CHAPTER-4

INDO-US NUCLEAR DEAL

October 10, 2008 was a historic day in Indo-US relations when the US Secretary of state Condoleezza Rice and her Indian counterpart, Pranab Mukherjee signed the landmark “Agreement for Cooperation between the Government of India and the Government of the United States of America concerning peaceful uses of Nuclear Energy”, or the 123 agreement, (Annexure-2) as it is popularly called, in Washington. Earlier, on October 8, the US President George W. Bush inked the concerned bill, already approved by the US Congress, into law, assuring that there will be no changes in fuel supply commitments as contained in the 123 agreement. He also specified that the agreement recognizes India’s right to reprocess spent fuel. With this over three decades of nuclear apartheid, forced on India by the international nuclear community, came to an end.

The story of Indo-US nuclear deal began about three years ago in July 2005, when the US President George W. Bush and India’s Prime-minister Dr. Man Mohan Singh agreed in principle to have civilian nuclear cooperation between both the countries, during the latter’s visit to Washington. The framework for this agreement was a joint statement (Annexure-3) made by both the leaders, under which India agreed to separate its civil and military nuclear facilities and place its civil nuclear

323 Ibid.
324 Ibid.
establishments under International Atomic Energy Agency (IAEA) safeguards and, in exchange, the United States agreed to work towards full nuclear cooperation with India.

Taking the above into account, India, on the basis of reciprocal actions by the US, will adopt the following approach:\footnote{www.dae.gov.in/press/sepplan.pdf}

(i) Thermal Power Reactors: India will identify and offer for safeguards 14 thermal power reactors between 2006 and 2014. This will include the 4 presently safeguarded reactors (TAPS 1&2, RAPS 1&2) and in addition KK 1&2 that are under construction. 8 other PHWRs, each of a capacity of 220MWe, will be offered. The overall plan will be as follows:

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<th>S.No.</th>
<th>Facility</th>
<th>Year offered for safeguards</th>
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<tr>
<td>1.</td>
<td>TAPS 1</td>
<td>2006</td>
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<td>RAPS 5</td>
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<td>RAPS 6</td>
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<td>9.</td>
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<td>10.</td>
<td>RAPS 4</td>
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<td>11.</td>
<td>KAPS 1</td>
<td>2012</td>
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<td>12.</td>
<td>KAPS 2</td>
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<td>13.</td>
<td>NAPS 1</td>
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<td>14.</td>
<td>NAPS 2</td>
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To further guard against any disruption of fuel supplies, the United States is prepared to take the following additional steps:

(i) The United States is willing to incorporate assurances regarding fuel supply in the bilateral U.S. – India agreement on peaceful uses of nuclear energy under Section 123 of the U.S. Atomic Energy Act, which would be submitted to the U.S. Congress.

(ii) The United States will join India in seeking to negotiate with the IAEA an India-specific fuel supply agreement.

(iii) The United States will support 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.

(iv) 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 countries such as Russia, France and the United Kingdom to pursue such measures as would restore fuel supply to India.

In light of the above understandings with the United States, an India-specific safeguards agreement will be negotiated between India and the IAEA providing for safeguards to guard against withdrawal of safeguarded nuclear material from civilian use at any time as well as providing for corrective measures that India may take to ensure uninterrupted operation of its civilian nuclear reactors in the event of disruption of foreign fuel supplies. Taking this into account, 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.

The above offer would, in effect, cover 14 out of the 22 thermal power reactors in operation or currently under construction to be placed under safeguards, and would raise the total installed Thermal Power capacity by MWe under safeguards from the present 19% to 65% by 2014.
**Fast Breeder Reactors:** India is not in a position to accept safeguards on the Prototype Fast Breeder Reactors (PRBR) and the Fast Breeder Test Reactor (FBTR), both located at Kalpakkam. The Fast Breeder Programme is at the R&D stage and its technology will take time to mature and reach an advanced stage of development.

**Future Reactors:** India has decided to place under safeguards all future civilian thermal power reactors and civilian breeder reactors, and the Government of India retains the sole right to determine such reactors as civilian.

**Research Reactors:** India will permanently shut down the CIRUS reactor, in 2010. It will also be prepared to shift the fuel core of the APSARA reactor that was purchased from France outside BARC and make the fuel core available to be placed under safeguards in 2010.

**Upstream Facilities:** The following upstream facilities would be identified and separated as civilian:

- Uranium Oxide Plant (Block A)
- Ceramic Fuel Fabrication Plant (Palletizing) (Block A)
- Ceramic Fuel Fabrication Plant (Assembly) (Block A)
- Enriched Uranium Oxide Plant
- Gadolinia Facility

The Heavy Water Production plants at Thal, Tuticorin and Hazira are proposed to be designated for civilian use between 2006-2009. We do not consider plants as relevant for safeguards purposes.

**Downstream facilities:** The following downstream facilities would be identified and separated as civilian:
• India is willing to accept safeguards in the ‘campaign’ mode after 2010 in respect of the Tarapur Power Reactor Fuel Reprocessing Plant.

• The Tarapur and Rajasthan ‘Away From Reactors’ spent fuel storage pools would be made available for safeguards with appropriate phasing between 2006-2009.

**Research Facilities**: India will declare the following facilities as civilian:

(a) Tata Institute of Fundamental research
(b) variable Energy Cyclotron Centre
(c) Saha Institute of Nuclear Physics
(d) Institute for Plasma Research
(e) Institute of Mathematics Science
(f) Institute of Physics
(g) Tata Memorial Centre
(h) Board of Radiation and Isotope Technology
(i) Harish Chandra Research Institute

These facilities are safeguards-irrelevant. It is our expectation that they will play a prominent role in international cooperation.


**Chronology of the Indo-US Nuclear Deal**[^326]

July 18, 2005: President Bush and Prime Minister Singh first announce their intention to enter into a nuclear agreement in Washington.

March 1, 2006: Bush visits India for first time.

March 3, 2006: Bush and Singh issue a joint statement on their growing strategic partnership, emphasising their agreement on civil nuclear cooperation.


July 28, 2006: In India left parties demand threadbare discussion on the issue in parliament.


December 18, 2006: President Bush signs into law congressional legislation on Indian atomic energy.

August 3, 2007: The text of the ‘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) is released by both governments.

July 18, 2008: Foreign Secretary Shiv Shankar Menon briefs IAEA Board of Governors and some NSG (Nuclear Supplier Group) countries in Vienna on the safeguards agreement.

July 25, 2008: IAEA secretariat briefs member states on India – specific safeguards agreement.

Aug. 1, 2008: IAEA Board of governors adopts India-specific safeguards agreement unanimously.
September 4-6, 2008: The NSG meets for the second time on the issue after the US comes up with a revised draft and grants waiver to India after marathon parleys.

September 27, 2008: House of Representatives approve the Indo-US nuclear deal, 298 members voted for the Bill while 117 voted against.

October 1, 2008: Senate approves the Indo-US civil nuclear deal with 86 votes for and 13 against.

October 4, 2008: Secretary of State Rice visits Delhi, India and the US unable to ink the nuclear agreement with New Delhi insisting that it would do so only after President Bush signs it into a low, an occasion when it expects certain misgivings to be cleared.

October 8, 2008: President Bush signs legislation to enact the landmark US-India civilian nuclear agreement.

October 10, 2008: The 123 agreement between India and US in finally operationalized between the two countries after the deal is signed by External Affairs Minister Pranab Mukherjee and his counterpart Secretary of State Condoleezza Rice in Washington DC.

The implications of the Indo-US nuclear deal are being continuously discussed by analysts and experts. As per views of Dr. A.N. Prasad, ex-Director of the Bhabha Atomic Research Institute, separation of civilian and military units under Indian conditions is next to impossible. G. Parthasarthy, Former Ambassador, and some others are however, happy with the deal.

