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**Indo-US Nuclear Deal: The Bill and  
Apprehensions**

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Scepticism often trails substantial changes in policies and their expected outcomes. From the very day Prime Minister Manmohan Singh and President George Bush issued their joint statement on July 18, 2005, many doubted the success of the India-United States (US) civil nuclear cooperation agreement. In the US, sceptics feared that the opposition of a section of non-proliferation group would jeopardise the move. In India too, people had and continue to have several concerns.<sup>1</sup> The likelihood of the dilution of US promises engraved in the agreement is the gravest of them. Optimists, however, scoff at any such possibility.<sup>2</sup> As the US President has to work with and its external alliance partners and the Congress to adjust the regimes, laws and policies coming into the way of the implementation of a civil nuclear cooperation agreement with India, an element of uncertainty continues.

On March 16, 2006, a bill, HR 4974, was introduced in the House of Representatives to authorise the President to waive the application of certain requirements under the Atomic Energy Act of 1954 to India. The same day, the bill was sent to the House Committee on International Relations. Simultaneously, a similar bill, S2429, was introduced in Senate for the same task, and this bill was referred to the Senate's Committee on Foreign Relations.

The committees of both the chambers of the US Congress modified the bills after holding a series of hearings and consultations. The modified bills are more detailed than the original ones. While some of the detailed provisions are a mere elaboration of what was already mentioned in the Administration version, some additional provisions have also been included in the final bills cleared by the committees and sent for voting. On June 27, 2006, the House Committee on International Relations passed the modified bill, HR 5682, and sent it to the House of Representatives for consideration. The same day, the US House of Representatives overwhelmingly passed the bill, the United States and India Nuclear Cooperation Promotion Act of 2006. On June 29, 2006, the Senate voted on the changed bill, S-3709, and it is currently on the legislative calendar.

The July 18, 2005 joint statement provided a framework as well as principles for nuclear cooperation between the two countries, and both the governments have periodically intimated the other about the steps taken in this regard. However, the process of implementation of the joint statement has created the impression that the US government does not

consider the July 18 statement to be sacrosanct. In fact, the changes in the bills at the committee level have become a cause for concern in India, with Prime Minister Singh stating that, “we will not accept any conditions that go beyond the parameters of the July 18, 2005, Joint Statement and the March 2, 2006, Separation Plan, agreed to between India and the United States.”<sup>3</sup> As government authorities are reliable sources of information about the progress of the Indo-US cooperation in this regard, the general assessment about deviations from the agreement is tested on the basis of statements of an authority as high as the Indian Prime Minister. Terms such as shift in goal-posts, deviations, and additionalities<sup>4</sup> have been frequently used by analysts and scholars to analyse the changes in the parameters of the July 18, 2005, joint statement. Currently, the Indian strategic community is facing a set of questions about the shape of the possible US-India nuclear agreement and these include: Is the US government gradually detouring around? How has the Indian government responded to the attempted move? Has the stance of the Indian government made the US retrace its steps?

The paper finds that there have been *attempts to change* the letter and spirit of the July 18 statement, substantially by the US Congress and occasionally by the Administration. While the Indian government has strongly resisted such attempts, it has conceded some ground on a few issues. Apparently, the US Administration, Congress and its committees, under pressure from different lobby groups, have tried to add new and unilateral strings. While some of these unilateral strings were eliminated at the pre-legislation stage, some remain in both the binding and non-binding parts of the bills and are also reflected in the pronouncements of US officials. The need is to understand the nature and category of these changes, popularly known as goal post shifts or deviations. The categorisation may effectively help in negotiating the agreement in the near future. The possibility of fixing the gridlock seems quite high as the US Administration has been assuring India on the July 18 statement and US Congressmen have on the whole demonstrated their resolve to develop a strategic relationship with India.

In the following segments the attempts by the US Congress and the Administration to change the letter and spirit of the July 18 Indo-US nuclear Agreement are discussed and assessed.

## Areas Facing Significant Changes

### *Curtailment of Fissile Material Production:*

In the joint statement, the Indian Prime Minister assured the US President that India would work with the US for 'the conclusion of a multilateral Fissile Material Cut Off Treaty' (FMCT). Realising that conclusion of an FMCT would take some time, a section of the US non-proliferation community started putting pressure on the Administration to make cessation of India's fissile material production as one of the conditions for the agreement. It tried to influence public opinion besides informally and formally interacting with Congressmen and administration officials generally considered sympathetic to the non-proliferation lobby. This is evident in the committee versions of the bills sent to both the chambers and passed by the House of Representatives.

Echoing the arguments made by some non-proliferation lobbyists, the House Committee gave a distorted angle to the Indian PM's commitment in the July 18 statement, and explained the entire rationale in its report as "...in the July 18, 2005, Joint Statement, India committed to taking on the 'same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology, such as the United States'. It is therefore imperative that India take steps soon to halt the production of fissile material for weapons, as four of the five nuclear weapon states have declared to have done. The Committee understands that India cannot do this alone, and therefore urges the US Government to pursue a moratorium by Pakistan and China as well as a multilateral treaty banning the production of fissile material for nuclear weapons."<sup>5</sup> The non-binding section 3(b) (5) of the House bill states the US policy to cap and eliminate nuclear weapons in South Asia. The non-binding sections 3 (b) (1) and (2) of the House bill demand a fissile material production moratorium from India, Pakistan and China. The inclusion of China reflects a balancing act done by the House and its Committee. In effect, while the old school in the US remains beholden to the narrow South Asia agenda regarding Indian nuclear weapons, a new school in the US strategic circles appreciates non-Pakistani factors, especially as they relate to China, in understanding India's nuclear weapons imperative.

