

U.S.-Indian Nuclear Cooperation Agreement: A Bad Deal

September 17, 2008

Attn: Foreign Policy; Energy; Defense; and Intelligence Aides

Dear Member of Congress,

We, the undersigned group of independent experts and organizations with substantial experience in the field of international security respectfully urge you to:

- reject the proposed U.S.-Indian nuclear cooperation (a.k.a. “123”) agreement in its current form;
- actively support measures that would help address the numerous flaws and ambiguities in this proposal; and
- resist overtures to rush toward a vote without carefully considering the far-reaching nuclear nonproliferation and security implications of this unprecedented and complex arrangement.

While we support expanded trade and ties between the United States and India, the energy, trade, and nonproliferation advantages of the proposal are vastly overstated by its proponents and the potential damage to the global nonproliferation system would be severe. Contrary to assertions by the Administration, the proposal would not bring India sufficiently into conformance with nonproliferation behavior expected of responsible nuclear-armed states.

As mandated by the 2006 Henry J. Hyde Act, the Administration obtained an India-specific waiver from longstanding Nuclear Suppliers Group (NSG) guidelines restricting trade with states, such as India, that are not members of the nuclear Nonproliferation Treaty (NPT) and do not allow comprehensive safeguards. Paradoxically, the Administration on Sept. 6 jammed through the NSG a waiver that *does not* incorporate the same common sense restrictions and conditions on nuclear trade with India that are required for U.S. nuclear trade with India. The Hyde Act mandates a ban on the transfer of enrichment or reprocessing technologies to Indian national facilities (unless they are part of a safeguarded bilateral or multilateral research program) and a requirement to cut off nuclear trade if India resumes nuclear testing.

Furthermore, the 123 agreement delivered to Congress on Sept. 10 contains ambiguous wording, loopholes, and inconsistencies with the Hyde Act. Before Congress acts on the agreement, it is essential that Congress ensure that U.S. and Indian officials resolve their differences on key issues including safeguards and the possible termination of the agreement in the event that India resumes nuclear testing.

U.S. firms will not be at a disadvantage due to any delay in the consideration of the 123 agreement because the Indian government has stated publicly that other bilateral nuclear cooperation agreements will not be implemented until the U.S. Congress approves this agreement. In addition, no supplier state can engage in nuclear trade with India until such time as it signs its new IAEA-Indian safeguards agreement. Furthermore, U.S. nuclear vendors will not be in a position to engage in nuclear trade with India until such time as

India ratifies the Convention on Supplementary Compensation for Nuclear Damage and the convention enters into force.

Please also consider that:

India Is Still Not in the Nonproliferation Mainstream: Contrary to the claims of its advocates, the deal fails to bring India further into conformity with the nonproliferation behavior expected of the NPT member states. Unlike 179 other countries, India has not signed the Comprehensive Test Ban Treaty (CTBT). It continues to produce fissile material and expand its nuclear arsenal. As one of only three states never to have signed the NPT, it has not made a legally-binding commitment to achieve nuclear disarmament.

Yet the arrangement would give India rights and privileges of civil nuclear trade that are more favorable than even for countries that are in good standing under the NPT. It creates a dangerous distinction between "good" proliferators and "bad" proliferators and sends out misleading signals to the international community with regard to NPT norms. It will make the task of winning international support to contain and constrain the nuclear programs of North Korea, Iran, and potential proliferators more difficult.

The Agreement Would Indirectly Assist India's Nuclear Weapons Program: While the Bush Administration's Nonproliferation Assessment Statement muddles the issue, classified responses to questions from Congress apparently make it clear that foreign supplies of nuclear fuel to India's civil nuclear sector will reduce or eliminate India's need to sacrifice electricity production to produce weapons-grade plutonium. This would enable India to increase the rate of fissile material production for bombs and violate the spirit if not the letter of Article I of the NPT. This situation will likely worsen nuclear arms competition in Asia.

Disturbingly, there is no provision in the 123 agreement or the Indian-IAEA safeguards agreement that prohibits India from removing heavy water from its *safeguarded* "civilian" reactors and extracting tritium, which can be used as boost gas for India's nuclear warheads. This omission must be addressed or else India's civil-military separation plan is not credible from a nonproliferation standpoint.

Safeguards on Additional Reactors Provide Little Nonproliferation Value: The chief nonproliferation benefit cited by the Bush Administration is that India would put a number of reactors and facilities under IAEA safeguards. Given that India maintains a nuclear weapons program outside of safeguards, facility-specific safeguards on a few additional "civilian" reactors provides no serious nonproliferation benefits and will cost the underfunded IAEA tens of million of dollars extra to implement.

