INDO-U.S. NUCLEAR AGREEMENT — A CURTAIN RAISER

By

—ASHEESH GUPTA,
Student of LLM 1st year
NALSAR University of Law,
Hyderabad, A.P.

INTRODUCTION

"When Nuclear Energy has been successfully applied for power production in, say a couple of decades from now, India will not have to look abroad for its experts but will find them ready at hand".

—Dr. Homi Jehangir Bhabha

The Indo-U.S Nuclear agreement is one of the major foreign policy achievements for India as it will fulfil the India's long needed future conventional energy requirements. It is a tremendous opportunity to end its nuclear isolation and join other leading nuclear country as an equal partner. This landmark bilateral agreement was reached within the frame work of Joint statement between Indian Prime Minister Manmohan Singh and United State's president George Bush on 18th July, 2005 at White House, Washington. To implement the Joint statement of 18th July, 2005, United States passed the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, also known as the Hyde Act, which modified the requirements of Section 123 of the U.S. Atomic Energy Act, 1954 to permit Civil Nuclear cooperation with India which lifted the ban of supply of nuclear fuel that has been in place for more than 30 years (caused by India's first nuclear explosion in 1974). On the basis of this Act, 123 agreement were concluded on July 27, 2007. The 123 agreement defines the terms and conditions for bilateral civilian nuclear cooperation, and requires separate approvals by the U.S. Congress and by Indian cabinet ministers. This deal is the result of India's impeccable record in non-proliferation even after the nuclear test of 1974 and pokharan test of 1998 under the Vajpayee government as a result of which it was denied nuclear fuel to develop civilian nuclear technology by the United States. The agreement called for steps to be taken by both sides. For the United States, it represents a sea change in policy, which included the need to revisit and revise its domestic law, and to get agreement of the 45 member Nuclear Suppliers Group (NSG)[1], to adjust agreed Guidelines prohibiting the supply of nuclear equipment, material, or technology to any state not accepting comprehensive IAEA safeguards on all of its nuclear facilities in order to accommodate the Indian situation. U.S. President Bush had committed himself to work to achieve "full civil nuclear cooperation with India" on the ground that "as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other states."

For India's part it agreed to "assume the same responsibilities and practices" as other countries with advanced nuclear technology, in particular, identifying and separating civilian and military nuclear facilities and programs;

1. The Nuclear Suppliers Group (NSG) comprises 45 nuclear supplier states that voluntarily agree to coordinate civil nuclear export policy on nuclear and nuclear related items and to require agreed standards on such exports. Requirements include such things as recipient state acceptance of full scope IAEA safeguards, physical protection against unauthorized use of transferred materials and facilities, and supplier consent to retransfer of items provided to the recipient.

filing a declaration regarding its civilian facilities and voluntarily placing them under IAEA safeguards; signing and implementing an Additional Protocol[2] with respect to those facilities; continuing its unilateral moratorium on nuclear testing; working with the United States toward conclusion of a multilateral fissile material cut off treaty (FMCT); implementing comprehensive export control legislation; and refraining from transferring enrichment and reprocessing technology to states that do not have them.

In both cases there is much work to be done, none of it is easy, and it cannot be taken as given that all of the above objectives can be met. In so far as the United States is concerned, significant nuclear exports can take place only pursuant to an agreement on civil nuclear cooperation. Agreements with non-nuclear weapon states (which is how U.S. and international law regard India) require that certain conditions be met including full-scope IAEA safeguards, adequate physical protection, a peaceful nuclear explosive guarantee, consent rights over enrichment and reprocessing of nuclear materials, and a U.S. right of return of items subject to the agreement if the cooperating partner detonates a nuclear explosive or terminates or abrogates an IAEA safeguards agreement. All agreements must be submitted to Congress. In the event of an agreement that does not meet all of the requirements because the president has chosen to waive one or more of the conditions, both houses of Congress must approve it by majority vote. Even if Congress does so, export licensing must be approved by the Nuclear Regulatory Commission (NRC) where waiver conditions may again be subject to Congressional review and disapproval. The complexity involved indicates that the executive branch would likely seek to amend the law with no certainty regarding the outcome.

Beyond domestic law and practice, the United States is politically obligated as a member of the NSG to require full-scope safeguards on all items appearing on a safeguards trigger list[3]. NSG decisions on criteria are based on consensus. Having laboured since 1975 to establish and strengthen the NSG, in particular to insist on full-scope safeguards, the United States faced a significant challenge to bring its 45 partners in the NSG around to make an exception on behalf of India or to a formulation that might be used for future cases. It is particularly ironic that the state that initiated and nurtured the NSG and laboured unrelentingly for the principle of full-scope safeguards and for enlarging the list of items to be covered by NSG rules would now be urging modifying the rules to accommodate a "special case." It is significant that the NSG at its most recent 2005 Plenary in Oslo further strengthened its Guidelines by agreeing to suspend nuclear transfers to countries that are in non-compliance with their safeguards agreements. Since these safeguard agreements refer to full-scope safeguards, the agreement with India would confer a special status on India not applicable to members of the NPT. To argue for selective exception is essentially to substitute selective proliferation for non-proliferation which strongly contradicts the NPT and the norms of the non-proliferation regime.

Further complicating matters is the position taken by NPT parties in past Review Conferences. In 1995, when states party to

2. Additional Protocol refers to a legal document granting the IAEA increased rights to information and access to sites in a safeguarded state as well as additional authority to use advanced technologies during the verification process. It is a means of strengthening the IAEA's comprehensive safeguards system to enable the Agency to provide assurance about declared and possible undeclared activities.

