The U.S.-India Nuclear Deal: Taking Stock

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In a July 18 joint declaration, the United States and India resolved to establish a global strategic partnership. The joint declaration was a bold and radical move that was clearly motivated by and reflects the mutual interests of both states in counterbalancing the rise of Chinese power.

It also promises other potential security benefits, notably enhancing U.S.-Indian counterterrorism cooperation. In these respects, the joint declaration has laid the foundation for promoting the long-term strategic interests of the United States.

One notable problem, however, is that, in signing on to the joint declaration, the Bush administration agreed to reverse a decades-old U.S. nonproliferation policy by removing obstacles to cooperation with India’s civil nuclear power program. Specifically, President George W. Bush referred to India’s strong commitment to preventing proliferation of weapons of mass destruction and stated that, “as a responsible state with advanced nuclear technology,” India should acquire the same benefits and advantages as other such states. The president pledged to seek agreement from Congress to adjust U.S. laws and policies and to work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India. In addition, the administration is seeking to include India in global efforts to develop advanced nuclear energy systems. In return, India agreed to take a number of specific steps to expand its nonproliferation commitments.

The key question is whether the United States could have accomplished its geostrategic objectives by strengthening ties with India in the economic, scientific, and military fields without having compromised important principles of its nonproliferation policy. It is open to serious doubt whether the proposed Indian concessions were significant enough to justify the accommodations promised by the United States and whether the steps the United States and India agreed to take in the civil nuclear area will, on balance, be supportive of global nonproliferation efforts.

Congress should approve the administration’s proposals to implement the joint declaration only under certain conditions. First, the members of the Nuclear Suppliers Group (NSG) should clearly support permitting peaceful nuclear cooperation with India. Second, India needs to bring an early halt to the production of nuclear materials for nuclear weapons or nuclear explosives. Third, New Delhi must accept safeguards in perpetuity on its civil nuclear facilities.

U.S.-India Peaceful Nuclear Relations

The United States and India entered into a peaceful nuclear cooperation agreement in 1963. Under that agreement, the United States supplied India with two light-water reactors at Tarapur and the enriched uranium to fuel those plants. Spurred, among other things, by India’s “peaceful” nuclear test in 1974, the United States enacted the 1978 Nonproliferation Act, which amended the Atomic Energy Act of 1954. This new legislation required that, in order to receive future nuclear exports from the United States, non-nuclear-weapon states such as India needed to place all of their peaceful nuclear activities under the safeguards of the International Atomic Energy Agency (IAEA)—so-called full-scope safeguards. India is a non-nuclear-weapon state under the nuclear Nonproliferation Treaty (NPT) and under U.S. law.

India refused to accept this condition, and significant U.S. nuclear cooperation with New Delhi, including nuclear fuel supplies to Tarapur, ceased in 1980. The 1963 peaceful nuclear cooperation agreement between India and the United States terminated in 1993 without replacement. In
response to India’s nuclear weapons tests in 1998, the United States imposed a series of strict economic and financial sanctions but has since then substantially relaxed these restrictions.

An Assessment

In proposing to revive civil nuclear cooperation between the two countries, Bush administration officials asserted that India has been a responsible steward of its nuclear assets, has refrained from transferring its nuclear technology to other countries, and will play a constructive role in strengthening the global nonproliferation regime. Under the joint declaration, the Indian government agreed to take specific steps to expand its nonproliferation commitments.

Separating and Safeguarding Civilian Facilities

India agreed to identify and separate civilian and military nuclear facilities and programs in a phased manner and to file a declaration regarding its civilian facilities with the IAEA. This action will probably take some time to implement and will likely run into resistance and delaying tactics from some quarters in India. The former prime minister, Atal Behari Vajpayee, and officials of the Indian Department of Atomic Energy have already criticized the decision to separate Indian civilian and military facilities as difficult if not impossible to implement and as prohibitively costly. Former officials of the Bhabha Atomic Research Centre (BARC) have expressed concern that safeguards would hamper ongoing research on India’s fast breeder reactor program and compromise India’s long-term energy security. A. N. Prasad, former director of BARC, said, “Our military activities are not aimed at stockpiling nuclear weapons” and said that stockpiling, which is what the logic of the Indo-U.S. joint statement implies, would be “highly counterproductive” and costly.