Dismissing opposition charges that the deal would make India a client of the US, Prime Minister Dr. Manmohan Singh asserted that nuclear ‘Swaraj’ would be

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maintained and their was no reason for opposition leader Advani and others to worry about.\textsuperscript{329}

According the deal, India agrees to allow inspectors from the IAEA, the United Nations’ nuclear watchdog group, access to its civilian nuclear program. By March 2006, India promised to place fourteen of its twenty-two power reactors under IAEA safeguards permanently.\textsuperscript{330} Other than, India commits to strengthening the security of its nuclear arsenals. India works toward negotiating a ‘Fissile Material Cutoff Treaty’ (FMCT) with the United States banning the production of fissile material for weapons purposes. India agrees to prevent the spread of enrichment and reprocessing technologies to states that do not possess them and to support international effort.\textsuperscript{331}

India would be eligible to buy US dual-use nuclear technology, including materials and equipment that could be used to enrich uranium or reprocess plutonium, potentially creating the material for nuclear bombs. It would also receive imparted fuel for its nuclear reactors.\textsuperscript{332}

According to 123 agreement USA will provide the nuclear fuel for civilian nuclear reactor of India and along this nuclear technology will also by provided by USA. This agreement was signed between the two countries on March 2, 2006. The main provisions of this agreement are\textsuperscript{333}:

**Article I – Definition**

\textsuperscript{329} Ibid.
\textsuperscript{330} http://www.dae.gov.in
\textsuperscript{331} Ibid.
\textsuperscript{332} Ibid.
\textsuperscript{333} http://www.usembassy.gov.
This article is related to definitions of different words which are used in this agreement like, By product material, Component, Conversion, Dual-use Item, High enriched uranium, Non-nuclear material, Peaceful purposes etc.

Article 2 – Scope of Co-operation

This article says that, each party shall implement this agreement in accordance with its respective applicable treaties national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes.

Transfer of nuclear material, non-nuclear material, equipment, components and information under this agreement may be undertaken directly between the parties or through authorized persons.

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.

Article 3 – Transfer of Information

Transfer of information may be accomplished through reports, data banks and computer programs and any other means mutually agreed to by the parties.

This agreement does not require the transfer of any information regarding matters outside the scope of this agreement. Restricted data, as defined by each party, shall not be transferred under this agreement.

Article 4 – Nuclear Trade

The parties shall facilitate nuclear trade between themselves in the mutual interests of their respective industry, utilities and consumers.

The parties recognize that reliability of supplies is essential to ensure smooth and uninterrupted operation of nuclear facilities.
Article 5 – Transfer of Nuclear material, Non-nuclear Material, Equipment, Components and Related Technology

Sensitive nuclear technology, heavy water production technology, sensitive nuclear facilities, heavy water production facilities and major critical components of such facilities may be transferred under this agreement pursuant to an amendment to this agreement.

Natural or low enriched uranium may be transferred for use as fuel in reactor experiments and in reactors, for conversion or fabrication or for such other purposes as may be agreed to by the parties.

Article 6 – Nuclear Fuel Cycle Activities

Within the territorial jurisdiction of either party, enrichment up to 20 percent in the isotope 235 of uranium transferred pursuant to this agreement, as well as uranium used in or produced through the use of equipment so transferred, may be carried out.

Article 7 – Storage and Retransfers

Plutonium and Uranium 233 and high enriched uranium, transferred pursuant to this agreement or used in or produced through the use of material or equipment so transferred, may be stored in facilities that are at all times subject, as a minimum, to the levels of physical protection that are set out in IAEA document INFCIRC 225/REV 4 as it may be revised and accepted by the parties. Each party shall record such facilities on a list, made available to the other party. A party’s list shall be held confidential if that party so requests.

Article 8 – Physical Protection

Adequate physical protection shall be maintained with respect to nuclear material and equipment transferred pursuant to the agreement. To fulfill this requirement each party shall apply measures in accordance with (i) levels of physical
protection at least equivalent to the recommendations published in IAEA document INFCIRC/225/Rev. 4 entitled “The Physical Protection of Nuclear Material and Nuclear Facilities”, and in any subsequent revisions of that document agreed to by the parties, and (ii) the provisions of the 1980 convention on the physical protection of nuclear material and any amendments to the convention that enter into force for both parties.

**Article 9 – Peaceful Use**

Nuclear material, equipment and components transferred pursuant to this agreement and nuclear material and by-product material used in or produced through the use of any nuclear material, equipment, and components so transferred shall not be used by the recipient party for any clear explosive, for research on or development of any nuclear explosive device or for any military purpose.

**Article 10 – IAEA Safeguards**

According to this agreement, India agrees that nuclear material and equipment transferred to India by the United States of America shall be subject to safeguards in perpetuity in accordance with the India-specific safeguards agreement between India and the IAEA.

If the IAEA decides that the application of IAEA safeguards (Annexure-6) is no longer possible, the supplier and recipient should consult and agree on appropriate verification measures.

**Article 11 – Environmental Protection**

The parties shall cooperate in following the best practices for minimizing the impact on the environment from any radioactive, chemical or thermal contamination arising from peaceful nuclear activities under this agreement and in related matters of health and safety.

**Article 12 – Implementation of the Agreement**
This agreement shall be implemented in a manner designed to avoid hampering or delaying the nuclear activities in the territory of either party; to avoid interference is such activities; to be consistent with prudent management practices required for the safe conduct of such activities; to take full account of the long term requirements of the nuclear energy programs of the parties.

Article 13 – Consultations

The parties undertake to consult of the request of either party regarding the implementation of this agreement and the development of further cooperation in the field of peaceful uses of nuclear energy on a stable, reliable and predictable basis.

Each party shall endeavour to avoid taking any action that adversely affects cooperation envisaged under Article 2 of this Agreement.

Consultations under this article may be carried out by a joint committee specifically established for this purpose.

Article 14 – Termination and Cessation of Cooperation

Each party shall have the right to terminate this agreement prior to its expiration on one year’s written notice to the other party. A party giving notice of termination shall provide the reasons for seeking such termination.

Before this agreement is terminated, the parties shall consider the relevant circumstances and promptly hold consultations to address the reasons cited by the party seeking termination.

Article 15 – Settlement of Disputes

Any dispute concerning the interpretation or implementation of the provision of this agreement shall be promptly negotiated by the parties with a view to resolving that dispute.
**Article 16 – Entry into Force and Duration**

This agreement shall enter into force on the date on which the parties exchange diplomatic notes informing each other that they have completed all applicable requirements for its entry into force.

This agreement shall remain in force for a period of 40 years. It shall continue in force thereafter for additional periods of 10 years each.

**Article 17 – Administrative Arrangement**

The appropriate authorities of the parties shall establish an administrative arrangement in order to provide for the effective implementation of the provisions of this agreement.

Different views have been expressed by Indian politicians and US politicians. Indian opposition politicians think that the country’s independence and prestige have been sold out. Many US politicians are thinking that a gaping hole has been punched into the NPT regime.\(^\text{334}\) American non-proliferation lobbyists critical of the nuclear deal on four grounds\(^\text{335}\): First, the deal would weaken the fundamental goal of US non-proliferation policy – to prevent the spread of nuclear weapons beyond the five recognized nuclear weapon states under the NPT. Second, the problems of nuclear proliferation would be compounded in the face of current challenges posed by North Korea and Iran. Third, US-India cooperation could prompt other suppliers, like China, to justify its proliferation and support for Pakistan. Finally in the process of accommodating India in the larger international non-proliferation regime, the resulting for US in its efforts towards non-proliferation may be relatively less than gain for India.