The seriousness of the matter comes with Section 4 (c) (2), which makes it mandatory for the US President to include 'to the fullest extent possible' information about US measures to "encourage India to identify and declare India a date by which India would be willing to stop production of fissile material for nuclear weapons unilaterally or pursuant to a multilateral moratorium or treaty." This is certainly a euphemism of asking the President to exert pressure on India to wind up its fissile material production and jeopardise its nuclear deterrence capabilities given the limited nature of its current arsenal.

The Senate bill, too, has provisions relating to Indian fissile materials. The non-binding Section 102 (5) of the Senate bill recommends that nuclear commerce should minimise the risk of nuclear proliferation as well as regional arms race. Although this provision will not have any immediate or direct impact on the nuclear commerce between the two countries, yet the entire spirit or orientation of the July 18 agreement seemingly de-hyphenating India and Pakistan in the US policy is diluted, if not completely dumped. US Congressmen are reasonably aware of India's security imperatives and consequently, India's reservations to capping and reducing its fissile materials. The Indian government and strategic community never made its nuclear strategy Pakistan-centric; therefore, associating India's requirement with Pakistan is highly undesirable, as India is facing an uncertain strategic environment, further fuelled by clandestine nuclear and missile technology transactions. Section 105 (5) of the Senate bill replaces the multilateral FMCT of the joint statement with a multilateral treaty for the cessation of the production of fissile materials. This was done to 'allow the possibility of a multilateral treaty other than a universal FMCT'.<sup>6</sup>

Sections 108 (b) (1), (2), (3) and (4) of the Senate bill, demanding a report from the US President to appropriate Congressional committees on additional nuclear facilities and materials under safeguards, a comprehensive listing and detailed information of all licenses, and steps to deal with non-compliance and the like do not look unusual. However, the demand in Section 108 (b) (5) for a detailed description of the US efforts "to promote national or regional progress by India and Pakistan in disclosing, securing, capping, and reducing their fissile material stockpiles, pending creation of a world-wide fissile material cut-off regime, including the institution of a Fissile Material Cut-off Treaty" may frustrate the otherwise growing relationship.

What Congress lays down now is what Robert Joseph, Undersecretary of State for Arms Control and International Security, wanted in the very first hearing of the House Committee on International Relations on September 8, 2005. He had stated, "With its decision to take the steps announced in the joint statement, India will now take on new non-proliferation responsibilities, which strengthen the global non-proliferation efforts and serve the fundamental purposes of the NPT. In this context, we remain committed to achieving Indian curtailment of fissile material production and we have strongly encouraged a move in this direction."<sup>7</sup> However, he instantly clarified that the US Administration will not insist on it, but will continue to 'explore options' to freeze the India fissile material production. In April 2006, Secretary Rice admitted that she had asked for a unilateral commitment from India to stop the production of fissile material for weapons, but failed to get its consent.<sup>8</sup>

#### *Full Civil Nuclear Cooperation*

One of the salient features of the July 18 joint statement was the idea of 'full civil nuclear energy cooperation'. In the joint statement, "the [US] President told the [Indian] Prime Minister that he would work to achieve full civil nuclear energy cooperation with India as it realises its goals of promoting nuclear power and achieving energy security. The President would also seek agreement from Congress to adjust US laws and policies, and the United States will work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India, including but not limited to expeditious consideration of fuel supplies for safeguarded nuclear reactors at Tarapur." As the statement is basically a statement of intent or merely a framework, it has not supplied details of the proposed nuclear cooperation. Yet, it is absolutely clear that it does talk about adjustment of the regimes coming in the way of full nuclear cooperation. Logically, the hindering full-scope safeguards requirement or the NPT-oriented categorisation in terms of voluntary/ safeguards in perpetuity should also become redundant.

#### *Enrichment and Reprocessing Technology*

The House bill does not mention restriction on enrichment and reprocessing technology. However, the Administration told the House that it had no intention to supply such a technology; therefore, there was no need to put it in the bill. On several occasions, the US Administration

informed that reprocessing and enrichment technology would not go to India.<sup>9</sup> Some Administration officials are arguing that it is not being sent to India because it does not go to any other country. Secretary Rice informed, "With respect to enrichment and reprocessing, the transfer of such equipment and technology is already addressed in the NSG guidelines, INFCIRC/254/Rev.7/Part1. Therefore, it was not deemed necessary for the proposed resolution to also address the matter. In this context, we have also informed our NSG partners that we do not intend to provide enrichment or reprocessing technologies to India. Our bilateral agreement for peaceful nuclear cooperation will not permit such transfers to be made under it."<sup>10</sup> Section 106 of the Senate version of the bill reiterates the prohibition of the export and re-export to India of any equipment, materials, or technology for enrichment of uranium, the reprocessing of spent nuclear fuel, and the production of heavy water. Significantly, Section 102 (b) (2) of the same bill talks about three exceptions. The first is for a 'multinational facility' developing an alternative to national fuel cycle permitted by IAEA. The second is for a bilateral or multilateral development of a proliferation-resistant technology. And the most significantly, the Senate version of the bill lays down that an approval for a license may be made if the President determines that the supply will not enhance India's ability to churn out nuclear weapons or fissile material for military purposes.

### *Safeguards in perpetuity*

However, some problem in relation to safeguards in perpetuity is noticed. Section 4 (b) (2) of the House bill lays down the requirement of the application of IAEA safeguards in perpetuity. Though the Senate bill does not mention safeguards in perpetuity either in binding or in the non-binding sections, it does mention 'the separation plan presented in the national Parliament of India on March 7, 2006, and in greater detail on May 11, 2006...' in Section 108 (a) 1 (B). Both these documents have provisions for safeguards in perpetuity. And both the Indian documents link safeguards in perpetuity to the assurance of the fuel supply reserve. The arrangement for a fuel supply reserve in fact was a bargain for India's acceptance of safeguards in perpetuity, replacing voluntary safeguards agreed to in the July 18 statement. The separation plan declares,

*"To further guard against any disruption of fuel supplies, the United States is prepared to take the following additional steps:[Emphasis mine]*

- (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.
- (c) 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."