In any event, it is at least questionable whether this pledge to separate civil and military nuclear facilities is a major concession on the Indians’ part because it is unlikely to limit Indian production of fissile materials for military purposes. The decision about which facilities to declare civilian rests with India.

Similarly, India’s agreement to place additional nuclear facilities under IAEA safeguards has the merit of expanding the coverage of such safeguards and narrowing to some degree the differences in the safeguards burdens that India assumes and those that non-nuclear-weapon states have to bear in accepting the full-scope safeguards under the NPT. To date, India has accepted international inspections only on those facilities and materials it has imported from other states. Most Indian nuclear facilities are unsafeguarded. However, the importance of this move will depend on how India chooses to fulfill this commitment, because the agreement leaves it to New Delhi to declare which facilities are eligible for international safeguards and which kind of safeguard agreement will be applied.

India could ask the IAEA to apply safeguards to those nuclear facilities it designates as civilian in accordance with facility-specific safeguards agreements, known as INFCIRC/66.Rev.2 agreements. These safeguards agreements provide for safeguards in perpetuity and would thus preclude India’s future use of designated civilian facilities for the production of nuclear material for nuclear explosive purposes and preclude its ability to withdraw such facilities from safeguards for national security purposes. If India is to receive nuclear materials or facilities from the United States, it will have to place such materials or facilities under safeguards in perpetuity in accordance with Section 123 of the Atomic Energy Act, unless, of course, the administration asks Congress to exempt India from this section of the law.

Alternatively, India could seek to enter into a new safeguards agreement with the IAEA that would be similar to the voluntary safeguards agreements that the NPT-recognized nuclear-weapon states—China, France, Russia, the United Kingdom, and the United States—have with the Vienna agency. With a voluntary safeguards agreement, India could submit a list of all Indian civil nuclear facilities that would be eligible for IAEA safeguards, like the safeguards agreements that the United Kingdom and the United States have concluded with the Vienna agency, or only a few designated civil facilities, as is found in the China-IAEA, France-IAEA, and Russia-IAEA voluntary safeguards agreements. Both the United Kingdom and France have submitted all their civil nuclear facilities to European Atomic Energy Community safeguards. If India elects to employ a voluntary safeguards
agreement as opposed to a facility-specific safeguards agreement, it would have the right to withdraw any facility from its safeguards-eligible list for national security reasons. However, unless Congress changes U.S. law, a voluntary agreement could also preclude nuclear cooperation with the United States.

In addition, if India sought the route of a voluntary safeguards agreement, it is not clear whether the IAEA would actually inspect all the civil nuclear facilities on the Indian eligible list or whether the IAEA would carry out inspections only if it has the funds available to do so, as is the case with the NPT-recognized nuclear-weapon states.

Thus, a voluntary safeguards agreement would be largely symbolic and is unlikely to yield meaningful nonproliferation benefits, such as halting the production of nuclear materials for nuclear weapons.

India also agreed to sign and adhere to an additional protocol with respect to civilian nuclear facilities. None of the three non-NPT states—India, Israel, and Pakistan—has agreed to accept the relevant provisions of the 1997 Model Additional Protocol to their nuclear activities covered under INFCIRC/66.Rev.2 safeguards agreements. The IAEA adopted the Model Additional Protocol in response to the revelations about the Iraqi nuclear weapons program in 1991. Under this protocol, the IAEA has the right to increased information about and access to all aspects of a state’s nuclear fuel cycle.