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\(^{334}\) [http://www.southasiaanalysis.org/%5cpapers18%5paper.1740.html](http://www.southasiaanalysis.org/%5cpapers18%5paper.1740.html).

Many analysts in America look at the Indo-US nuclear deal positively as a step necessitated by the mutual interests of both the states in balancing the rising strategic power of China.\textsuperscript{336} However, there is a concern within some segments of the US Congress that the willingness of the Bush Administration to seek changes in the existing laws and multilateral agreements would undermine US national interests in regard to nuclear non-proliferation.\textsuperscript{337} As opposed to the preference of the Bush Administration to treat India as a responsible state with advanced nuclear technology, a counter view has emerged that sees the Indo-US nuclear deal as a compromise that by passes rules applicable to others.\textsuperscript{338}

Unable to persuade the Bush administration to renege the deal, the UN nuclear lobby group changes tactics and have started a campaign against it with the US congress.\textsuperscript{339}

The Bill approved by the US House requires the President to make several determinations to congress. Among these, the President must determine\textsuperscript{340}:

- That India has concluded a credible plan to separate civilian and military nuclear facilities;
- That India has concluded a safeguards agreement with the IAEA that will apply safeguards in perpetuity to India’s nuclear facilities, materials and programmes;


\textsuperscript{337} Rabet Einhorn, \textit{Should the US sell nuclear Technologies to India?}, November 10, 2005 at <http://yaleglobal.yale.edu/display.article?id=64877>.


\textsuperscript{339} http://www.southasiananalysis.org/%5Cpapers18%5C-paper1740.html.

\textsuperscript{340} The Tribune, July 28, 2006.
• That India is harmonising its export control laws and regulations to match those of the nuclear suppliers group; and

• That India is actively supporting US efforts to conclude a fissile material cut off treaty.

A critic of the deal, congressman Ed Markey, Massachusetts Democrat, called the plan a “historic failure” that “pours nuclear fuel on the fire of an India-Pakistan nuclear arms race.”

The “Ayatollahs of Non-proliferation” in the US launched a shrill campaign that the nuclear deal would compromise US commitments to global nuclear non-proliferation encourage countries like North Korea and Iran to go nuclear and destabilise the balance of power in Asia, as it would permit India to develop hundreds of nuclear warheads by getting across to important uranium ore for its power reactors.

US ambassador to India David C. Mulford to defended the nuclear deal. Speaking to members of the Indo-American Chamber of Commerce at the “3rd Indo-US Economic Summit to New Delhi, Ambassador Mulford said, “President Bush” India policy is premised on the belief that no other relationship will be more important in shaping the world of the 21st century.” Most recently, a key element of our cooperation in the US-India Civilian Nuclear Agreement. This will stimulate opportunities for the US and enhance our scientific cooperation.

The state department of U.S. also said, “Increased civil nuclear trade with India will create thousands of new jobs for the US economy while helping India to meet its

341 Ibid.
rising energy needs in an environmentally responsible way by reducing the growth of carbon emissions.”

What’s in it for the U.S.? Diplomatic detente: the deal removes a major political obstacle between the world’s most powerful democracy and its largest. These are commercial motives too. India plans to build many reactors in the coming decades; the US wants part of the business.

In favour of nuclear deal Henry Hyde said, “A major argument in favour, however, is that, a closer relationship with India is needed to offset the rising power of China. There is much merit to this view and it is clear that US will need to draw upon new resources to handle the challenges of the new century.”

Urging full support from his colleagues for the legislation, congressional Caucus of India and Indian Americans Founder Frank Pallone stressed India in a strong ally of the US and should be viewed as a credible and worthy nation of “our help and support.”

This deal is beneficial for US for many reasons:

- If India sets up 10 large size nuclear power plants, which is its intent in next 15 years. India will import technology hardware from U.S. for at least half of these projects.

- U.S. benefits immensely with India as a major military power. Forty percent of worlds’ oil and commerce passes through the Indian Ocean sea lanes. Those

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347 Ibid.
today are unprotected. Pirates in the Red-sea and at the Malacca straits prey on commerce. Indian cooperation will be helpful in keeping the sea-lanes free.348

In India, Nuclear Scientists, leftist parties and opposition BJP Nationalists have opposed the deal, citing concerns over national security, technological self-sufficiency and sovereignty. And their claim that the deal could have a negative impact on India’s independent foreign policy.349

The, then, leader of opposition in Lok Sabha L.K. Advani told reporters that the deal will close all strategic option for the country. It may help the U.S. but is not in India’s interest.350 Former Prime-minister Atal Bihari Vajpayee slammed the Indo-US nuclear deal saying the USA had “merely made promises” but India had made “long term and specific commitments” having security implications for the nation.351

Mr. Vajpayee said in a statement, “The Bush administration may have recognised India as a responsible state with advanced nuclear technology but it is far from recognising India as a legitimate and responsible nuclear weapon state.”352

BJP said that there was genuine concern that the deal would compel us to eschew nuclear testing for and also “cap” our nuclear weapons production at a relatively low level. There was also concern that the US would use the deal to pressurise us on foreign policy issues like Iran.353

Bhartiya Janta Party (BJP) changed its stand later. In a dramatic turnaround, the BJP in March, 2008 distanced itself from the left over the Indo-US nuclear deal with

348 http://www.southariaanalysis.org/%5(papers18%5(paper1740.html.
349 http://www.time.com/time/world/article/0,8599,1626023,00.html.
351 The Tribune, July 20, 2005.
352 Ibid.
353 The Tribune, July 27, 2006
L.K. Advani says that his party has no objection to the 123 agreement if the government amends the Indian Atomic Energy Act to ensure strategic independence and non-hindrance in reactor fuel supplies.\(^{354}\)

Advani, however, said that the proposed nuclear deal in the present form was an agreement between “unequal” and the BJP objected to such “strategic subservience.”\(^{355}\)

Advani said his party has pleaded that international agreements which impinge upon India’s strategic independence or territorial integrity should be ratified by parliament and an amendment to this effect must be made in the Constitution.\(^{356}\)

The United Nationalist Progressive Alliance (UNPA) was divided over support of the nuclear deal. While the Samajwadi Party supported it after consultations with Abdul Kalam, the other members of the UNPA led by the Telugu Desam Party (TDP) opposed it saying that the deal is against India’s interest. The SP was eventually suspended from the UNPA.

The Bahujan Samaj Party (BSP) also opposed the nuclear deal, saying that it was anti-Muslim. The party joined hands with the Left Front and the TDP in voting against the government in Parliament on the nuclear deal.

The primary opposition to the nuclear deal in India, however, comes from the Communist Party of India (Marxist) (CPI(M)) and its parliamentary allies Communist Party of India, Revolutionary Socialist Party (India), and All India forward Bloc. The CPI (M), an external parliamentary supporter of government, alleged that the deal would undermine the sovereignty of India’s foreign policy and also claimed that the Indian government was hiding certain clauses of the deal, which would harm India’s

\(^{354}\) Indian Express, March 12, 2008.

\(^{355}\) Ibid.

\(^{356}\) Ibid.
indigenous nuclear program, from the media.\textsuperscript{357} On July 9, 2008, the left front withdrew support to the government reducing its strength to 276 in the Lok Sabha.\textsuperscript{358}

The United Progressive Alliance-Left committee has been tasked to examine America’s new Hyde Act and the Indo-U.S. 123 Agreement. While the conditions-laden Hyde Act does not disguise its intent to regulate India’s conduct in areas unrelated to civil nuclear cooperation, the 123 Agreement raises at least 15 troubling questions, which the Government ought to answer.\textsuperscript{359}

(1) Despite America’s enactment of a new domestic law in 1978 to retroactively rewrite its obligations with India over Tarapur, why has New Delhi allowed the primacy of “national laws” to be upheld in the new 123 Agreement? India has no national law governing cooperation with any nation, but the U.S. today has an India-specific internal law that expressly defines the limits and conditions of cooperation.