However, Rice stated, "to clarify, the Indian government document referenced is just that, an *Indian* document that contains India's views on the fuel supply assurances it seeks. We have indicated to India our willingness to explore potential fuel supply assurances it seeks. We have indicated to India our willingness to explore potential fuel assurance options, and the Indian document is generally reflective of these discussions to date; but these discussions are still quite exploratory in nature, and we will require further discussion."

She said "The Indian separation plan presented to the Indian Parliament on March 7 is India's plan. While that is not a US-origin document, and while we would have presented particular issues somewhat differently, that document accurately reflects the general discussions between the United States and India."<sup>11</sup> Secretary Rice also stated that fuel supply

assurances for India's safeguarded reactors are "intended to mitigate disruptions caused by 'acts of God' or *unprovoked* cut-offs of nuclear fuel supplies by foreign private or governmental entities."<sup>12</sup> She said that those assurances would not outwit any current or future US laws. She also informed that "Our negotiators were very clear that, while the US would be willing to provide reasonable fuel assurances designed to counter market imperfections, fuel assurances could not be a 'condition' to any of India's commitments under the plan—including, in particular, safeguards in perpetuity."<sup>13</sup> More interestingly, on the guarantee of supply, Secretary Rice added, "The United States is also working with other major nuclear fuel suppliers and the IAEA to develop a mechanism for providing assurances of reliable nuclear fuel supply to countries that refrain from developing enrichment and reprocessing capabilities. Of course, India would not be eligible for fuel assurances under this mechanism, since it already has enrichment and reprocessing capabilities."<sup>14</sup> On the issue of 'corrective measure' of the Indian separation plan, she wondered and demanded, "It will be incumbent on India to clarify what it means by the 'corrective measures' it claims it may seek should fuel supply become disrupted. India will need to clarify its intent in this respect in its discussions with the IAEA."<sup>15</sup>

Secretary Rice in reply to a question submitted by Senator Lugar during the April 2006 testimony said, "The principle that safeguards should be applied in perpetuity in INFCIRC/66/Rev.2 safeguards agreements was embodied in a Memorandum from the IAEA Director General to the IAEA Board of Governors in 1973 (IAEA Gov/1621). We expect any pledge.... 'We've been very clear with the Indians that the permanence of the safeguard is permanence of the safeguards without condition.'"<sup>16</sup>

### *Nuclear Testing*

The most contentious part or provision in the bills of both the chambers is the provision for termination of the agreement after India conducts nuclear tests in the future. In India, analysts find a gap between a unilateral Indian commitment for test moratorium and the legal obligations under the act. They consider it a deviation from the July 18 statement. Section 110 of the Senate bill states: "A Determination under section 105 and any waiver under section 104 shall cease to be effective if the President determines that India has detonated a nuclear explosive device after the

date of enactment of this act.” The House bill does not mention so explicitly on the issue. However, Section 1 (d) of the HR 4974, the Administration version for the House bill, provides for termination, if ‘the President determines that India has detonated a nuclear explosive device after the date of enactment of this act.’ On a number of occasions, Administration officials also repeated this idea. India has already announced a unilateral moratorium on nuclear tests. In an uncertain strategic environment, it is unrealistic to expect India to continue its nuclear moratorium where other nuclear weapon countries conduct tests. The US administration has already been making many moves to test its nuclear devices for safety and reliability.

### *Other Areas*

Some of the changes made in Sections 108 (a) (3) and (4), which ask for reporting on “significant changes in the production by India of nuclear weapons or in the types or amounts of fissile material produced; and changes in the purpose or operational status of any safeguarded nuclear fuel cycle activities in India” have very negative repercussions. As India has not made its weapon or fissile materials stockpile public, the apprehension that this reporting requirement would force the US President to increase US espionage activities in India appears quite valid.<sup>17</sup> Some recent spying activities undertaken by US agents against the National Security Council Secretariat in 2006 have already been in the public eye and have made people bitter. The increased spying activities because of the reporting requirement will not only adversely affect the nuclear agreement but also the overall relationship. Anyway, it looks extremely undesirable when both the countries are proclaiming to take the relationship to a new height.

Similarly, Section 4 (o) (2) (B) of House bill asks the US President to report on India’s nuclear fuel in a classified form if necessary about the amount of uranium mined, the quantity of uranium used or separated for the production of nuclear explosive devices, the production rate of nuclear bombs and fissile materials, and the role played by the imported uranium in determining the rate of production of nuclear weapons. Likewise, the presidential report on un-safeguarded nuclear facilities may cause unpleasantness in the relationship. One of the demands is reporting on “the provision of nuclear fuel in such a manner as to facilitate the increased production of highly enriched uranium or plutonium in un-safeguarded nuclear facilities.”

## **Irritants**

### *Personnel and Logistics*

To certify the credibility of the Indian separation of civil and strategic facilities, the US President has to make a declaration under Section 105 (1) of the Senate bill. This otherwise meaningless provision, with some guidelines from the Senate Committee, is going to be a big irritant in negotiations. This instruction is on 'temptation to use common personnel or logistics in the management and operation' of reactors. The Senate committee report, with the bill, notes, "The committee believes, however, that a credible separation of nuclear programme would have to extend to such functions as management, operation, safety, personnel, finance and planning. The committee expects the President to examine these factors before determining that India has provided such a credible separation plan."<sup>18</sup> This could be a guiding principle at the licensing stage.

