Writing in 1998, then Senior Advisor on Defence and Foreign Affairs to Indian Prime Minister Atal Bihari Vajpayee and a Member of Parliament for the Bharatiya Janata Party Jaswant Singh described the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as institutionalised “nuclear apartheid.” The 2008 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) has been an attempt, at least from the Indian perspective, to address this.

However, is the 123 Agreement legally problematic for the United States in light of its obligations as a State Party to the NPT? Discuss.

This essay looks into the nature of the 123 Agreement and its ‘compatibility’ with the NPT and the obligations each ‘agreement’ places on the US, in order to assess whether the 123 Agreement might be problematic for the US in light of its obligations under the NPT. It does this by briefly examining the NPT and why India are not a state party and why the agreement was a change in US policy before giving an overview of the 123 Agreement and an overview the debate within the literature. The essay then discusses the reasons why there is a debate over the 123 Agreement and looks at the legal issues that may make it problematic for the US. This involves an analysis whether it allows NPT members to have nuclear dealings with non-NPT members and the dual responsibility it imposes on the US. This will be followed by a critical examination of the 123 Agreement provisions, IAEA safeguards, NSG guidelines and the Hyde Act. The essay will conclude by answering the question of whether the 123 Agreement is legally problematic for the US in light of its obligations to the NPT.

The Treaty on the Non-Proliferation of Nuclear Weapons1 (NPT) signed in 1968 was the first measure towards a world free of nuclear weapon. Meant as an intermediate measure to start to process towards disarmament, the NPT has become the cornerstone of international nuclear energy law and nonproliferation of nuclear weapons. The treaty divides its member states into nuclear weapon states (NWS), who conducted nuclear explosions before 1967 and non-nuclear weapons states (NNWS), which had not.2 For a number of years, India has refused to become party to the international nonproliferation of nuclear weapons. Since the original signing of the NPT, India have criticised the regime as dividing the world between those who had and those who did not. The refusal of India to comply with international policy on the area of nuclear energy and its subsequent nuclear tests in 1794 lead to a trade embargo being placed upon India by the US, when the former refused to submit to

1 The Treaty on the Non-Proliferation of Nuclear Arms, signed 01 July 1968
2 Ibid Article IX
International Atomic Energy Agency (IAEA) safeguards, which would have prevented them from using their civil nuclear program being used to assist India’s military nuclear program. The boycott by the US towards India was still evident in 2001, when the US condemned Russia for planning to ship nuclear fuel to India which the US said was in violation of Russia’s nonproliferation commitments. For a number of years the US had claimed that the trade embargo on India was an important part of its international nonproliferation policy and perhaps the most concerning thing about the 123 Agreement is that it marks a radical change in the US’s policy on international nuclear energy law and nonproliferation. Many argued that the deal undermined the spirit of the NPT by rewarding states that chose not to be party to the NPT and develop nuclear weapons contrary to international nonproliferation efforts and give incentive to nuclear inspiring states to abandon their obligations and start acquiring nuclear weapons. However de facto NWS not party to the NPT but who conducted nuclear tests after 1967 like India, do need to be subject to some form of international nuclear energy regulation. The likelihood of India or Pakistan and Israel ever willingly joining the NPT is close to none and other methods of monitoring their nuclear facilities civilian or otherwise is needed, if the spirit of the NPT is ever to fulfil its goal. The only way that the five NWS’s will fully disarm, is if the de facto NWS’s do as well. In order for this to happen there needs to be a degree of trust of both sides and the 123 Agreement is possibly the first step modernising the NPT in order to achieve the original goals of the NPT.

The US-India Civil Cooperation Agreement (123 Agreement) is an agreement on the peaceful uses of nuclear energy, which allows the USA and India to share and exchange nuclear information, technology and materials. The agreement is controversial as it is the only agreement on peaceful uses of nuclear energy where one party is not a signatory to the NPT. It is significant that India, the non-NPT party, is known to have nuclear weapons, when assessing whether the 123 Agreement is legally problematic for the United States in light of its obligations to the NPT. The agreement has resulted in the Nuclear Suppliers Group (NSG)

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3 P.T. Reeker, U.S. Department of State, Office of the Spokesman, February 16, 2001
4 The argument that the US embargo on India was an important part the US’s nonproliferation policy is somewhat questionable, in light of the waivers of sanction on Pakistan by the US when the former repeatedly violated US nonproliferation laws. However this theory is outside the scope of this essay. See John Glenn, “On Proliferation Law, A Disgraceful Failure,” International Herald Tribune, June 26, 1992 accessed from http://www.fas.org/news/pakistan/1992/920731.htm
granting India a waiver, meaning that India is the only non-NPT party that is allowed to trade legally on the international nuclear market.