In particular, why did India agree to omit a standard provision in bilateral agreements that uphold a cardinal principle of international law by debarring either party from invoking domestic law to justify a breach of obligations? Article 2(1) of the Indo-U.S. Agreement is identical to Article 2(1) of the China-U.S. 123 Agreement except that the following qualifying final sentence has been dropped – “The parties recognise, with respect to the observance of this Agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law is justification for its failure to perform a treaty”.

(2) Why is there no provision for an arbitral tribunal in the 123 Agreement, even though America has agreed in 123 accords with other states to establish such a tribunal in case of a dispute? Why does the Agreement’s Article 15, titled “Settlement

\textsuperscript{357} Ibid.
\textsuperscript{358} Ibid.
\textsuperscript{359} www.hinduonnet.com/thehindu/thecrip.....
of Disputes,” in a departure from this practice, not provide for arbitration, the applicability of the principles of international law, or the setting up of a tribunal? The Japan – U.S. 123 Agreement, for example, protects Tokyo’s interests through Article 14, which states: “If any dispute arising out of the interpretation or application of this Agreement is not settled by negotiation, mediation, conciliation or other similar procedure, the parties may agree to submit such dispute to an arbitral tribunal.”

(3) Why has India, on issues of vital concern, settled merely for sugar-coated but worthless “consolations” (with no provision for arriving at a mutually acceptable outcome) even while implicitly granting the U.S. the right to take all final decisions? Why did New Delhi not heed the lesson from the 1963 Indo-U.S. 123 Agreement, which, despite providing for consolations and for taking into account the economic and other effects of any precipitate action, failed to stop the U.S. from unilaterally walking out of its obligations?

(4) Why had India bent backwards to accept terms that go beyond even the requirements of any U.S. law? For example, why had India granted the U.S. an open-ended right to suspend or terminate cooperation at will, when American law itself sets limits on such action? The U.S. Atomic Energy Act (AEC), as amended in 1978, specifies precise triggers for cessation of exports: a nuclear test; or a material branch of international safeguards; contravention of the terms of a 123 accord; or proliferation-related transfers.

And doesn’t the accord’s Article 14(2) place India at the mercy of the supplier-state by stating that the “party seeking termination has the right to cease further cooperation under this Agreement if it determines that a mutually acceptable resolution of outstanding issues has not been possible or one-year notice period, the U.S. is empowered to suspend all cooperation forthwith, without having to institute an alternative supplier. The only requirement is that a “party giving notice of termination shall provide the reasons for seeking such termination.” But with the reasons for
termination not defined in the Agreement unlike, say, the Japan-U.S. accord, the cause can be any.

(5) Similarly, why has New Delhi granted an unfettered any uninfringeable right to the U.S. to demand the return of all exported items and materials if it were to held India in breach on the stipulated conditions? Under Section 123(a) (4) of the AEC, America’s “right of return” is limited to two specific causes – “if the cooperating party detonates a nuclear-explosive device, or terminates or abrogates an agreement providing for IAEA safeguards.” So, why has Indian charitably granted the U.S. carte blanche to cite any reason to demand a full return?

(6) Why has India made concessions beyond its Separation Plan merely to obtain an empty conceptual entitlement to reprocess, instead of securing an operational right to reprocess, just as Japan had won though an implementing agreement accompanying its 123 accord with the U.S.?

(7) Indeed, why had India agreed not only to build an expensive new reprocessing facility that meets U.S. design expectations, but also, as the Prime Minister admitted in Parliament on August 13, to route all “foreign nuclear material” through that plant? How could New Delhi grant Washington a say in where it reprocesses spent fuel generated from imports from countries other than the U.S.? Also, given the frequent outages and breakdowns in any reprocessing plant due to its handing of radioactive spent fuel, why has India limited its options by agreeing to route all foreign nuclear material through a single facility instead of also using the existing PREFRE plant under safeguards, as called for under the Separation Plan?

(8) Having agreed to build this special reprocessing facility just to meet the U.S. demand, why has India placed itself in an unenviable position on the plant by settling for less than the “full cooperation” that the original deal promised – it will bear the construction costs but will not have the right to import any components for the safeguard facility? Contrary to the Prime Minister’s August 13 statement in Parliament
that the U.S. has a “longstanding policy” not to make civil reprocessing and enrichment transfers, hasn’t Washington exported reprocessing equipment to Japan under the permissible terms of its 123 Agreement with Tokyo? And doesn’t the U.S. have ongoing laser enrichment cooperation with Australia?

(9) With only two of the deals five contemplated stages completed, why has New Delhi agree, through the 123 Agreement, to a sixth phase to be added – a separate agreement on reprocessing-related “arrangements and procedures” under Section 131 of the AEC? By arming the U.S. with an effective veto on reprocessing until such time New Delhi has satisfied it first by building a new “state-of-the-art” facility and then by working out the subsequent arrangements, doesn’t India risk getting into a bigger mess than over Tarapur, whose spent fuel has been accumulating for 38 years?

(10) After expending considerable resources of its own to lobby members of the U.S. Congress to pass the enabling legislation on the deal (the Hyde Act), has India factored in the foreign-policy implications of having now to wage tow more campaigns on Capitol Hill – securing congressional approval first of the 123 agreement and then of a special 131 agreement? Won’t these battles subject Indian foreign policy to congressional scrutiny and demands over an extended time?

(11) Why has the Government, in breach of its assurances to Parliament, agreed to terms that provide for no enforceable link between perpetual fuel supply and perpetual international inspections? When the Prime Minister, in agreeing to permanent external inspections, went back on his original pledge to accept only “the same responsibilities and obligations as the United States,” he assured Parliament in March 2006 that the perpetual safeguards would be tied to perpetual fuel supply. But does not the 123 Agreement explicitly exclude such a link and amount to another breach of promise? The Agreement not only denies India any such linkage, but also mandates that New Delhi’s safeguards obligation are irreversible to the extent that they would survive even if the accord were unilaterally terminated.
Furthermore, the Agreement renders the reference to “corrective measures” entirely cosmetic by blocking India ever undertaking real correction – the ending of outside inspections in response to a fuel supply cut-off. Why has New Delhi gone along with this?

(12) In addition to international inspections, doesn’t the Agreement permit U.S. end-use verification by requiring in its Article 12(3) that where cooperation “requires visits of experts, the parties shall facilitate entry of the experts to their territory and their stay therein consistent with national laws, regulations and practices”? In doing so, doesn’t it meet the Hyde Act’s Section 104(d)(5)(B)(i) stipulation for “end-use monitoring,” which — along with the Act’s Section 109 requirement for an access-gaining programme “with scientists” in India — is intended to facilitate collection and submission of detailed information on Indian nuclear activities to the U.S. Congress on a yearly basis?

13. Why has New Delhi accepted a provision that makes the Agreement indefinite in nature? The U.S. currently has in force 23 bilateral agreements with other states under Section 123, but most stipulate expiry in 30 years. But Article 16(2) of the Agreement with India specifies that the agreement is for an initial term of 40 years but is to continue in force ad infinitum in 10-year intervals until either party elects to end the accord. The Agreement also lacks a safety measure built into the Japan-U.S. accord, which provides that at the request of either party, the accord can by mutual consent be replaced “with a new agreement.” In contrast, if international circumstances change, India can seek only an amendment to the Agreement.