### *Export Control—new interpretation*

In the joint statement, India promised adherence to and harmonisation of its national export control systems with the MTCR and the NSG. Interestingly, the US Administration and the draft Senate bill gave a different legal interpretation to the Indian adherence to the MTCR. India has not been accorded the status of an MTCR adherent country as per US laws. If the purpose of the Indian promise is just to assure that now it has an MTCR type control system, this legal status may not be seen as a goal-post shift. But if the adherence is related to the supply of those items to India and part of bargaining, it would definitely amount to deviation. Secretary Rice revealed that India will not get an "MTCR adherent" position in missile sanctions law under Section 73 of the Arms Export Control Act. She explained, "Unilateral adherence to the MTCR means that a country makes a unilateral political commitment to abide by the Guidelines and Annex of the MTCR. In particular, an MTCR unilateral adherent country commits to control exports of missile-related equipment and technology according to the MTCR Guidelines, including any subsequent changes to the MTCR Guidelines and Annex. To meet this commitment, MTCR unilateral adherent countries would need to have in place laws and regulations that permit them to control the export of MTCR Annex equipment and technology consistent with the MTCR Guidelines."<sup>19</sup> And

she went on, “An ‘MTCR Adherent’, as defined in Section 74 of the Arms Export Control Act, is a country that ‘participates’ in the MTCR or that, ‘pursuant to an international understanding to which the United States is a party, controls MTCR equipment and technology in accordance with the criteria and standards set forth in the MTCR’. India’s ‘unilateral adherence’ to the MTCR would not meet this requirement.”<sup>20</sup> Section 111 of the Senate bill states that India is not a MTCR adherent country. Likewise, Section 4 (b) (6) (C) of the House bill points out India’s “adherence to the MTCR and the NSG in accordance with the procedures of those regimes for unilateral adherence”.

Moreover, under the pressure of a section of non-proliferation group, the US Administration and the Congress through the non-binding and Statements of Policy Section 3 (b) (3) (C) of the House bill called on India to adhere to the Australia Group and the Wassenaar Arrangement. Section 108 (b) (6) of the Senate bill has watered down the demand of the non-proliferation group and has basically advised Congress to make an effort to get India into the folds of Australia Group and Wassenaar Arrangement, and report to an appropriate Congressional committee. Secretary Rice acknowledged that India as a member country of the Chemical Weapon Convention has already a global standard for export control of chemical materials, but she immediately added that India was told to control the ‘full range of chemical agents, and equipment in line with the Australia Group.’<sup>21</sup>

In the same way, the insertion of the demand on the President in Section 108 (b) (6) in the Senate bill for a comprehensive data on US efforts to get India’s full participation in the PSI and formal commitment to the statement of interdiction principles departs from the mutually agreed terms of reference. Similarly, the non-binding Statements of Policy Sections 3 (b) (3) (A) and (B) of the House bill are devoted for seeking India’s involvement with interdiction principles and participation in PSI. However, it will fall in the future negotiating category. For an additional obligation, India may demand additional benefits.

## **Additional Constraints**

### *Posture on Iran*

Since the September 8, 2005, hearing, some US Congressmen have

been putting pressure on the Administration to link India's stand on Iran to the nuclear agreement. Tom Lantos, a leading supporter of the nuclear agreement with India, has demanded that India will have to change its Iran policy to get the benefits of the July 18 joint statement. Burns assured Lantos and other Congressmen who linked Iran to the nuclear deal that the issue would be raised with the Indian government.<sup>22</sup> This was the most highlighted shift or additional condition in the initial days.

When there was a report about the visit of two Iranian ships, officials of the State Department defended India on the issue. They argued that several allies of the US had been interacting with Iran; therefore, the Indian interaction with Iran should not be seen differently. The State Department spokesman said, "I think those reports were overwritten. We looked into those and our understanding is that there were two ship visits—or there were ship visits by two ships with naval cadets from Iran into Indian ports. They were not training programmes. They were ship visits with naval cadets. That's a much more limited type of event and doesn't suggest Indian training or Indian contribution to Iranian military capabilities."<sup>23</sup> However, what is implicit in the statement is that if India goes beyond the 'limited' interaction, it may adversely affect the agreement. In her statement, Secretary Rice was more direct when she stated, "We have also expressed to the Indian government our concern about Indian military-to-military contacts with Iran. The Indian government has told us repeatedly that while Iranian ships occasionally make routine port calls, these interactions do not include substantive training or joint exercises. We have been assured by the Indian government that there is not today, nor are there plans to develop, substantive bilateral military collaboration."<sup>24</sup> This clearly amounts to a condition imposed on India.

The non-binding section 3 (b) (4) of the House bill demands "Secure India's full and active participation... to dissuade, isolate, and if necessary, sanction and contain Iran for its efforts to acquire weapons of mass destruction, including a nuclear weapon capability (including the capability to enrich or process nuclear materials) and the means to deliver weapons of mass destruction." The Senate bill has no provision on this.

On Iran, the Indian policy so far revolves around three principles: opposition to the emergence of any more nuclear weapon states, especially in India's neighbourhood; opposition to acquiring nuclear weapons

capability through clandestine means; and the need for transparency in and compliance of international treaties and instruments.

### *Reciprocity*

Who will take the initiative first? This question has haunted policy analysts in the US as well as in India. As in the joint statement the Indian Prime Minister conveyed India's reciprocal moves after the steps taken by the US, the general understanding in India was that the US President had to take some concrete initiatives before India would implement the provision. After coming back from his July 2005 visit to the US, Prime Minister Singh strengthened this perception in the Parliament by stating on July 29, "I would like to make it very clear that our commitments would be conditional upon, and reciprocal to, the US fulfilling its side of this understanding."