The Indian agreement to accept an additional protocol would help reinforce the legitimacy and significance of international safeguards and reduce the difference in the safeguards burdens that India has to assume and those that non-nuclear-weapon states have to bear in accepting IAEA safeguards on all their nuclear facilities. Nevertheless, India’s conclusion of an additional protocol with the IAEA is also largely symbolic because this safeguards agreement was designed to detect undeclared nuclear activities in states that have all their peaceful nuclear activities under IAEA safeguards.

**Other Nonproliferation Commitments**

India made other nonproliferation commitments under the joint declaration, but these simply further codify current Indian policy.

For example, India has pledged to continue a moratorium on nuclear testing. This is not an entirely new initiative, but India’s pledge in the joint declaration turns a purely bilateral commitment to Pakistan not to be the first to test new nuclear weapons into a further political commitment to the United States.

Likewise, India pledged to work with the United States for the conclusion of a multilateral fissile material cutoff treaty (FMCT). Yet India has been supporting the negotiation of such a treaty for some time, so this is not a new concession. Moreover, it is not clear how meaningful this action will really be because the United States itself has thrown the prospects for concluding this treaty into some confusion by asserting that an FMCT cannot be adequately verified. In the meantime, India will remain free to produce fissile materials for its nuclear weapons program, even though the five NPT-recognized nuclear-weapon states have all ceased the production of plutonium and highly enriched uranium (HEU) for nuclear weapons purposes. China has not announced its decision to do so, but it is widely assumed to have stopped production of fissile material for nuclear weapons purposes. The absence of an Indian commitment to halt its production of weapons materials is a notable void in the joint declaration.

New Delhi also promised to take the necessary steps to secure nuclear materials and technology through comprehensive export control legislation and through harmonization and adherence to the guidelines of the Missile Technology Control Regime (MTCR) and the NSG, although remaining outside the organizations themselves. India’s willingness to adopt NSG guidelines is a positive development, but it will really not break any new ground: India has always been a responsible nuclear exporter. India also agreed to refrain from transferring enrichment and reprocessing technologies to states that do not have them and to support international efforts to limit their
spread. This statement is in support of Bush’s February 2004 proposal, but it is also not a new initiative because, to its considerable credit, India has never, to public knowledge, transferred such technology to any state in the past.

Thus, although some Indian nationalists complain that India has given away the store to the United States, the actual concessions India has promised are really quite limited and are unlikely to contribute significantly to strengthening the nonproliferation regime.

**The Stakes**

If Bush can convince Congress and the members of the NSG to take the necessary steps to implement the U.S.-Indian joint declaration, the U.S. action would represent a de facto recognition of India’s status as a nuclear-weapon state. It would also reverse an almost 30-year policy of urging nuclear supplier states to require full-scope safeguards as a condition of nuclear cooperation with states that the NPT has defined as non-nuclear-weapon states, including India.

**Nuclear-Weapon Status**

India detonated a “peaceful” nuclear explosive in 1974 and conducted several nuclear weapons tests in 1998. However, neither U.S. law nor the NPT recognizes India as a nuclear-weapon state. The administration has evidently now concluded that it is only wise to accept this reality, as U.S. acknowledgement of India as a de facto nuclear-weapon state would enhance New Delhi’s standing as a regional counterweight to China, and that this would outweigh any damage done to the nonproliferation regime.

The downside, however, is that the U.S. acceptance of India as a nuclear-weapon state gives weight to the notion that nuclear weapons enhance a country’s status and power. It also means that the United States accepts the notion that some states are entitled to have nuclear weapons—the good guys—but is not willing to accept others—the bad guys. Administration officials have denied that the United States is recognizing India as a nuclear-weapon state, but when the United States accepts India’s nuclear-weapon program, it only legitimizes possession of these weapons and enhances their status rather than challenging the general importance and role of nuclear weapons. Moreover, the irony of the administration’s initiative is that it frees India to increase its nuclear weapons arsenal while the NPT-recognized nuclear-weapon-states have ceased production of nuclear materials for nuclear weapons purposes.