14. Is it judicious for Indian officials to suggest, even if obliquely, that the 123 Agreement would override the grating India-specific terms and conditions of the Hyde Act? How can a 123 Agreement — a requirement only under American law — supersede U.S. law? Haven’t U.S. officials publicly made clear that the 123 Agreement merely codifies technical rules of nuclear commerce and cannot supplant the Hyde
Act’s provisions? Isn’t New Delhi aware of America’s consistent legal position that a 123 Agreement with any nation carries no force under the 1969 Vienna Convention on the Law of Treaties? Or has New Delhi forgotten the legal stance the U.S. took in the 1970s — to India’s acute discomfiture — that such an accord is liable to change in response to the evolution of American law?

15. Why has New Delhi, in spite of the Hyde Act’s clear-cut stipulations, concluded an ambiguously formulated 123 Agreement? The U.S. can easily live with this Agreement for two reasons — the ambiguities relate only to issues of concern to India, and the accord confers enforceable rights only on the supplier-state.

CPI National Secretary D. Raja said, “There is a wide gap between Indian on the US understanding of the deal”. He said, “While Washington considered 123 agreement to be governed by the Hyde Act, it is Atomic Energy Act and other American claws, New Delhi is of the view that only this agreement is binding.” He cautioned that American nuclear companies were waiting to tap the massive Indian market, which would help them revive financially, and added “the congress-led UPA government helping them in this.”

CPM leader Sita Ram Yechury questioned the low cost of nuclear energy he asked what is the total cost of nuclear energy per Megawatt produced by imported reactors including the cost of import, etc. A rough estimate puts the figure around Rs 11 crore per Megawatt. Thus, 30,000 Megawatt of nuclear power generation from imported nuclear reactors would mean a cost of Rs. 3,30,000 crore. Comparing this figure with the cost *of the best of thermal energy, the best of technologies to control pollution, etc., per Megawatt, it will come to around Rs 4 crore. There is no dearth of coal in India. According to the Planning Commission estimates, till 2050, the major source of

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361 Ibid.
our energy production will be coal-based. So, there is no reason why we really have to rely on nuclear energy. We can produce the same 30,000 Megawatts, using thermal energy at the cost of Rs. 1,20,000 crore.\textsuperscript{362}

Looking at the other alternative of hydroelectric power generation – there is no dearth of water in India. On the contrary, every year, hundreds and thousands of crores of property is devastated and lakhs of people die because of floods. We can tap these water resources. Our national hydroelectric corporation tells us that we today utilize only 20 per cent of our potential for hydroelectricity. Now keeping all our environmental concerns in mind, the cost of one Megawatt of hydroelectricity would be Rs. 3 crore. Thus the same 30,000 Megawatts can be obtained in Rs. 90,000 crore. Alternatively, if we consider gas, we now have a discovery of a huge gas basin in Krishna Godavari. We are now talking about huge gas reserves on which the whole of the northeast is floating. We are talking of the gas supply from Iran. For this gas, again, we do not have to go anywhere. So the question that we are asking is not whether energy augmentation is needed. We fully agree that energy augmentation is a must, but the point that we want to emphasize is that energy augmentation has to be achieved using our own domestic resources, which means all the multiplied effects, all the downstream and upstream industries that will follow, will be within India.

Secondly, Yechury argued that we will have complete civilian nuclear cooperation. The 123 Agreement specifically says that as far as reprocessing and enrichment are concerned, these deal use technologies are prohibited to be transferred to India. So, where is this complete scientific cooperation leading us to?\textsuperscript{363}

The third objection is that with the IAEA, we entered into a perpetual safeguard agreement. And we are told that with this 123 Agreement, we are actually bringing India back into the non-proliferation regime. But now with the permanent safeguards


\textsuperscript{363} Ibid
that India will have, 90 per cent of India’s reactors will be under the inspections of the IAEA. We are entering into the case inspections in order to facilitate this 123 Agreement. If this breaks down, why should we continue with that? Why should he IAEA and the government always cooperate? 364

From the conflicts point of view, of course, it is not. And here, we have to draw attention of the whole world and ourselves. The 123 Agreement exists between, let us say, the U.S. and China and in case of a dispute between these two countries, the law that would peril to take care of the issue would be an international law. For India, in case of a dispute on any of these issues, the law that will finally prevail would be the U.S. domestic law which is the Hyde Act. If china has an international law then why not for us? What does the 123 Agreement in Japan say? That is case of a dispute, an Arbitration Council will be set up to resolve the dispute, with one representative from Japan, one from the US, and a third one from a third country agreed upon by both and the Chairperson of this Arbitration Council whose verdict is to be accepted by both. If Japan has an Arbitration Council and for China, it is as per an international law; for India, please tell us, why it should be an US domestic law?

The Polit Bureau of the Communist Party of India (Marxist) met in New Delhi on August 17 and 18, 2007. It unanimously adopted the firm opinion that going ahead with this agreement will not serve India’s interests. 365 The agreement should be seen in the light of the Hyde Act and in the context of the wider implications of India being bound into a strategic alliance with the United States and its adverse consequences for an independent foreign policy, sovereignty and the economic interests of the people. 366

CPI (M) criticised the Hyde Act passed by the US Congress. CPI (M) general-secretary Prakash Karat told in a press conference, “The US government has not taken

364 Ibid


366 Ibid.
seriously the assurances given by Prime Minister Manmohan Singh to Parliament on August 17, 2006, we demand the government to renegotiate the deal based on the PM’s nine-point assurances; strictly not on the Act passed by the US.” 367 “The US Act goes beyond the Indo-US nuclear deal. It is an attempt to bind India. It will affect our autonomy”, Karat said. 368

The left parties say that the United States has been going about stating the obvious strategic and commercial benefits that will accrue from the nuclear deal. Apart from the sale of nuclear reactors, the U.S. is mounting pressure of India for military contracts to purchase fighters planes, naval ships, radar and artillery. 369

Our many nuclear scientists also have opposed the deal. A.N. Prasad, Former Director of the Bhabha Atomic Research Centre (BARC) told that this agreement is totally against national interest. I shudder to think how we could have conceded such a thing. India would now face the prospect of the FBR programme being undermined and the cast of its nuclear weapons programme dramatically escalating. 370 A.N. Prasad said, the U.S. has already shifted the goalposts and does not treat India as a equal partner in the deal. 371 He clarified that as you go deep into the details of the agreement, it becomes quite clear that as far as the US is concerned, the deal is more to meet at least three objectives, viz., (1) bring India into the mainstream of global non-proliferation agenda by taking all possible measures to cap and work for a roll back of its strategic programme; (2) exploit the Indian market for nuclear energy at the same time using its resources to revive their nuclear industry which is dormant since the late 1970s; and (3)

368 Ibid.
369 http://www.pragoti.org/bn/print/119
370 The Hindu, July 20, 2005.
make India a strategic partner in this part of the world in line with their foreign policy objectives.  

He told that there is a systematic attempt on the part of the supporters of the deal to underplay the significance of the consequences of India were to conduct a nuclear test in supreme national interest. While there is nothing in the deal which legally prevents us from going in for a test if the situation so demands, the US law is very clear that the deal will be off and they reserve the right of return of all materials and equipment supplied. After investing billions of dollars in importing reactors and building huge infrastructure, which government in future will be able to take a decision in favour of tests and face economic catastrophe? For all practical purposes, the option of testing will be Energy Regulatory Board, consider the drawbacks of imported reactors. First, the exorbitant casts – it would cast us about Rs. 10.5 crore per Megawatt as against Rs. 4 crore per Megawatt for thermal energy or other coal-based systems. Our own national reactors are casting about Rs. 7 crores per Megawatt but even at that cast, we have to support the national reactor programme that is the only way we are going to get plutonium by shifting to thorium reactors. Hopefully, when we stabilize in the thorium route, our nuclear costs will start dropping.

He raised another major question concerns reliability. We all saw what happened in Bhopal – a foreign company almost got away after the accident in which thousands of our people died. The foreign reactor manufacturers who are coming into the country have already started arguing that they want a liability-free environment to set-up the reactors.