Central to the debate that surrounds the 123 Agreement is the question of whether it hampers or enhances efforts on non-proliferation of nuclear weapons. Some writers argue that while the 123 agreement is not perfect it does pave the way for developing future nuclear policy and non-proliferation. They argue that the NPT is out dated as the world has changed dramatically since its drafting and agreements like the 123 Agreement help to modernise international non-proliferation regimes. Others state that the 123 Agreement is a direct breach of the NPT as it encourages proliferation of nuclear weapons within India as the agreement gives India access to nuclear materials available on the international market, freeing up their existing nuclear material to be used in their weapons program. There is also concern that the 123 Agreement will be seen by nuclear aspiring states like North Korea and Iran as permission to continue with their own nuclear weapons programs and that the agreement will lead to similar agreements with fewer safe guards in place designed to prevent nuclear proliferation.

One reason for this divide is that the NPT does not address the legality of an NPT member dealing with a non-NPT member. Another reason is that the legal status of India’s nuclear arsenal is unclear. Under the NPT India would be classed as a non-nuclear weapon state (NNWS) which would render their nuclear weapons program illegal, however as India is not bound by NPT obligations this does not apply. The changing nature of acceptance from other countries of India as a nuclear weapon state outside the NPT has also made it difficult to identify the legal status of India’s nuclear weapon program. Although India’s initial tests were condemned both in 1974 and 1998 by the international community, arguably the signing of the 123 Agreement, the consequential waiver by the Nuclear Suppliers Group in allowing

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10 China announced that it would be selling two nuclear reactors to Pakistan. The British were worried about China’s nuclear dealings with Pakistan, as China in the past, have been suspected of nuclear proliferation activities when ‘helping Pakistan in the past. See: http://www.bbc.co.uk/news/10418208 accessed 3/2/11
11 NPT Article IX defines nuclear weapons states from non-nuclear weapons states. Those who exploded nuclear devices before 1967 are nuclear weapon states. For the purposes of the NPT any state party who has nuclear weapons after this date must disarm as they breach the underlying principles of the NPT. India falls into this category but because they are not party to the NPT they are not required to give them up.
India to trade on the international nuclear energy market, and subsequent agreements on cooperation on the peaceful uses of nuclear energy between India and other states,\textsuperscript{12} show a customary acceptance of India as a NWS. With this in mind this essay seeks to establish whether the 123 Agreement is problematic for the US in light of its obligations to the NPT.

It is widely accepted that assistance in establishing nuclear energy programs for peaceful purposes helps to prevent proliferations of nuclear arms. However there are those who believe that bilateral civilian cooperation agreements lead directly to nuclear weapons proliferation.\textsuperscript{13} However Kroenig’s recent study indicates that only 14 out of over 2000 bilateral civilian cooperation agreements involve the transfer of sensitive nuclear assistance which would enable NNWS to manufacture nuclear weapons.\textsuperscript{14} One of the arguments used to demonstrate that bilateral civilian cooperation agreements lead to proliferation of nuclear weapons is that it helps nuclear weapon aspiring states to gain the training and knowledge though civil use in order to transfer it over to military use at a later date. This argument has certainly been used to criticise the 123 Agreement by those who oppose to it and reason that it is a breach of the NPT.\textsuperscript{15} While there is some logic to this debate in the case of the 123 Agreement it is probably irrelevant, as India already not only has nuclear weapons and the necessary ‘knowledge and training’ in order to make and develop nuclear weapons but also an advanced civil nuclear program. A more practical way to assess if the 123 Agreement is legally problematic for the US in light of this duel responsibility is to examine how the obligations of the 123 Agreement interact with the US’s obligations under the NPT. This method of analysis will help to determine whether the 123 Agreement is an effective balance of the US’s responsibilities which will in turn establish whether the deal between the US as state party and India as a non-state party is permitted under the remit of the NPT.