**The Rules of Nuclear Trade**

By signing the joint declaration as U.S. policy, the Bush administration has weakened the basic and long-held nonproliferation principle that a legal commitment to forswear nuclear weapons should be a precondition for countries seeking assistance in building civilian nuclear reactors. It also has overturned a 27-year effort to making full-scope safeguards a condition of nuclear cooperation with non-nuclear-weapon states into a universal international norm. The irony here is that the United States was the leading promoter of this initiative.

The fear is that these proposed changes will turn existing norms for nuclear trade into rules governed by commercial gain and that it will now be much more difficult to dissuade some suppliers from providing nuclear assistance to countries of proliferation concern. For example, it could be more difficult for the United States to argue against Russian assistance to Iran’s nuclear power program because Moscow could cite the U.S. deal with India to justify further assistance to Tehran. Pakistan is already demanding similar treatment from the West, and China might be more than willing to meet this demand, even if Western counties turn Islamabad down. On the other hand, the potential economic benefits for the United States of the deal are also uncertain. Even if nonproliferation conditions are eased, India may continue to deal with Russia or even buy from France. This could leave the United States in the ironic position of leading a move to ease nuclear trade restrictions with India without deriving major commercial benefits.

**Implementation**
The United States will have to overcome several diplomatic and legal obstacles in order to implement the U.S.-Indian declaration.

**The Nuclear Supplier Group**

The United States is obliged as a member of the NSG, at least as a policy matter—and some may argue as a legal matter—to require full-scope safeguards on exports of nuclear materials, equipment, components, and related technology specified on the so-called NSG trigger list to non-nuclear-weapon states as defined by the NPT.

Because the NSG makes its decisions on a consensus basis, the United States would have to persuade 44 NSG members to amend or reinterpret the NSG guidelines to permit nuclear cooperation with India without requiring New Delhi to accept full-scope safeguards. France and the United Kingdom have openly indicated a new willingness to consider nuclear cooperation with India. However, as Robert Joseph, undersecretary of state for arms control and international security, revealed in congressional testimony September 8, “Some have understandably questioned how this complex initiative comports with the NPT and our efforts to combat proliferation.” Some NSG members may very well argue, and with some justification, that it would be unfair to non-nuclear-weapon states party to the NPT to give India all the peaceful benefits of nuclear energy specified in Article IV of the treaty without requiring India to accept the corresponding obligations of Article I to forswear nuclear weapons and of Article III to implement full-scope safeguards.

The United States would risk throwing the nuclear export control regime into disarray if it tried to move forward in the absence of an NSG consensus and in defiance of serious protests by other NSG members that the U.S. initiative is unfair and undermines nonproliferation norms. Thus, it is difficult to believe that the administration would ask Congress to approve a new peaceful nuclear cooperation agreement with India without a clear and credible indication that the NSG will accept a special exception for India from its full-scope safeguards requirement.

**Negotiation of a New Agreement**

The Atomic Energy Act requires that significant nuclear exports from the United States only take place pursuant to an agreement for peaceful nuclear cooperation with the recipient state. Because the U.S.-Indian peaceful nuclear cooperation agreement expired in 1993, the United States and India would need to conclude a new one. Negotiating such an agreement may not be easy. Among the more difficult issues will be the question of whether and how to include nuclear material and equipment covered by the previous U.S.-Indian agreement in a new agreement. India maintains that the old agreement’s nonproliferation assurances and controls expired when that agreement terminated, but the United States has taken the position that all nonproliferation assurances and rights have continued in perpetuity, notwithstanding the expiration of the former agreement.

In addition, Section 123 of the Atomic Energy Act requires that a number of conditions, assurances, and controls be included in all U.S. peaceful nuclear cooperation agreements with non-nuclear-weapon states, including full-scope safeguards and a right of the United States to approve the reprocessing of nuclear material subject to the agreement. India may resist giving the United States such a right or insist that the United States give advance, long-term consent to such reprocessing. Most importantly, India clearly will not agree to Atomic Energy Act-required full-scope safeguards because this would mean, in effect, renouncing its nuclear weapons.