373 Ibid.
374 Ibid.
375 Ibid.
Anil Kakodkar, Chairman of the Atomic Energy Commission, in his interview to ‘The Hindu’, says that if as good as dead and remains only in theory.\(^{376}\)

Former Atomic Energy Commission Chairman M.R. Srinivasan feels the provisions of the US law are “intrusive” and makes one feel that Washington is treating India as a “subservient entity” and not as a sovereign, responsive nuclear power.\(^{377}\) Although Srinivasan favours the deal for access to nuclear energy to meet the country’s power demand in the future.\(^{378}\)

According to P.R. Chari of the institute of peace and conflict studies, the BARC reactors that produce weapon-grade plutonium also facilitate a significant amount of civilian research and activity, such as the production of radio isotopes, firewalling military and civilian nuclear activities would mean denying scientists from university departments across the country access to BARC research facilities.\(^{379}\)

A.G. Gopalakrishnan, Atomic all our concerns are met, certainly it is a win-win situation for us.\(^{380}\) He says that we discussed in such a manner that civil nuclear agreement does not impinge on the country’s strategic programme.\(^{381}\) On the assurance of fuel supply he says that separation plan clearly states there would be multi-layered assurances for fuel supplies and that includes the ability to build a stockpile to meet the lifetime requirements of the reactors.\(^{382}\)

\(^{376}\) *Ibid.*


\(^{378}\) The Hindu, September 3, 2007.

\(^{379}\) The Hindu, 20 July 2005.

\(^{380}\) The Hindu, January 17, 2007.

\(^{381}\) *Ibid.*

\(^{382}\) *Ibid.*
P.K. Iyengar, Former Chairman of India’s Atomic Energy Commission, told reporters that the bill indirectly makes India party to the NPT, the fissile material cut off treaty and the Comprehensive Test Ban Treaty (CTBT) even though India has always refused to sign them. Iyengar is particularly annoyed by the suggestion that Washington terminate civilian cooperation of India conducts a nuclear test. “It is impossible to have a minimum credible deterrent without conducting nuclear tests”, he said.

For India, nuclear energy has become critical in meeting its needs in the medium term. Right now, the country is heavily dependent on oil imported from West Asia and the increased use of coal would run up against the issue of green-house gases and global warming. It would need to expand its nuclear energy programme from 2400 MW to 40,000 MW in the medium term.

Even an indigenous nuclear programme, however, will run up against the shortage of fuel, domestic nuclear fuel supplies can support no more than 10,000 MW in the immediate future. Supplies of nuclear fuel from outside have become critical to meet the need of the expansion programme.

The External Affairs Minister, P. Mukerjee, described the agreement as the first step to India’s cooperation with the rest of the world in civil nuclear field.

The critics of nuclear deal raised the questions of sovereign right of nuclear test, Supremacy of Hyde Act over 123 agreement, uninterrupted fuel supply and independency of Indian foreign policy.

http://www.time.com/time/woprld/article/0,85991568945,00.html.

Ibid.


Ibid.

Indian Express, Oct. 11, 2008.
Indian government tried to remove all respect of nuclear deal at many occasions. Intervening during the question and answer on the “Nuclear Energy deal with U.S.”, Prime-minister Manmohan Singh said: “I wish to assure the house that we will never compromise in any manner which is inconsistent with the provisions of the joint statement of July 18, 2005.” The Prime-minister also assured the nation that there would be “no compromise” on national interest and he was trying to ensure “utmost transparency” and overall “accountability” in the deal with U.S.

When other members wanted to know if this deal required Indian to change its foreign policy, Minister of State for External Affairs, Anand Sharma assured the house that this agreement was restricted to civil nuclear energy alone.

In an effort to ensure that the nuclear deal does not crumble of. India tests a nuclear device, both New Delhi and Washington have agreed to a one year notice period before the agreement can be terminated. Article 14.1 of the agreement states: “Either party shall have the right to terminate this agreement, prior to its expiration (40 years), on one year’s written notice to the other party.” That year will be used for “consultations” to understand the security considerations behind such a decision – in other words, the US will factor in why India had to test.

Some critics alleged that the US has shifted the goalpost. The 123 agreement passed by the US Congress have been changed. Many provision of this bill are against July 18 (2005) joint statement.

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388 Indian Express, July 27, 2006
389 The Tribune, July 27, 2006
390 Indian Express, July 27, 2006
391 http://www.indianexpress.com/news/...10
392 Indian Express, 3 Aug, 2007
The apprehensions expressed by opposition and the congress-led UPA’s left allies that the US was sifting the goalpost and the legislation would harm India’s interests. The Prime-minister said he had spoken about these concerns to US President George W. Bush. Mr. Bush had assured that the “US administration will do all it can to see that the parameters – the goalpost of July 18, 2005 – are not tempered with.”

Mr. Geoff Pyatt, charged affairs of the US Embassy here said: “I will challenge anybody to find a single element (in the Bill passed by the US House) that is not there in the July 18, 2005 US-India joint statement.”

Mr. Pyatt allayed fears that the deal would sound the death knell of India’s long term strategic programme and observe that: (i) The US legislation imposes no constraint on India with regard to production of fissile material. (ii) There is no obligation on part of India to report to the US Congress about its strategic nuclear activities. (iii) India is not a target of the US non-proliferation efforts. On the contrary Washington looks upon India as a partner.

Speaking at the White House, G.W. Bush said the legislation he was about to sign made no changes to the terms of the 123 agreement he had submitted to congress.

In the answer of a question to Indian Express C. Raja Mohan said under the 123 agreement, India has neither given up its right to test nor agreed to sign the Comprehensive Test Ban treaty, which prohibits all nuclear testing.

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394 Ibid.
395 Ibid.
397 Indian Express, 3 Aug. 2007.
Fuel supply is also a major concern for India. Because India has a better experience of Tarapur. On the issue of fuel supply, Anil Kakodkar, Chairman of the Atomic Energy Commission, said that it is a crucial matter. If US does not fulfill its obligation of fuel supply there were serious concerns because we have this Tarapur example glaring at us.\(^\text{398}\)

President George W. Bush allayed India’s concerns about nuclear fuel supply assurances, saying the legislation he was signing “does not change the fuel assurance commitments that the United States government has made to the Government of India, as recorded in the 123 agreement.”\(^\text{399}\)

According to C. Raja Mohan, after its bitter experience with the Tarapur nuclear power station, when Washington cut-off fuel supply after the 1974 test, New Delhi has insisted on getting iron-clad guarantees on fuel supplies. It has successfully got them written into the 123 agreement sections 2.2(3), 4.1, 5.6, 14.5 and 14.8 deal with various dimensions of fuel supply guarantees. They fully commit the U.S. to help India develop a “strategic reserve” of nuclear fuel for the entire lifetime of the reactors.\(^\text{400}\)

The US also promises to “create conditions” for India’s “assured and full” access to the international fuel market.\(^\text{401}\) During a state visit to India in November 2010, U.S. President Barack Obama announced U.S. support for India's membership in the Nuclear Suppliers group.

Nuclear Suppliers Group (NSG) is a multinational body concerned with reducing nuclear proliferation by controlling the export and re-transfer of materials that may be applicable to nuclear development and by improving safeguards and protection

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\(^{398}\) The Hindu, January 27, 2007.

\(^{399}\) The Tribune, Oct. 10, 2008.

\(^{400}\) Indian Express, 4 Aug. 2007.