Disagreement Regarding the Permanence of Safeguards: The Hyde Act requires that the safeguards on civil nuclear material and facilities last "in perpetuity" and must be "consistent with IAEA standards and practices." The Bush Administration and the IAEA Director-General agree that the safeguards agreement meets this standard.

However, Indian officials have stated otherwise and have publicly suggested they may withdraw from the safeguards agreement if fuel supplies are interrupted, even if it is due

to a nuclear test.¹ An official acknowledgment by the Government of India of the U.S. and IAEA interpretation is necessary to ensure there is no misunderstanding and should not be a problem if the safeguards agreement is in order.

A Declaration of Facilities to Be Safeguarded Has Not Been Filed with the IAEA:

Section 104 of the Hyde Act requires that the President determine, before he submits the proposed U.S.-Indian peaceful nuclear cooperation agreement to Congress, that India, “has filed a declaration regarding its civil facilities and materials with the IAEA.” The Hyde Act also requires that the President include with his determination an analysis and a copy of “the declaration made by India to the IAEA identifying India’s civil facilities to be placed under IAEA safeguards.”

To date, India has not filed a declaration of facilities that will be subject to the safeguards agreement. In fact, India's safeguards agreement (Section II A. para 13) says:

"Upon entry into force of this Agreement, and a determination by India that all conditions conducive to accomplishment of the objective of this Agreement are in place, India shall file with the Agency a Declaration, based on its sovereign decision to place voluntarily its civilian nuclear facilities under Agency safeguards in a phased manner."

As a result, the President’s determination is incomplete and there is no guarantee that India will place under safeguards the list of civil facilities it identified in its March 6, 2006 statement to the Indian parliament.

Enrichment and Reprocessing Issues: No IAEA safeguards can prevent India from replicating any imported sensitive nuclear technologies for use in its unsafeguarded military sector. The State Department has informed Congress that as a matter of policy the United States does not intend to transfer such technologies. Congress should transform this U.S. policy into law.

The State Department also claims that no NSG participating government intends to transfer such technologies to India. However, until such time as the NSG adopts new guidelines barring enrichment and reprocessing technologies to non-NPT members, other states may engage in such trade with India.

Nuclear Testing and Termination of Nuclear Trade: If there is an added benefit to the nuclear cooperation proposal, it is that Congress made it clear in the Hyde Act that if India breaks its political pledge not to resume testing, U.S. nuclear trade shall be terminated. Yet under the NSG waiver, other countries may continue trading with India and India asserts that under the U.S.-Indian 123 agreement, the United States and other suppliers should provide fuel supplies even it resumes testing. Congress must clarify that if India resumes nuclear testing, the United States will terminate bilateral nuclear trade, and immediately convene an emergency NSG meeting to seek the termination of all NSG trade with India.

¹ See the comments of Department of Atomic Energy official R.B. Gover as reported by *The Hindu* July 13, 2008: <http://svaradarajan.blogspot.com/2008/07/perpetuity-of-safeguards-only-with.html>

India's Nonproliferation Record Is Not "Impeccable:" Unlike Pakistan, there is no evidence that India has transferred nuclear weapons-related technology to other states. However, India has apparently relied upon a secret program to outfit its uranium enrichment program and circumvent other countries' export control efforts. These procurement practices create the potential for leakage of sensitive nuclear technology and know-how² and should be fully scrutinized by the relevant congressional committees.

India and Iran: In addition, at a time when the United States and many in Congress are seeking to further sanction Iran to persuade it to come clean on its past, secret nuclear activities and halt its uranium enrichment, India has joined in NAM statements supporting Iran's nuclear program and is a major supplier of refined petroleum products for Tehran. Furthermore, shortly after the House vote on the Hyde Act in 2006, the State Department belatedly reported that Indian entities had sold sensitive missile technologies to Iran in violation of U.S. export control laws.

We respectfully urge you to look beyond the Administration's talking points, exercise your oversight responsibility to critically examine this unprecedented nuclear cooperation proposal, and actively support measures that would help address some of its numerous flaws and ambiguities.

Sincerely,

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² "India's Gas Centrifuge Program: Stopping Illicit Procurement and the Leakage of Technical Centrifuge Know-How," by David Albright and Susan Basu, Institute for Science and International Security March 10, 2006: http://legacy.armscontrol.org/projects/india/india_record.asp

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