**Congress**

If the United States and India negotiate a new peaceful nuclear cooperation agreement without an Indian full-scope safeguards commitment, the president would have to submit an agreement to Congress that does not meet all the Section 123 requirements. In that case, both houses of Congress must approve the agreement by majority vote. In doing so, Congress could impose conditions on the entry into force or implementation of the agreement.

Moreover, even if Congress approved such an agreement without requiring any conditions, the
Nuclear Regulatory Commission would still have to license significant nuclear exports in accordance with criteria set forth in Sections 127 and 128 of the Atomic Energy Act. Section 128 requires full-scope safeguards. If India does not have safeguards on all its nuclear activities, the president would have to authorize an export by executive order and submit the executive order to Congress for review for 60 days of continuous session, during which time Congress could decide to reject the proposal or impose conditions on its implementation.

In addition, Section 129 of the Atomic Energy Act requires the termination of nuclear exports to a non-nuclear-weapon state that the president finds, among other things, to have “detonated a nuclear explosive device” or to have engaged in activities involving nuclear material and “having direct significance for the manufacture or acquisition of a nuclear explosive device, and [which] has failed to take steps which, in the president’s judgment, represent sufficient progress toward terminating such activities.” The president may waive this requirement if he determines that cessation of such exports would be seriously prejudicial to the achievement of U.S. nonproliferation objectives or otherwise jeopardize the common defense and security. This waiver also is subject to congressional review.

If Congress approved a new U.S.-Indian peaceful nuclear cooperation agreement without the full-scope safeguards requirement and without liberalizing the Atomic Energy Act’s nuclear export licensing provisions, the United States could, in theory, engage in new nuclear cooperation with India by using the waivers noted above. Yet, waiving the relevant provisions of Sections 128 and 129 of the Atomic Energy Act would hardly allow U.S. nuclear cooperation with India to take place on a stable, reliable, and predictable basis. Therefore, as a practical matter, in order to engage in such nuclear cooperation with India, the administration is likely to ask Congress to amend the act.

Bush has scheduled a visit to India for early 2006 that will put pressure on his administration to persuade Congress to act fairly soon and to start the process of negotiations with India. Yet, the task of convincing Congress to approve a new U.S.-Indian peaceful nuclear cooperation agreement or to amend the Atomic Energy Act may prove difficult.

In July, the House Energy and Commerce Committee adopted an amendment to an energy bill that a House-Senate conference committee was considering. That amendment would have prohibited any export of nuclear technology or equipment to India and other countries that had detonated a nuclear weapon and not signed the NPT. The Senate members of the House-Senate conference committee ultimately rejected the measure, but the members of the House have vowed to pursue their opposition to the Bush-Singh nuclear agreement.

Representative Joe Barton (R-Texas), who chaired the conference committee, said with regard to the amendment, “This is a way for the House to send a signal on this particular treaty.”

In addition, Senate Foreign Relations Committee Chairman Richard Lugar (R-Ind.) did not appear eager to embrace the joint declaration when he said that he expected the White House to explain how the change would affect overall U.S. nuclear policy and warned that “[w]e’re going to have a lot of conversations.”

In a September hearing of the House International Relations Committee, Rep. Jim Leach (R-Iowa) said, “[F]ew, if any, members appear to have been clamoring in these dangerous and uncertain times for the administration to peremptorily re-write the rules of the global nonproliferation order that have well-served U.S. interests for over three decades,” and that “the timing as well as the reasoning underlying this agreement appear to many on Capitol Hill as hurried and perhaps unrealistic.”

These various hurdles that the administration will confront, plus the domestic difficulties that the Indian government may face in implementing the pledges it made in the joint declaration, mean that the two sides are likely to face a long and difficult trek in putting the joint declaration into effect. In addition, how the two governments will sequence their various commitments in implementing the joint declaration is unclear.

