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Indo-US Nuclear Deal

Unending Drama in Many Acts

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A Prologue

The Indo-US nuclear deal enjoys considerable support in the US policy community—White House, Congress, State Department, and Neo-Con think tanks close to the Bush administration, (apart from the nuclear industry). They hope that the greatly improved relations with India would, hopefully, counter-balance the enveloping disaster in Iraq. The present status of the Indo-US nuclear deal is that the US Atomic Energy Act of 1954 has been amended to exempt India from its provisions; thus allowing the transfer of nuclear technology to India despite its being outside the Nonproliferation Treaty and not accepting fullscope safeguards over its nuclear program. Now, the so-called 123 agreement must be negotiated by the two countries in line with this enabling legislation.

Core Issues

Four basic issues provide an overview to the present debate on the nuclear deal.

First, have both countries over-invested in it? This viewpoint reflects the voice of caution. The more intrepid would urge that negotiating a radical Indo-US nuclear deal would raise their relationship to a qualitatively higher level. In truth, both these positions are extreme. India needs to deepen its relations with the US, which occupies the apex of political, military, economic and technological power in the international system. The US needs to incorporate a democratic, multiethnic and rising India into its strategic fold to shape the evolving international system. It is arguable therefore that Indo-US relations will weather the fate of the nuclear deal, whichever direction it takes.

Second, what are the compulsions informing both countries to negotiate this deal? India requires nuclear technology from abroad—specifically natural uranium for its heavy water reactors, low enriched uranium for its light water reactors, and technical information to hasten its fast breeder reactor program. But it will not join the Nonproliferation Treaty or accept fullscope safeguards. In lieu, the Bush Administration wishes to co-opt India into its strategic schema for containing the growing challenge from China. In essence, the United States is sacrificing its commitment to the nonproliferation regime at the altar of regional diplomacy. This suits New Delhi. Besides gaining recognition for its nuclear weapon status, it can acquire nuclear technology and international finance to expand its atomic energy program, while ceasing to be excluded by technology control regimes like the Nuclear Suppliers Group (NSG).

Third, the intense debate in India on this deal has been frugal on assessing the place of atomic energy in India's energy future. Only 3000 MWs, less than 3 % of its total power, is presently being generated by the Atomic Energy Commission (AEC), despite some 50 years of strenuous effort. The Sarabhai profile (1970) had envisaged the AEC producing 10,000 MWs by 1980. Now, it is promised that 30,000 MWs would be generated by 2022 and 63,000 MWs by 2032. How realistic are these targets, if the AEC's past record is reviewed? No details are available on where the finances for this gigantic program would be found or how the accentuated problems of reactor safety or waste disposal would be addressed. Apropos, wind power production over the last decade has crossed 4000 MWs. A willing suspension of disbelief is needed to accept the AEC's grandiose schemes.

Fourth, the centrality of the AEC in India's nuclear decision-making processes has greatly accelerated after the Indo-US nuclear deal was reached on July 18, 2005. The frequency of the AEC Chairman's public statements, often contrary to the positions taken by the Ministry of External Affairs, bears testimony to this phenomenon. The AEC's new centrality in the nuclear decision-making process is also manifested by the Prime Minister conceding that any final agreement reached with the United States would be reviewed by a group of AEC retirees, which is a modality unknown before in the annals of the Indian administration. The AEC's power derives primarily from its proximity to the Prime Minister, its secretive ways of working, and its now becoming the repository of India's magic nuclear deterrent.

The New Delhi Scene

The drama has currently shifted to New Delhi. A controversy obtains over how the provisions of the amended American law are prejudicing India's national interests. Since India will gain access to nuclear technology and legitimacy for its nuclear weapon status without joining the Nonproliferation Treaty or accepting fullscope safeguards, why is New Delhi looking the gift horse in the mouth? Why is a strange coalition of the Left and Right parties in India opposing the US legislation, apart from a group of former AEC officials? Each of these entities has its own agenda. Briefly, the Left parties are driven by ideological compulsions to oppose any steps by India to improve its relations

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no contradiction in opposing the nuclear deal, despite having initiated steps to deepen bilateral Indo-US relations when they were in power during 1998-2004. They are now animated by the desire to oppose everything the Congress-led UPA government does. The former AEC officials are

informed by an exaggerated ultra-nationalism, which really conceals their animus against the United States for having treated them as pariahs after the Pokharan I nuclear test in 1974. Importantly, are they providing an alibi for the UPA Government's own predilections? This doubt arises because it could easily ignore the Left parties and the BJP. Neither is really prepared to bring down the UPA Government and face new elections.