The first issue to address is whether the NPT prohibits its members form having dealings with its non-members. The NPT does not expressly prohibit a NPT party state from entering into a peaceful uses of nuclear energy agreement with a non-NPT party. In this sense the agreement between the US and India is not a breach of the US’s obligations under the NPT. However the NPT might impliedly prohibit NPT parties from entering into such agreements

\textsuperscript{12} France and India entered into a similar agreement in 2010
\textsuperscript{14} Matthew Kroenig, “Exporting the Bomb: Why States Provide Sensitive Nuclear Assistance,” American Political Science Review, Vol. 103(1) (2009), p113
with non-party states. When the NPT was being drafted the UN General Assembly passed Resolution 2028 which entrusted the Eighteen Nation Committee on Disarmament (ENCD) to draft a nuclear weapons non-proliferation treaty which incorporated five principles.16 One principle in particular was that “treaty should be void of any loop-holes that mean permit nuclear or non-nuclear powers to proliferate, directly or indirectly, nuclear weapons in any form.”17 This may imply that peaceful uses of nuclear energy agreements with non-NPT party states could be in breach of NPT obligations in certain circumstances. For example, if an agreement is entered into where nuclear materials and technology is shared without regard to the NPT or with adequate safeguards in place to prevent transfer of these materials for military purposes, or the NPT party knows that there is significant risk that the materials will be used for military purposes. Therefore NPT members should not use the absence of an express prohibition on making peaceful agreement with non-parties as a way to get round the prohibition on the proliferation of nuclear weapons. The 123 Agreement would only be prohibited under the US’s obligations under the NPT if any deal for peaceful uses of nuclear energy resulted in transfer to military uses. Prevention of this happening comes down to the US balancing both its obligations under the NPT as a NWS. The IAEA document, The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, does allow for agreements between non-NPT members and the IAEA to introduce safeguards that allow for bilateral civil cooperation agreements between NPT and non-NPT members.18

The second issue that needs to be addressed are the two obligations that specifically bind the US under the NPT. The first obligation prohibits the US from directly or indirectly facilitating the proliferation of nuclear weapons,19 while the second obligation requires the US to help NNWS in establishing and maintaining civilian nuclear energy programs.20 This duel responsibility requires a delicate balancing act. Article III of the NPT provides how this balance between, providing the means and assistance in establishing civil nuclear programs and non-proliferation of nuclear weapons. The article requires that all NNWS to the NPT to place their civil nuclear programs under the safeguards of the IAEA. Whilst this prevision is

16 UNGA RES 2028 1961
17 Ibid
19 NPT Article I
20 Ibid Article III
not applicable to India, non being an NPT party, the 123 Agreement does require that India adhere to the same safeguards as NNWS under Article III, before nuclear trade could begin.

Whilst the 123 Agreement does not explicitly mention the NPT, it is indirectly referred to in the preamble which “affirms... states commitment to preventing WMD which is repeated later on in as mindful of their shared commitment to preventing the proliferation of weapons of mass destruction”. This indicates that the agreement was drafted with elements of the NPT and other nonproliferation of WMD agreements in mind.

However it is easy to see why many have criticised the 123 Agreement as being in compatible with the US’s obligations to the NPT. It is noteworthy that Article 2(4) of the agreement states “The Parties affirm that the purpose of this Agreement is to provide for peaceful nuclear cooperation and not to affect the unsafeguarded nuclear activities of either Party”. This statement recognises India as a de facto NWS for the first time in a legal document and has been highly controversial. It seems to suggest that it is ok for states not party to the NPT to proliferate nuclear weapons, hence concerns that it gives incentive to nuclear aspiring states to ignore their obligations under the NPT.

The 123 Agreement is also problematic as the extent of what nuclear material or technology is not limited in any way than to ‘peaceful purposes’. There are concerns that nuclear materials and/or technology will be transferred to India under the guise of peaceful purposes but be used albeit indirectly for military purposes. The agreement lacks any clause which would allow the US will cease nuclear trade if:

- India directly or indirectly uses traded nuclear materials/technology for other than peaceful purposes.
- India conducts nuclear tests as part of developing its nuclear weapons program.
- India does not comply with International Atomic Energy Agency (IAEA) safeguards.

Any of these actions by India could mean that the US has assisted India in proliferating nuclear weapons and subsequently be legally problematic for the US in light of its obligations to the NPT.