\(^{401}\) Ibid.
on existing materials. It was founded in 1974 in response to the Indian nuclear test earlier in that year. The test demonstrated that certain non-weapons specific nuclear technology could be readily turned to weapons development. Nations already signatories of the Nuclear Non-Proliferation Treaty (NPT) saw the need to further limit the export of nuclear equipment, materials or technology.\(^{402}\)

A series of meetings in London from 1975 to 1978 resulted in agreements on the guidelines for export. Listed items could only be exported to non-nuclear states if certain International Atomic Energy Agency safeguards were agreed to or if exceptional circumstances relating to safety existed.

The name of the "London Club" was due to the series of meetings in London. It has also been referred to as the London Group, or the London Suppliers Group.

The NSG did not meet again until 1991. The revelations about the Iraqi weapons program following the first Gulf War led to a tightening of the export of so-called dual-use equipment. At the first meeting since 1978, held at The Hague in March 1991, the twenty-six members agreed to the changes, which were published as the "Dual-use List" in 1992, and also to the extension of the original list. A regular series of plenary meetings was also arranged as was the regular updating of the two key lists.

In July 2006, the United States Congress amended U.S. law to accommodate civilian nuclear trade with India. A meeting of NSG members on 21–22 August 2008 on an India-specific exemption to the Guidelines was inconclusive. Several member countries, including Austria, Switzerland, Norway, Ireland, and New Zealand, expressed reservations about the lack of conditions in the proposed exemption. In another meeting on September 6, 2008, the NSG members agreed to grant India a "clean waiver" from its existing rules, which forbid nuclear trade with a country which has not signed the Nuclear Non-Proliferation Treaty (NPT). The NSG's

\(^{402}\) http://en.wikipedia.org/wiki/Nuclear_Suppliers_Group
decision came after three days of intense U.S. diplomacy. The approval was based on a formal pledge by India stating that it would not share sensitive nuclear technology or material with others and will uphold its voluntary moratorium on testing nuclear weapons. The pledge was contained in a crucial statement issued during the NSG meeting by India outlining the country's disarmament and nonproliferation policies.

Many statements of American official create the environment of apprehensions. On the issue of India’s foreign policy, U.S. lawmakers led by Democratic congress man Tom Lantos wrote to Prime Minister Manmohan Singh warning that India’s close relations with Iran could negatively impact the future of the deal.403

Daryal Kimball, executive director of the Arms Control Association, said that “Bush’s comments do not in any way negate the U.S. Law (including the Atomic Energy Act, the Hyde Act, or H.R. 7081) or his own administration’s statements that make it absolutely clear that if India resumes testing, US nuclear trade and fuel supply assurances shall be terminated and the 123 agreement is, as Sen (Richard) Lugor put it, ‘over’.”404

Public interest litigation was also filed against Indo-US nuclear deal. This PIL was filed by Anil Chawla, who cited how the deal, which is based on the US Hyde Act, tends to weaken the country’s sovereignty and legislative abilities.405 Taking note of the concerns raised by the petition, the bench headed by Chief Justice of India K.G. Balakrishnan said, “we do not say these are minor things. These are serious matters.” The court formed the view that an order directing the deal to be placed before

403 http://www.time.com/time/world/article/0,8599,1626023,00.html.
parliament was not possible since it is a matter of parliamentary proceeding which is to be regulated by the minister for parliamentary affairs.  

Hyde Act

The Henry J. Hyde United States-India peaceful Atomic Energy Co-operation Act of 2008 also known as the Hyde Act, (Annexure-4) is the U.S. domestic law that modifies the requirements of Section 123 of the U.S. Atomic Energy Act 1954 to permit nuclear cooperation with India and in particular to negotiate a 123 agreement to operationalize the 2005 joint statement. As a domestic U.S. law, the Hyde Act is binding on the United States. The Hyde Act cannot be binding on India’s sovereign decisions although it can be construed as prescriptive for future U.S. reactions. As per the Vienna Convention, an international treaty such as the 123 agreement cannot be superseded by an internal law such as the Hyde Act.

The many provisions of Hyde Act are against the joint statement of 2005. There are much debate in our country that 123 agreement will supersede the Hyde Act or Hyde Act will supersede the 123 agreement. The main controversial provisions of the Hyde Act are:

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406 Ibid.
410 Mainstream, Vol. XLVI, No. 43, mainstreamweekly.net/article983.html.
(i) that in the event of nuclear testing by India, the cooperation would be terminated (of course, the US would consider if the testing was done under exceptional international circumstances);

(ii) that the termination would be accompanied by measures for getting back the equipment, the nuclear fuels and other materials supplied by the USA;

(iii) that the US would make sure that India does not try to build fuel reserves beyond; the minimum needed for operational purposes;

(iv) that the US would ensure that India does not generate plutonium, even from plants excluded from IAEA safeguards (inspection).

(v) that the US President would have to certify to the US congress every year that India is behaving in a manner “conducive to the US interests.”

Siddharth Varadarajan clarifies in ‘The Hindu’: “Some commentators have noted that the Indian 123 agreement does not contain a sentence found in article 2.1 of China’s 123 agreement with the U.S. namely that “the parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”: Thus it is felt the U.S. administration can always claim the Hyde Act’s restrictions trump the 123 agreement’s more generous commitments. 

Taking another step towards the implementation of the landmark and rather contentious Indo-US civil nuclear deal, the two countries have signed a pact on the nuclear fuel reprocessing arrangements.

Indian Ambassador to the US Meera Shankar and the US under secretary of state for political affairs Bill Burns signed the agreement on July 30, 2010.


412 http://www.outlookindia.com
It enables reprocessing by India of U.S.-obligated nuclear material under IAEA safeguards and will facilitate participation by US firms in India’s rapidly expanding civil nuclear energy sector, the statement said by the State Department.\textsuperscript{413}

Upon entry into force, the arrangements and procedures will enable reprocessing by India of the US obligated nuclear material at a new rational reprocessing facility to be established by India, dedicated to the reprocessing of safeguarded nuclear material under international Atomic Energy Agency safeguards.\textsuperscript{414} Previously US had extended such reprocessing consent only to the European Union (EURATOM) and Japan.

India says fuel purchased abroad for civilian purposes will not be diverted for military uses. But some in the US fear that accepting India’s demand for reprocessing right and technology will increase its strategic nuclear capabilities.\textsuperscript{415}

The State Department corroborated the commitment on the U.S. side, noting that the reprocessing arrangement, negotiated and concluded under President Obama, reflected the administration’s “strong commitment to building successfully on the landmark U.S.-India Civil Nuclear Cooperation initiative.”\textsuperscript{416} It was also a prerequisite for U.S. nuclear fuel suppliers to conduct business with India, a spokesperson noted.\textsuperscript{417}

The State Department spokesman said that increased civil nuclear trade with India would create thousands of new jobs for the U.S. economy and also help India to meet its rising energy needs in an environmentally, responsible way by reducing the growth of carbon emissions.\textsuperscript{418}

\textsuperscript{413} Ibid.
\textsuperscript{414} Ibid.
\textsuperscript{415} http://www.time.com/.../0,8816,1626023,00.html.
\textsuperscript{416} The Hindu, July 31, 2010.
\textsuperscript{417} Ibid.
\textsuperscript{418} Ibid.
Indian ambassador to US Meera Shankar reiterated that the government of India had an ambitious programme for development of civil nuclear energy to meet its growing energy needs, noting that its target was “to increase our installed capacity more than seven fold to 35000 MWe (92) by the year 2022, and to 60,000 MWe by 2032.”\textsuperscript{419}

In this context the government had already designed two sites for nuclear power plants to be established in cooperation with the U.S. and the companies of the two countries were now engaged in discussions, she noted.\textsuperscript{420}

\textsuperscript{419} http://www.thehindu.com/news/.../article544164.ec.