However, the US administration in various statements and testimonies has simply reversed the order of reciprocity.<sup>25</sup> The US Administration wants the Indian government to implement some fundamental promises made in the joint statement. For example, in one of the statements, a US Administration official said, "But before we actually present any agreement to the Congress, India needs to take several steps, including the separation of their civilian and military nuclear programmes, so these are preconditions for us actually presenting this agreement to the Congress."<sup>26</sup> The Indian foreign secretary saw the Indian concession on reciprocity in terms of the 'mechanics of implementing the July 18 agreement,' and basically, a 'non-issue'.<sup>27</sup> His idea was that "having laboured over the mountain, we will not stumble on the molehill."<sup>28</sup> This argument looks convincing, provided the US makes some concession in return.

### *Safeguards*

In the July 18 joint statement, Prime Minister Singh agreed to identify and separate "civilian and military nuclear facilities and programmes in a phased manner ...and to place voluntarily its civilian nuclear facilities under IAEA safeguards...." On the floor of Parliament, Prime Minister Singh reiterated,

"The Joint Statement refers to our identifying, and separating civilian and military nuclear facilities in a phased manner and taking a decision to

place voluntarily civilian nuclear facilities under IAEA safeguards. India will never accept discrimination.”

However, the US administration attached conditions: the separation must be “credible and defensible from a non-proliferation standpoint to us and to our international friends and partners”.<sup>29</sup> It was further noted, “To strengthen the international non-proliferation regime and to meet our own expectations, the civil/military split must be comprehensive enough to strengthen the nuclear non-proliferation regime and to provide strong assurances to supplier states and the IAEA that materials and equipment provided as part of civil cooperation will not be diverted to the civil cooperation.”<sup>30</sup> In his statement to Senate Foreign Relations Committee, Robert Joseph said, “...we would not view a voluntary offer arrangement as defensible from a non-proliferation standpoint or consistent with the joint statement, and therefore do not believe that it would constitute an acceptable safeguards arrangement.”<sup>31</sup>

A ‘comprehensive enough’ split was the early modification. This seemed to echo the concerns of the non-proliferation lobbyists, who had demanded the maximum number of the Indian nuclear facilities, including upstream and downstream facilities under the safeguards system. The US Administration thus made official the desire of the non-proliferation analysts.<sup>32</sup> Rice informed Congressmen, “in the negotiating process, we sought a credible, transparent and defensible separation plan as well as safeguards in perpetuity on its present and future civil nuclear facilities.”<sup>33</sup>

Finally, Section 4 (b) 1 of the House version of the bill and Section 105 (1) of the Senate version inserted the term credible. As the purpose of agreeing to the safeguards system is to give assurance to its suppliers and partners that any item supplied to India would neither be diverted to its strategic programme or a third country, one can understand the logic of the US administration’s statement about the assurance for a credible system for non-diversion of the supplied items. Section 105 (4) of the Senate bill wants the President to append a report that IAEA and India have made substantial progress towards implementing an additional protocol. This appears to be in synergy with the assurance given by the Indian Prime Minister in the joint statement.

### *Global Nuclear Energy Partnership*

In April 2006, to a question raised during a Congressional hearing,

Secretary Rice responded that Indians had been categorically told that their participation in the Global Nuclear Energy Partnership (GNEP) would depend on the status of safeguarded future breeder reactors. She stated, “We would like nothing better than the safeguarding of future breeder reactors by India so that they could participate in this cooperation, this global nuclear cooperation. And we believe that that will be an incentive for India to put future breeders under civilian safeguards.”<sup>34</sup> Replying to Senator Lugar, Secretary Rice rationalised the denial of India’s full participation in the GNEP: “US negotiators told India that India’s decision not to designate its fast breeder reactors and associated fuel cycle research and development facilities as civil and place those facilities under IAEA safeguards would preclude our ability to collaborate on issues related to the fast burner reactors contemplated under GNEP at this time.”<sup>35</sup> The US ambassador to India reiterated the position and informed that India would have to put at least one reactor to become a full-fledged member.<sup>36</sup> Hopefully, in negotiations, some solution to this issue would be found.

## **Avoidable Controversies**

### *Additional Protocol*

In the joint statement, the Indian Prime Minister promised to sign an additional protocol with respect to civilian nuclear facilities. The Indian government has frequently explained that this additional protocol will be India-specific. An additional protocol signed by a nuclear weapon country is different from the one signed by non-nuclear weapon countries. With the public categorisation of nuclear facilities into civilian and military, the intrusive Model Additional Protocol INFCIRC 540 has no significance in relation to India. It was assumed that the additional protocol signed between the IAEA and India would be patterned on the one signed by a nuclear weapon country. However, the Senate bill defines the additional protocol as ‘a protocol additional to safeguards agreement with the IAEA, as negotiated between a country and the IAEA, based on the Model Additional Protocol as set forth in IAEA information circular (INFCIRC) 540.’ It is possible to give the benefit of doubt to the committee and the US Congress for unintentionally making a mistake. However, this needs to be rectified. The US Congress and one of its reports acknowledge the complexity about India vis-à-vis the additional protocol.<sup>37</sup> The House bill does not mention INFCIRC 540 in this regard.