The objections voiced in New Delhi to going beyond the literal provisions of the 18 July 2005 nuclear deal and the 2 March 2006 separation plan have been voiced by many parties, and specifically by the Prime Minister in Parliament on 17 August 2006, Sonia Gandhi outside Parliament and, most recently, by the Foreign Minister in Parliament on 12 December, 2006. They do not seem to appreciate the tortuous legislative history of the amended American law. Indeed, the Foreign Minister noted "certain extraneous and prescriptive provisions in the legislation," before throwing the gauntlet that India's objective "is that technology denial regimes that have targeted India for so many decades must be dismantled." But the qualifications in this legislation embody the compromises made by American lawmakers to finalize a very divisive amending law, balancing the political interests of the Bush administration, business interests of the nuclear industry, and the ideological interests of the non-proliferation lobby. This is the divisive backdrop to the 123 negotiations between India and the United States, impinging on the parallel negotiations proceeding with the IAEA to finalize a safeguards agreement to govern India's nuclear program, and India's efforts to secure support from individual member-countries to exempt India from the provisions of the NSG Guidelines.

Parsing the Amending Legislation

The precise content of the enabling amendments can be noticed now. A policy declaration requires India to: place a moratorium on fissile material production for weapons purposes; accept the Proliferation Security Initiative and its Interdiction Principles; conform to the export regulations of the Australia Group and the Wassenaar Arrangement; sanction and contain Iran's efforts to acquire WMDs; halt its growth of nuclear weapon arsenals, reduce and ultimately eliminate them; not increase weapons grade fissile

material stocks in unsafeguarded nuclear facilities; ensure that the safeguards agreement reached with the IAEA will apply to all exported or reexported nuclear materials and equipment; and see that fuel supplies made to India will only be commensurate with "reasonable reactor operating requirements." Finally, the 123 Agreement should incorporate all these measures.

Further, the U.S. President is enjoined to make an annual determination that India has a credible plan to separate its civilian and military nuclear facilities; that an IAEA safeguards agreement has been reached in perpetuity, and progress made towards establishing an Additional Protocol; that it is working towards finalizing the FMCT, and preventing the proliferation of enrichment and reprocessing technology; and that its export control laws have been harmonized with those of the Nuclear Suppliers Group (NSG) and Missile Technology Control Regime (MTCR). Significantly, the President is also required to certify that the NSG has decided by consensus to permit the supply of nuclear items to India covered by its guidelines. No transfers should be effected "if such transfers would be inconsistent with the transfer guidelines of the NSG in effect on the date of the transfer." This annual Presidential determination, along with its basis, should be sent to the appropriate House Committees of Congress.

New Delhi's Reservations

These sweeping amendments indubitably qualify the Indo-US nuclear deal of July 2005 and the separation plan of March 2006. India's doubts are understandable. Its major objections and the validity of their premises are discussed below.

First, the obiter that nuclear cooperation would cease if India conducts another nuclear test is deemed an affront to India's national sovereignty and national security; hence India is not prepared to accept any binding obligations to forswear further nuclear testing. US laws, however, dictate that any country conducting a nuclear test must be sanctioned; making India an exception to their universal prohibitions is hardly rational. Should it test India should be prepared to face the inevitable consequences of being sanctioned again. More realistically, India should seriously evaluate its need for further nuclear testing to acquire its "minimum nuclear deterrent." It is not enough to urge that its shape and size cannot be

discussed on national security considerations, or that there is no "fixity" here.

Second, another obiter expects that India would "sanction and contain" Iran for seeking uranium enrichment technology en route to gaining nuclear capabilities. India joined the UN Security Council

resolutions to constrain Iran's nuclear quest, but also needs oil from Iran.

Currently, the Iran-Pakistan-India oil pipeline project is stuck, because Iran can only make supplies on

commercial prices. It is also unclear how the project will be insured. Supplies by tankers at market prices seem more realistic. India could live, therefore, with the requirement to go along with the international community to "contain and sanction" Iran.