For example, in a July 19 briefing, Undersecretary of State for Political Affairs Nicholas Burns offered
an indication of U.S. views on that point, saying, “It will have to be implemented by the Indian
government and then we will have to seek these changes from Congress and we’ll also have to have
conversations with our allies and partners in the Nuclear Suppliers [Group].” On the other hand,
India’s Atomic Energy Commission chairman, Anil Kakodkar, has said that, “[b]efore we take up any
reciprocal steps, we have to closely watch what happens to the U.S. laws on restrictions and lifting of
embargo and the [NSG] front.”

Conclusion

On balance, if the Bush administration is able to implement the joint declaration without significant
modification, it will have given the Indians a great deal—acknowledgment as a de facto nuclear-
weapon state and access to the international nuclear energy market—in return for largely symbolic
concessions in the nonproliferation area.

The Indian concession to separate military and civilian facilities and to place civil facilities under IAEA
safeguards could add very little value to the global nonproliferation regime. Moreover, India, not the
United States nor the international community, will determine which Indian facilities to designate as
civilian and place under safeguards and what kind of safeguards agreement(s) will apply. The joint
declaration does not call for India to cease production of weapons-grade plutonium or HEU, thus
allowing India to expand its nuclear weapons arsenal.

The administration has settled for Indian support for negotiating an FMCT, which could be protracted,
rather than insisting on India soon capping the production of unsafeguarded fissile material. As
Joseph has stated, “[W]e will continue to encourage additional steps, such as India’s acceptance of a
fissile material production moratorium or cap, but we will not insist on it for the purposes of the civil
nuclear cooperation initiative announced by the president and prime minister.”

The full ramifications that the U.S.-Indian joint declaration will have on the international
nonproliferation regime are not yet clear, and any ill consequences could be limited by conditions
imposed by Congress. Lawmakers could tie U.S. implementation of the joint declaration to an Indian
commitment to halt the production of weapons materials. They could also require convincing
evidence that an exception from the full-scope safeguards requirement for India is fully acceptable
to the NSG and will not lead to an erosion of the principle that full-scope safeguards will remain a
mandatory condition for nuclear trade with non-nuclear-weapon states. Furthermore, Congress could
also reject any administration request to exempt India from the requirement of safeguards in
perpetuity or allow India to use a voluntary agreement. Insisting on facility-specific safeguards rather
than a voluntary offer would eliminate the possibility that such facilities could be removed from
safeguards and avoid the image that India has achieved the same status as NPT nuclear-weapon
states.

If the NSG endorses a special full-scope exception for India while keeping the rest of the regime in
place, this could counter concerns that the Bush initiative will result in a serious erosion of the
nuclear supplier rules. On the other hand, if other suppliers, particularly non-nuclear-weapon states,
insist on maintaining full-scope safeguards as a condition of supply to India, the whole initiative
could fail. Worse still, if some suppliers try to exploit the U.S. initiative for commercial purposes to
pursue previously off-limit markets, it could wreak serious damage to the nonproliferation regime.

The administration’s initiative comes on the heels of various other actions that have raised serious
doubts about its support for the nonproliferation regime: its rejection of the Comprehensive Test Ban
Treaty, its downplaying of the value of IAEA safeguards in the run-up to the war in Iraq, its
contention that an FMCT cannot be verified, and its refusal at the 2005 NPT Review Conference to
reaffirm disarmament commitments that the United States made at a similar conference in 2000.
Many critics and countries are already attacking the Bush administration for these past actions, and
this latest initiative may only add to their doubts about the U.S. commitment to advancing
nonproliferation objectives.
and Associates, LLC. Both were career officials who held senior positions in the Department of State, the Department of Energy, and the U.S. Mission to the International Atomic Energy Agency. Lawrence Scheinman is distinguished professor at the Center for Nonproliferation Studies in Washington, D.C., and was formerly assistant director of the Arms Control and Disarmament Agency.