## *Verification*

As the Indian acceptance of the safeguards arrangement aims at assuring a supplier that it does not intend to divert procured materials for civil purposes to its strategic programme, the demand of Congressmen for end-use monitoring assurance from the US President for supplied items looks natural. However, some intended, and other apparently unintended, provisions of the Senate version of the bill have made people in India apprehensive. Section 107 (b) (1) and (2) of the Senate bill stipulates a detailed system of reporting and accountability of the identified recipients of nuclear technology as well as end-use monitoring. This stipulation has created an impression that US officials will undertake monitoring for the IAEA. US lawmakers very well understand that when they mention end-use monitoring, it involves IAEA. Section 107 (b) (3) discusses alternative arrangements when the IAEA does not implement safeguards. During hearings, some Congressmen talked about the fallback arrangement for safeguarding,<sup>38</sup> if the IAEA system does not work. Section 108 of the Senate bill has been devoted to compliance while implementing the agreement, and for the purpose, makes it mandatory for the President to properly inform relevant Congressional committees. Here, Sections 108 (a) 1 and 2, laying down requirements such as a substantial case of non-compliance and a safeguards agreement between India and the IAEA, look normal.

## *Backdoor Entry of the NPT?*

Some critics in India argue that the US Administration and the US Congress are trying to impose the NPT on India through the backdoor. They cite the section on "Sense of Congress" in the House bill to prove their point. A careful reading of this section reveals that the bill just states its policy on the NPT. In the same section, it spells out some criteria for relaxing the NPT for any country, and finally adjudicates in favour of India-specific relaxation in the same section. This 'Sense of Congress' should not alarm Indian analysts. Another non-binding part of the House bill, Section -3, comprising Statements of Policy does mention the US opposition to the 'development of a capability to produce nuclear weapons by any non-nuclear state, within or outside' of the NPT. However, the very title of the Section 3 (a) under which this statement is recorded is 'in general' nature. The remaining part of the Section 3 (a) has just broad comments on the NPT commitment to provide nuclear energy to its member states and

guarding against nuclear weapons as well as strengthening the NSG, particularly its consensus principle. This appears to be an attempt to accommodate the view of some of the non-proliferation commentators who tried to twist the NPT provisions to corner the US Administration and extensively lobbied with the Congress with their arguments.

### **Indian Response and the US Approach**

India has demonstrated a mixed approach of firmness combined with flexibility on the deviations from the July 18 joint statement. Apart from the Iranian issue, it demonstrated flexibility on reciprocity, and submitted its plan of separation before the US government acted. The Indian government clearly mentioned that 'credible' approach was one of the factors for separation. Demonstrating its flexibility, it placed a large number of reactors under safeguards, seemingly fulfilling the demand of the US Administration. In the July 2005 joint statement, India had agreed to voluntary safeguards. In negotiations, India may have resisted the attempt to change, but finally settled for a compromise formula. The Indian government also accepted safeguards in perpetuity, but after getting an 'assurance' from the US Administration for 'full access to the international fuel market, including reliable, uninterrupted and continual access to fuel supplies from firms in several nations.' As discussed, the US Administration maintains that it has just given assurance to facilitate uninterrupted fuel supply in the normal circumstances, and will withdraw any such assurance if US law is violated. The acceptance of safeguards in perpetuity is therefore a significant compromise by India.

Also, in the US, the non-proliferation groups opposing the deal had dragged CIRUS and the fast breeder reactor to the centre of the debate. Curiously, the Indian government decided to shut down the CIRUS reactor in 2010. The Indian government took the decision when scientists and analysts had provided incontrovertible arguments against the allegation of the non-proliferation lobby and even the US Administration found factual uncertainty in the allegations. India also took the decision to move the fuel core of the Apsara reactor out of the current pool situated in BARC and place it under safeguards in 2010. Although the Indian government chose to safeguard all future civilian thermal power reactors and civilian breeder reactors, it still kept the right to decide any reactor as civilian with itself. Similarly, the Indian government did show firmness on current fast

breeder reactors and placed them outside the inspection regime. The Indian Prime Minister indicated that the dismantling of restrictive regimes required 'complex and sensitive' negotiations resulting in 'contradictory pulls and pressures'. This mixed approach seemingly helped the US government to accept the Indian separation plan.

India has actively resisted additional conditions or additionalities. Indian officials have expressed concern through formal and informal channels to their US counterparts. The Indian Prime Minister asserted in Parliament that India will not compromise on any deviations from the parameters laid down in the July 2005 joint statement and the March 2006 separation plan. He stated that even a deviant non-binding provision violates the letter and the spirit of the July statement and may bring in an element of uncertainty; therefore, it will not be acceptable to India. He was emphatic on the Presidential annual report and certification when he said, "...the effect of such certification will be to diminish a permanent waiver authority into an annual one." The Indian Prime Minister rejected a moratorium on the production of fissile material, the proposal to restrict technology transfer related to reprocessing and enrichment and any possibility of sauntering of US inspectors. Prime Minister Singh informed the Parliament that he had personally conveyed India's concerns and deviations of the bills from the July 2005 joint statement and the separation plan to President Bush during the G-8 summit in St. Petersburg. He further said that President Bush had assured him that there would be no shifts in the goal posts. However, he acknowledged that the July 26, 2006, White House statement of US Administration Policy had not fully addressed India's concerns. In sum, his reaction was: "...if the final product is in its current form, India will have grave difficulties in accepting the bills....the Government will draw the necessary conclusions consistent with my commitments to Parliament."

