be reasonable to conclude that India has had a de facto NWS status and has further had other non-proliferation policies. This can be seen in their adherence to the IAEA safeguards and their agreement in statements of strict civilian use of traded nuclear energy materials. It is then justified as to why the ‘India Exception’ was given in many waivers. Furthermore, India should be regarded individually because much of the international community still holds the almost universality of the NPT and its importance in the international system. The India exceptions given do not affect their membership of the NPT. Although Gallucci had portrayed the norms of the NPT diminishing, the most important norm is that of non-proliferation which has been reinforced. Condoleezza Rice states ‘we are clearly better off having India most of the way in rather than all the way out’. The Indo-US agreement brings a de facto NWS into the non-proliferation regime, something that has not been done before, therefore not leading to the demise of the nuclear non-proliferation treaty but to its enhancement.

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24 Heinzelman, K. Towards Common Interests and Responsibilities, pg 460
Bibliography:


The Text Of The Safeguards Agreement Relating To The Bilateral Agreement Between India And The United States Of America, IAEA Doc. (INFCIRC/154), 3 Sep. 1971

Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. (INFCIRC/140), 22 April 1970

United States Atomic Energy Act, (1954)