\textsuperscript{420} Ibid.
The Civil Liability for nuclear Damage Bill 2010

The civil liability for nuclear Damage Bill 2010 is passed by both houses of Indian parliament. The Bill aims to provide a civil liability for nuclear damage and prompt compensation to the victims of a nuclear incident through a no fault liability to the operator, appointment of claims commissioner, establishment of nuclear damage claims commission and for matters connected therewith or incidental thereto.421

This is one of the last steps needed to activate the 2008 Indo-U.S. civilian nuclear agreement as the United State nuclear reactor manufacturing companies will require the liability bill to get insurance in their home state. After this bill becomes an act, India will become a member of the international convention on liability in the civil nuclear arena.422

Highlights of the Bill423

The civil liability for nuclear damage bill 2010 fixes liability for nuclear damage and specifies procedures for compensating victims.

- The Bill fixes no-fault liability on operators and gives them a right of recourse against certain persons. It caps the liability of the operator at Rs. 500 crore. For damage exceeding this amount and up to 300 million SDR, the central government will be liable.
- All operators (except the central government) need to take insurance or provide financial security to cover their liability.
- For facilities owned by the government, the entire liability upto 300 million SDR will be borne by the government.

421 The Hindu (New Delhi), Business Line, August 31, 2010.
423 http://www.presindia.org/index.php?name=sections...
• The Bill specifies who can claim compensation and the authorities who will assess and award compensation for nuclear damage.

• Those not complying with the provisions of the Bill can be penalised.

The government has encountered fierce opposition when trying to push this bill through parliament. The opposition believes the bill is being pushed through due to US pressure though this is denied by the government.  

On allegations that the bill was aimed at benefiting US companies, Prime-minister Manmohan Singh said “To say that has been brought to promote American interests, to promote American cooperation, I think, this is far from the truth”, He said such charges against him were not new as he had faced these even in 1992 when he presented the Budget as the then Finance Minister.

“To say we have anyway compromised India’s national interest will be a travesty of facts”, Manmohan Singh said apparently addressing the left parties which have alleged that the bill had been drafted to suit American companies.

The US has expressed apprehensions over amendments to the Civil Liability for Nuclear Damages Bill. US ambassador to India Timathy Roemer spoke exclusively to ‘Headlines Today’ over Washington’s reservations on the bill that was recently passed with some amendments by both houses of parliament.


India Today, August 25, 2010
http://indiatoday.intoday.in/site/story

Ibid.

India Today, September 8, 2010
http://indiatoday.intoday.in/site/story.
The bill is in present form, makes the suppliers of nuclear equipment potentially liable in case of nuclear accidents at the sites.\textsuperscript{428}

According to the provisions in the draft legislation, the operator would not be liable for any nuclear damage if the incident was caused by “grave national disaster of exceptional character”, armed conflict or act of terrorism and suffered by person on account of his own negligence.\textsuperscript{429}

The bill also applied to all suppliers, including those coming from abroad. It does not make any distinction between India and foreign suppliers.\textsuperscript{430}

This bill is criticized for many reasons. The Bill sets a cap on total liability at 300 million SDR for each nuclear incident, and limit liability of the operator to Rs 500 crore. It also states that for nuclear power plants owned by the central government, the entire liability is that of the government. Currently, all nuclear power plants are owned by the government or government owned entities (such as NPCIL). This proposal law may be necessary to safeguard suppliers from no-fault liability if the government needs to import equipment and fuel.

However, in such a situation, limiting the operation’s liability would not be requirement, since the government would be liable for the entire amount (either directly or through a fully owned company). A cap on the operator’s liability is required only if private sector participation is permitted; that would require and amendment to the Atomic Energy Act, 1962. The government has not indicated any such plans. However, under current law, joint ventures between private and government companies are permitted if the government holds the majority stake. The government has not announced any plans for forming such joint venture companies.

\textsuperscript{428} Ibid.

\textsuperscript{429} India Today, March 31, 2010. http://www.indiatoday.intoday.in/.../Nuke+Liability+Bill+due...

\textsuperscript{430} Ibid.
Regardless of the extent of damage, the total liability would be limited to SDR 300 million. This amount may not be sufficient to provide adequate compensation in case of a major incident. More than six lakh people were affected in Chernobyl. More than five lakh people were affected after the chemical leakage in Bhopal in the Union Carbide incident (not a nuclear incident). For that incident, the Supreme Court required Union Carbide to provide compensation of 470 million dollars and asked the government to meet any further liability. May other countries which are major producers of nuclear energy do not have a cap on the overall liability for nuclear damage (see Table).431

| Liability of the operator and the government in the top 10 nuclear power generating countries, and India. |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|
| Country                        | Total generation (MW(e)) | Operator’s Liability (USD Million) | State Compensation | Total Liability (USD Million) |
| United States                  | 1,00683          | 11,900          | Unlimited        | Unlimited        |
| France                         | 63,130           | 861             | 300             | 1,161            |
| Japan                          | 46,823           | Unlimited       | Unlimited        | Unlimited        |
| Russia                         | 22,693           | No amount specified | Unlimited        | Unlimited        |
| Germany                        | 20,480           | Unlimited       | 2,500            | Unlimited        |
| South Korea                    | 17,705           | 474             | Unlimited        | Unlimited        |

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http://www.prsindia.org/index.php?name=Sections&action=bill_details&id=6&bill_id=1042&category=42&parent_category=1
<table>
<thead>
<tr>
<th>Country</th>
<th>Liability Limit</th>
<th>Capital</th>
<th>Operator's Liability</th>
<th>Compulsory Reserve</th>
<th>Minimum Reserve</th>
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<tr>
<td>Ukraine</td>
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<td>India**</td>
<td>4,189</td>
<td>109</td>
<td>345</td>
<td>454</td>
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</tr>
</tbody>
</table>

Sources: Various Sources13; PRS.
*Values have been converted into USD in sources document as of December 2009
**The values for India have been taken from the Bill and calculated at current exchange rates.

The Operator’s liability is lower than in several other countries

The liability of the operator has been capped at Rs 500 crore (USD 109 million at current exchange rates) This means that if the nuclear damage exceeds this amount, the central government is liable to compensate victims subject to a cap of 300 million SDR. Several countries which are major producers of nuclear power have a higher limit on the liability of the operator (see above table).

**Insurance cover**

Operators need to take insurance or provide financial security converging their liability. A higher insurance cover implies higher electricity costs. Our calculation indicate that the electricity cost would go up by about 1 paisa for insurance cover of Rs 500 crore by a 500 MW power plant assuming the international premium rate of 0.3%–0.5% per annum.
India’s access to international funds may be blocked

The statement of objects and Reasons of the bill list four international conventions and states the need to enact a legislation that enables joining an appropriate international liability regime. The Convention on Supplementary compensation of 1997 creates an international pool of fund which can be accessed in case liability due to nuclear damage exceeds SDR 300 million. Clause 6(1) of the Bill limits the total liability for under the Convention as the additional compensation under that convention is only available if the liability exceeds this amount.

Payment of compensation

In situations where the damage exceeds the upper limit set by the Bill, there is no criteria to determine the manner in which those suffering damage will be compensated. The bill does not mention in what priority payment of claims for compensation will be made, or in what proportion if any, claims for compensation will be made. Some other countries such as Brazil and Belgium specify that in such cases the government will have the right to reduce the compensation for each victim on a proportional basis.

The US itself is not augmenting its energy through nuclear sources because of the accident they had in the Pacific Island. So, if this Deal takes place, a huge number of orders will go to the US, allowing them to make profits while we would be saddled with these imported reactors. The first point is that nuclear energy being the best alternative for energy augmentation is based on false premises. And the country cannot afford such high prices. Because what is the cost definition? It would be roughly aim not being fulfilled.

Despite this debate and interpretation, this deal is a milestone in the Indo-US nuclear relations. This deal will help India to meet its energy requirement.