The July 26 statement expressed the Bush Administration's concerns with such provisions in the Congressional bills as restrictions on nuclear transfers to India, the linking of the Indian policy on Iran to the nuclear agreement, dictating the US President on foreign policy and diplomatic negotiations for non-proliferation. In general, the statement disagreed with any amendment that would necessitate 'renegotiation of what was agreed to in the July 18 Statement, such as, requiring India to cap its production of fissile material before cooperation could occur.' The statement mentioned

that the US Administration would work with the Congress to address those concerns. In an interview to an Indian newspaper, the US Ambassador to India said that it would not be the best tactic to introduce amendments on the floor of Senate to remove those changes generally considered goal-post shifts.<sup>39</sup> He felt that discussing the removal of the deviant features at the Conference stage when both house sit to reconcile their differences could be more useful.<sup>40</sup>

## **Conclusions**

In the US, the NPT was certainly in the shadows even if it was not the guiding principle of the July 18 statement. Most arguments to change the letter and spirit of the statement emanated from the logic of the NPT. The divergent framework of analysis centred on the NPT led to differential understanding of the July 18 joint statement in both the countries. Some deviations of the House bill are harsh, as are some in the Senate bill and the policy pronouncements of the Administration. The US needs to understand that fundamental deviations from the spirit of the July 2005 Agreement is not in the interest of either party. The US policy-makers will have to come out of the shadow of the NPT. This does not mean destruction of the non-proliferation regime, but strengthening it by accommodating a useful global actor like India. Indo-US cooperation is necessary to manage uncertain and new global proliferation.

Earlier, forces supportive of the deal reasoned with US policy-making actors that conditionalities would nip the civil nuclear agreement in the bud. This logic generally made the US government withdraw proposed extra conditions after the July 18 statement. Once again, it is necessary to tell the US Congress and the Administration that new conditionalities do not augur well for the nuclear deal. The basic principles of the deal must be respected. The US Administration and Congress need to remove all the fundamental changes that are being suggested. As the bills contain some changes that are irritants, the US should adopt a constructive and patient approach towards these issues and resolve them amicably. It seems some unintended ambiguity has crept into the language of the bill. The Congress should not have any problem in bringing clarity to the text. As the US has already extracted concessions from India in some areas, it should reciprocate by removing the provision on the termination of the agreement after the future Indian nuclear tests. This provision also has its roots in the NPT.

Some imaginative amendments in the bill may help in continuing the agreement. The resolution of this problem will settle a serious issue like fuel reserve for facilities under perpetual safeguards. The 'Sense of Congress' has to guide the US in entering into arrangements with India. Normally, in export control or licensing, administrative authorities in charge use discretion on a number of subjective criteria. The 'Sense of Congress' will be an additional unfavourable 'red flag'. The US government will have to resolve this issue as well. Unlike the NPT-defined nuclear weapon countries, India has placed a number of facilities on the IAEA safeguards regime, and thus accepted a relatively costly (monetarily) possible verification system. The US needs to share some of the monetary burden that would fall on India as a result. It may bear the cost of initial verification machinery. The unnecessary inclusion of this requirement can be financially crippling. Instead, a review should be made to remove some of the less proliferation relevant facilities from the safeguards list.

India is really at a crossroads. After facing several decades of denial of technology by the advanced nuclear powers, it finds an opportunity to receive nuclear technology for its energy needs. But, at the same time, it has to protect its core interests. It has already demonstrated some prudence during negotiations and bargained reasonably well. Though India currently does not seem to require nuclear tests for credibility of its minimum nuclear deterrence, no one can be sure of the strategic environment if the US conducts a nuclear test, and if that is followed by Russian and Chinese tests. In this environment, India's continuance of the current unilateral moratorium on nuclear tests will create a credibility gap in India's nuclear deterrence, and adversely affect its security. As it has conceded some ground on issues such as Iran, reciprocity and the closure of CIRUS, it must now ask the US to remove the provision terminating the agreement after any nuclear test in the distant future. India needs to protect its core interests without getting stuck into unnecessary symbolism. However, it must also vehemently resist any fundamental changes in the bills and policy pronouncements on India-US civil nuclear agreement that compromise its vital interests. Similarly, India can enter into a dialogue on irritants such export control groupings and possible Indian membership in these. This dialogue may take time. Meanwhile, India can enter into an agreement, if other serious proposed changes are rectified. India can of course overlook any innocuous modifications.

## References/End Notes

- <sup>1</sup> For example, Arun Shourie, "Rescued from the Abyss", *The Indian Express*, August 22, 2006, <http://www.indianexpress.com/story/11097.html>; Arun Shourie, "This is about Energy, Did You Say?", *The Indian Express*, August 23, 2006; Arun Shourie, "'Parity', Did You Say," *The Indian Express*, August 24, 2006, <http://www.indianexpress.com/story/11160.html>; Brahma Chellaney, "Ever-shifting Nuclear Goal Posts", *The Pioneer*, August 16, 2006, [http://www.dailypioneer.com/archives2/default12.asp?main\\_variable=front%5Fpage&file\\_name=story6%2Etxt&counter\\_img=6&phy\\_path\\_it=D%3A%5Cdailypioneer%5Carchives2%5Caug1606](http://www.dailypioneer.com/archives2/default12.asp?main_variable=front%5Fpage&file_name=story6%2Etxt&counter_img=6&phy_path_it=D%3A%5Cdailypioneer%5Carchives2%5Caug1606); and Brahma Chellaney, "15 Nuclear Benchmarks shifted", *The Pioneer*, August 15, 2006, [http://www.dailypioneer.com/archives2/default12.asp?main\\_variable=front%5Fpage&file\\_name=story5%2Etxt&counter\\_img=5&phy\\_path\\_it=D%3A%5Cdailypioneer%5Carchives2%5Caug1506](http://www.dailypioneer.com/archives2/default12.asp?main_variable=front%5Fpage&file_name=story5%2Etxt&counter_img=5&phy_path_it=D%3A%5Cdailypioneer%5Carchives2%5Caug1506)
- <sup>2</sup> For example, C Raja Mohan, "Clearing the Cloud Around the Nuclear Deal", *The Indian Express*, July 28, 2006, <http://www.indianexpress.com/story/9432.html>; C Raja Mohan, "Winners still in Denial," *The Indian Express*, June 29, 2006, <http://www.indianexpress.com/story/7441.html>; G Balachandran, "The Doctor and the Scientists", *The Indian Express*, August 26, 2006, <http://www.indianexpress.com/story/11367.html>
- <sup>3</sup> Manmohan Singh, "Statement of the PM in Rajya Sabha on the India-US Nuclear Agreement", August 17, 2006, <http://pmindia.nic.in/speeches.htm>
- <sup>4</sup> The term used by Dr Anil Kakodkar, Chairman of the Atomic Energy Commission, in an interview to T S Subramanian, "Safeguards can Kick in Only after Cooperation Starts", *The Hindu*, September 8, 2006.
- <sup>5</sup> The Committee on International Relations, the United States House of Representatives, the United States Congress, "United States and India Nuclear Cooperation Promotion Act of 2006": A Report, Serial No 109-590, One Hundred Ninth Congress, Second Session, July 21, 2006, US Government Printing Office, Washington: 2006, p.18. Find at: <http://www.gpoaccess.gov/congress/index.html>
- <sup>6</sup> Committee on Foreign Relations, United States Senate, United States Congress, One Hundred Ninth Congress, Second Session, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, US Government Printing Office, Washington: July 20, 2006, p. 30, Find at: <http://www.gpoaccess.gov/congress/index.html>
- <sup>7</sup> The Committee on International Relations, the United States House of Representatives, the United States Congress, *The U.S. and India: An Emerging Entente?*, Hearing, Serial No 109-117, One Hundred Ninth Congress, First Session, September 8, 2005, US Government Printing Office, Washington: 2005, p. 20. Find at <http://www.gpoaccess.gov/congress/index.html>
- <sup>8</sup> The Committee on International Relations, the United States House of Representatives, the United States Congress, Hearing, Serial No 109-179, One