21 123 Agreement preamble
22 123 Agreement Article 2(4)
23 123 Agreement Article 3(1)
The legality of the 123 Agreement comes down to, is the balance of duel responsibilities that is bestowed upon the US under the NPT and the safeguards imposed on India by the IAEA as a result of the agreement. A positive outcome of the agreement is that India agreed to separate its nuclear civil and military programs and place its civilian program under the authority of the IAEA. India has been a state party to the Statute of the IAEA which created the regulatory body since it was first signed in 1957, however it had never signed up or complied with the full safeguards of the IAEA until after the signing of the 123 Agreement. The safeguards imposed on states with nuclear technology under the authority of the IAEA are there to check compliance with NPT provisions. In the case of India and the 123 Agreement the safeguards serve the same purpose albeit outside the scope of the NPT. It means that all nuclear trade between India and the US or NSG will be monitored by the IAEA, lessening the chances of transfer to India’s military program. Because India has signed up to IAEA safeguard system, it means that IAEA inspectors will be allowed full access to all India’s civil nuclear facilities, making sure not only that transfer of nuclear materials intended for peaceful purposes are not used for military purposes but also that the materials are stored safely to prevent nuclear accidents and that nuclear facilities are secure, preventing unauthorised persons from getting control of nuclear materials and using them for terrorist purposes. Unfortunately the IAEA scope it only applicable to facilities that are declared to it my member states, therefore is has no authority to those facilities that declared, even if they have reasonable suspicion that these facilities are being used in the proliferation of nuclear weapons or other non-peaceful purposes. The IAEA is often criticised for keeping inconsistent inspections and records of its member nuclear facilities and its lack of authority to report to the UN Security Council.  Although all known breaches of the NPT have occurred in facilities not declared to the IAEA. Where there have been attempts to breach use nuclear materials for peaceful purposes inside the scope of the IAEA, the agency has been highly successful in preventing and ending attempts to proliferate nuclear weapons and there is no reason to think that India will be any different.

All nuclear materials brought by India from the US or the NSG can only be used for peaceful purposes under the terms of the agreement and therefore will be subject to the full IAEA

24 Statute of the IAEA, signed 1957
25 Nuclear Weapons falling into the hands of terrorists is a big concern for many governments. In particular the US make reference to it in the Hyde Act Section 102 (6) (D)
26 See: Cortright & Väyrynen, Towards Nuclear Zero, (Routledge (2010)) p125
27 Examples include: Iraq in 1990’s when the IAEA dismantled Iraq’s nuclear weapons program, North Korea in 2002 and Iran, in which the IAEA put pressure on Iran to comply with safeguards and allow access to its nuclear facilities preventing further advancement of Iran’s nuclear aspirations.
safeguards who will monitor what the materials are being used for. Any suspicion that India is not complying with the IAEA safeguards or using nuclear materials brought as a result of this agreement would suspend all international trade with India and probably have detrimental effect on India’s political status in the international community.

The safeguards are strengthened by the NSG who require that transfers of certain nuclear materials to India must be reported to NSG members before transfer making it less likely that sensitive nuclear materials, i.e. those that can be used for nuclear weapons programs, will be approved for transfer to India. The 123 Agreement also requires that both parties implement in accordance with its relevant international treaties.28

For the US this resulted in the US Congress passing the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 (Hyde Act).29 The US Congress saw the 123 Agreement as a way to ‘strengthen its nonproliferation policy by engaging non-NPT outliers like India’. The act reflects the intentions of the US in regard their change of policy and their obligations to the NPT, as it recognises the need to bring de facto NWS in line with nonproliferation policy. Section 102 (4)-(6) recognises this and state that is in the interests of US security to ensure that non-party states are responsible for their nuclear technology.30 Unlike the 123 Agreement the Hyde Act details that all states should refrain “from all nuclear cooperation with any State Party that the International Atomic Energy Agency (IAEA) determines is not in full compliance with its NPT obligations, including its safeguards obligations.”31 This implies that the US will cease all trade with India if it does not comply with the IAEA. The Hyde Act also deals with the fact that the agreement might inspire nuclear aspiring states and Section 102 (6) (A-D)32 allows for peaceful uses of nuclear energy agreements with NPT outliers so long as they have meet certain criteria, such as being a democratic state and that the agreement means that stronger protections are put in place to prevent proliferation of nuclear arms. Unless something drastic happens to change the way of politics in nuclear aspiring states like North Korea or Iran then they will never be able to fit the criteria that would allow them to enter into an peaceful uses of nuclear energy agreement. Even if they did, it is reasonable to assume that the same safeguards put in place for India would be applicable.