Third, India is hesitant about reaching an agreement with the IAEA in perpetuity unless it is provided assured access to nuclear materials in perpetuity. India's negotiations with the IAEA are going nowhere on this issue, since the latter is a regulatory, and not a policy making, authority. Failure to reach a safeguards agreement with the IAEA would not permit the Indo-US nuclear deal to be implemented, unless the Bush Administration prevails on the IAEA to make an exception for India in regard to safeguards being imposed conditionally.

Fourth, the requirement that the US President must certify annually that India is conforming to the requirements of the American legislation posits as an infringement of its sovereignty, apart from introducing an element of uncertainty. These caveats, moreover, would be predicated on individual judgments that add to this uncertainty. It is, of course, possible to exaggerate these fears; indeed alternate language has been discovered by President Bush agreeing to an "annual assessment" rather than "certify" that India is conforming to the US legislation.

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should conform to the NSG guidelines is unavoidable if it wants other NSG members to go along with it. For its part, the NSG must reach a unanimous decision to permit nuclear technology transfers to India by modifying its Guidelines. What view hardliners like the Scandinavian countries and Japan will take remains uncertain. Chinese views also remain a conundrum if their public statements are closely examined. It would be unrealistic, however, for India to expect that reprocessing or enrichment technology would be transferred; since India does not really need these technologies, it is only making a debating point.

It is dubious if these nuances in the debate that has occurred in the US Congress on the Indo-US nuclear deal are appreciated in New Delhi. Or the need for New Delhi to move beyond the precise wording of the Indo-US agreement of July 18 2005 and the separation plan of March 2, 2006. The American position is circumscribed by the legislation passed by Congress and signed into law by President Bush. A confrontation is now enjoined, even before the safeguards agreement with the IAEA has been negotiated, and an exemption obtained from the NSG Guidelines.

All eyes are riveted on President Bush. He had issued a "signing statement" while approving the legislation on the Indo-US nuclear deal holding that this legislation is only advisory and not binding on him. If required, he would veto any legislative impediment to implementing the nuclear deal. Will President Bush adhere by this resolve, despite the Republican hold over the House of Representatives and Senate loosening after the Congressional elections? And the Democrats gaining control over the committees in both Houses dealing with Foreign Relations, Defense and Intelligence? Will they challenge the President's authority to override Congressional legislation pertaining to the nuclear deal? What happens if the two Houses, with their Democrat majorities, re-pass the legislation vetoed by the President?

But, there are more fundamental legal issues involved. Presidential signing statements were not widely appreciated issue until recently when President Bush attached one to torture ban legislation, holding that he had the constitutional

authority as commander-in-chief to allow the CIA to violate the ban to protect national security. A review of his record revealed that he had challenged over 750 statutes since he took office through this device, which has inspired a Senate Judiciary Committee hearing, and a probe by the American Bar Association. In this confrontationist milieu, a majority judgment by the U.S. Supreme Court (*Hamdan vs. Rumsfeld*) has held that "signing statements" cannot oust the Courts from exercising jurisdiction over executive actions. Whether President Bush will use this device to advance the Indo-US nuclear deal overriding the clear provisions in the amending legislation, which could be challenged in law, seems dubious.

Conclusions

These are issues that New Delhi should factor into its 123 negotiations with the United States, rather than issue needlessly incendiary statements, while hoping, in a serendipitous fashion, that President Bush will somehow override the amending law passed by Congress for transferring nuclear technology to India. New Delhi should also examine how it would implement its ambitious atomic energy program by indigenous efforts if the Indo-US nuclear deal unravels, apart from remaining transfixed in the equally serendipitous hope that the Atomic Energy Commission will somehow achieve India's ambitious atomic energy targets, despite its none-too-complementary past record. A holistic approach to energy security is required to best serve India's energy interests—conservation, non-traditional energy sources, ethanol, a much-needed reform of the inefficient State Electricity Boards, new technologies like exploiting coal bed methane and so on should be explored. The place of atomic energy in this matrix would then form part of an examination of these fundamental issues, placing the Indo-US nuclear deal in a more realistic perspective.



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