- Hundred Ninth Congress, Second Session, April 5, 2006, US Government Printing Office, Washington: 2006, p. 22. Find at: <http://www.gpoaccess.gov/congress/index.html>
- <sup>9</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 80.
  - <sup>10</sup> The Committee on International Relations, Hearing, Serial No 109-179; and Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 90.
  - <sup>11</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 81.
  - <sup>12</sup> The Committee on International Relations, Hearing, Serial No 109-179, pp. 52 and 63.
  - <sup>13</sup> Ibid
  - <sup>14</sup> Ibid, p. 63.
  - <sup>15</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 82.
  - <sup>16</sup> Ibid, p. 175.
  - <sup>17</sup> Brahma Chellaney, "Trick and Treat", *The Hindustan Times*, July 18, 2006, [http://www.hindustantimes.com/news/181\\_1746584,00120001.htm](http://www.hindustantimes.com/news/181_1746584,00120001.htm)
  - <sup>18</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 27.
  - <sup>19</sup> The Committee on International Relations, Hearing, Serial No 109-179, p. 80.
  - <sup>20</sup> Ibid
  - <sup>21</sup> Ibid p. 82.
  - <sup>22</sup> The Committee on International Relations, *The U.S. and India: An Emerging Entente?*, Hearing, Serial No 109-117, p. 37.
  - <sup>23</sup> Adam Ereli, "Daily Press Briefing," Department of State, April 3, 2006 <http://www.state.gov/r/pa/prs/dpb/2006/64060.htm>
  - <sup>24</sup> The Committee on International Relations, Hearing, Serial No 109-179, pp. 68-69.
  - <sup>25</sup> The Committee on International Relations, *The U.S. and India: An Emerging Entente?*, Hearing, Serial No 109-117, p.18, and p. 23.
  - <sup>26</sup> Sean McCormack, Daily Press Briefing, Department of State, October 26, 2005, <http://www.state.gov/r/pa/prs/dpb/2005/55689.htm>

- <sup>27</sup> Shyam Saran, "Transforming U.S.-India Relations: Forging a Strategic Partnership", Carnegie Endowment for International Peace, December 21, 2005, <http://meaindia.nic.in/pressbriefing/2005/12/21pb01.pdf>
- <sup>28</sup> Ibid
- <sup>29</sup> The Committee on International Relations, *The U.S. and India: An Emerging Entente?*, Hearing, Serial No 109-117, p. 24.
- <sup>30</sup> Ibid
- <sup>31</sup> Robert G Joseph, Remarks in the Hearing on US-India Civil Nuclear Cooperation Initiative, Senate Foreign Relation Committee, November 2, 2005.
- <sup>32</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p.101.
- <sup>33</sup> The Committee on International Relations, Hearing, Serial No 109-179, p. 55
- <sup>34</sup> The Committee on International Relations, Hearing, Serial No 109-179, p. 22.
- <sup>35</sup> Committee on Foreign Relations, United States-India Peaceful Atomic Energy Cooperation and US Additional Protocol Implementation Act, Report no 109-288, p. 178.
- <sup>36</sup> David C Mulford, "The Goalpost haven't been shifted and they will not be shifted", an interview to T S Subramanian and Kesava Menon, *The Hindu* (New Delhi), September 30, 2006.
- <sup>37</sup> The Committee on International Relations, United States and India Nuclear Cooperation Promotion Act of 2006, Report, Rept 109-590, Part 1, p. 20.
- <sup>38</sup> Fred McGoldrick, "US-India Civil Nuclear Deal", Prepared Testimony, House International Relations Committee, May 11, 2006, [http://wwwc.house.gov/international\\_relations/109/mcg051106.pdf](http://wwwc.house.gov/international_relations/109/mcg051106.pdf)
- <sup>39</sup> David C Mulford, "The Goalpost haven't been shifted and they will not be shifted", an interview to T S Subramanian and Kesava Menon, *The Hindu* (New Delhi), September 30, 2006.
- <sup>0</sup> Ibid.

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