28 123 Agreement Article 2(1)
30 Hyde Act Section 102
31 Ibid 103
32 Ibid Section 103 (6)
Although there is suggestion that parts of the nuclear non-proliferation regime have “evolved into a binding facet of customary international law”\(^\text{33}\) and the NPT is considered the cornerstone of nonproliferation law, it has long been recognised that the treaty is out of date with modern international nuclear energy policy. There is a general consensus that if de facto states like India were bound by the provisions of the NPT then the international regime would be more effective.\(^\text{34}\) In essence the 123 Agreement is an attempt to modernise international policy on nuclear energy and nonproliferation as it recognises that only way that de facto NWS like India will adhere to the international nonproliferation policy and long term disarmament goals is if they are recognised as NWS and regulations and monitoring are done outside of the NPT remit.

So is the 123 Agreement legally problematic for the US in light of its obligations to the NPT? It is important to remember that the agreement was compromise between two states where one sees the international nonproliferation regime as an “institutionalised nuclear apartheid”. The 123 Agreement was never going to be an overnight solution that fixed this problem, but it does show that both states are willing to work together towards international nuclear security. The very fact that this agreement needed a great deal of trust on both sides before it was signed, should be hailed as a success not a failure. When reading the 123 Agreement in isolation, it does appear to have shortfalls which would allow for the use of nuclear energy for non-peaceful purposes, which would make the agreement problematic for the US. However the shortfalls are addressed when the safeguards of the IAEA, NSG and Hyde Act are taken into account. The obligations required of India under the agreement are similar to those that the NPT requires of NNWS who enter into agreements for the peaceful uses of nuclear energy, were insisted upon by the US before the agreement was signed and any trade could commence. While the agreement recognises India as a de facto NWS it does not allow it to have the same freedoms as NWS who are party to the NPT, as they have the freedom to trade on the international nuclear market for military purposes and India does not. The US appears to have got the balance right between its duel obligations under the NPT when drafting and entering into the 123 Agreement so that the agreement is not legally problematic for the US in light of its NPT obligations.

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\(^{34}\) Garvey J,To Fix the Nuclear Non-Proliferation Regime - Avoid State Classification (2009) Florida Journal of International Law, 21, 3, 371
Legal Instruments


Statute of the IAEA, signed 1957

The Treaty on the Non Proliferation of Nuclear Arms, signed 01 July 1968

UNGA RES 2028 1961

Books

Chari, Indo-US Nuclear Deal Seeking Synergy in Bilateralism, (Routlede (2009))

Cortright & Väyrynen, Towards Nuclear Zero, (Routledge (2010))

Goldblat, J, Arms control : the new guide to negotiations and agreements, (PRIO (2002))


Müller, H, Nuclear non-proliferation and global order, (Oxford University Press (1994))

Articles


Joyner D, Recent developments in international law regarding nuclear weapons, International & Comparative Law Quarterly 2011 60(1), 209


Lodgaard S, Dealing With the Outliers, Nuclear Challenges And Policy Options For The Next U.S. Administration, accessed from http://docs.google.com/viewer?a=v&q=cache:MBbdsSdoRnIJ:se2.isn.ch/serviceengine/Files/RESSpecNet/95927/ichaptersection_singledocument/43EFC38B-DF34-422D-A7F3-8C43FE52F366/en/ch_4.pdf+strengthen+its+nuclear+nonproliferation+policy+by+engaging+non-NPT+outliers+like+India%E2%80%99&hl=en&gl=uk&pid=bl&srcid=ADGEESgdmmku1Yy6o7YAlh9Qh0


Publications


Sergio Duarte, Towards a World Free of Nuclear Weapons High Representative for Disarmament Affairs (United Nations (2008))

Press Statements

P.T. Reeker, U.S> Department of State, Office of the Spokesman, February 16, 2001

Websites

http://www.bbc.co.uk/news/10418208 accessed 3/2/11