3. **The Trigger List** contains materials and equipment that are considered to be controlled commodities that either cannot be exported or that require an export license. The list is an up-to-date database maintained by Oak Ridge National Laboratory (ORNL) and has interactive search capabilities. http://www.ipd.anl.gov/excontrol/trigger.html, Last visited on 26/09/08.

the treaty agreed to its indefinite extension, they included in a Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament that was critical to indefinite extension a proviso that "New supply arrangements should require as a necessary precondition, acceptance of IAEA full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices."[4] The 2000 NPT Review Conference not only reaffirmed this position, but also emphatically declared that the 1998 nuclear test explosions carried out by both India and Pakistan "do not in any way confer a nuclear-weapon State status (NWS) or any special status whatsoever."[5] In short, the initiative raises significant political problems both domestically and internationally and runs a serious risk of resulting in a net weakening of the non-proliferation regime according to the analysts.

India also faces problems in fulfilling the undertakings noted above. Some see the agreement as promises on one side (U.S.) and explicit commitments on the other (India) and as such imbalanced. Among the concerns that have been expressed is the problem of separating the civil and military programs apparently because the latter has few dedicated facilities and relies on the former for fissile material and the impact of perceived "intrusive" international inspection on Indian nuclear facilities especially with an Additional Protocol in place. The prospect that the nuclear bureaucracy in India will seek to minimize the undertakings with respect to international safeguards, and to avoid having to fully separate civil and military activities (*inter alia* for cost considerations of having to build dedicated facilities for the latter alone) suggests that reaching closure on a mutually acceptable arrangement will not be easy.

As per the joint statement of July, 2005 and 123 agreement of July 27, 2007, India agreed to allow inspectors from the International Atomic Energy Association (IAEA), the United Nations' nuclear watchdog group, access to its civilian nuclear program. But it was India to decide which of its many nuclear facilities to classify as civilian. By March 2006, *i.e.*, before the passing of the Hyde Act, 2006 on November 16, 2006, India promised to place fourteen of its twenty-two power reactors under IAEA safeguards permanently. India also promised that all future civilian thermal and breeder reactors shall be placed under IAEA safeguards permanently. As per the agreement India has already identified 14 of its 22 nuclear facilities (existing or in the process of being built) as civilian. That means that the remaining eight facilities could be used to produce essential fuels for nuclear bombs; even more easily since the need for nuclear fuel for the civilian facilities would be henceforth met by the US and, hopefully, other suppliers. Therefore, Military facilities—and stockpiles of nuclear fuel that India has produced up to now—will be exempt from inspections or safeguards.

The importance of this agreement can be ascertained from the statement given by to the Nuclear Power Corporation of India, which says that, the agreement will help India meet its goal of adding 25,000 MW of nuclear power capacity through imports of nuclear reactors and fuel by 2020. This deal is important from the point of view that India is still not a signatory to Non-Proliferation Treaty and is considered as Non-Nuclear Weapon State (NNWS) according to NPT Treaty but is assured by the United States that it will make a deal with NSG (Nuclear Supplier Group) for the supply of nuclear fuel to India, because as per the NSG guidelines only signatories to Non-

4. 1995 NPT Review and extension Conference, Paragraph. 12, Available at http://disarmament.un.org/wmd/npt/1995dec2.htm, (Last visited on 26/09/08)

5. 2000 NPT Review Conference Paragraph. 9 under Articles I and II, http://www.armscontrol.org/act/2000_06/docjun, Last visited on 26/09/08.

Proliferation Treaty (NPT) are eligible for supply of nuclear Fuel. This deal has gone through various opposition from Left parties and opposition in the parliament and the members of the NSG group, but still it had made all its way through and persuaded the 45 member Nuclear Supplier's Group (NSG) to give its nod to Indo-U.S Nuclear Deal on 6th September, 2008 after a marathon meeting held in Vienna in which India obtained a clean waiver from its (NSG's) existing rule, which forbid nuclear commerce with any country, which has not signed the Nuclear Non-Proliferation Treaty (NPT), for the export of Uranium, for operationalising India's Civilian Nuclear reactors without any reference to ban on testing, enrichment ban and pre-processing technology ban.[6] Therefore, as per the deal India will get access to nuclear technology without having signed the Comprehensive Test Ban Treaty (CTBT) or Non Proliferation Treaty (NPT). It also opens up nuclear commerce for India and it can buy nuclear reactors from Russia, France and USA. India will also get access to nuclear fuel from the international market and also civilian space technology. It is important to mention that there is no explicit mention of nuclear testing in the NSG Waiver and India has not made any legal commitment on the conduct of nuclear test and has reiterated its earlier stand of unilateral, voluntary moratorium on conducting atomic tests. The deal does not require India to cap or limit its fissile material production which is necessary for producing a nuclear weapon. This comes at a time when nearly all the major nuclear powers—including the United States, France, Britain, and Russia—are moving to limit their production.

6. According to Anil Kakodkar, Chairman of the Atomic Energy Commission, India's "legal" right to conduct nuclear tests has been fully preserved and the country has not made any commitment in this regard to gain the waiver from the NSG to participate in nuclear commerce, Anil Kakodkar, Chairman of the Atomic Energy Commission said on Saturday 06th September, 2008.

PROS AND CONS OF INDO-U.S. NUCLEAR DEAL

There are both proponents and opponents to this Indo-U.S Nuclear Deal. The proponents of the agreement argue that the deal bring India closer to the United States at a time when the two countries are forging a strategic relationship to pursue their common interests in fighting terrorism, spreading democracy, and preventing the domination of Asia by any single power. It also sees nuclear energy as one of the important requirements for future development of the country. On the other hand it has also received opposition from Non-proliferation activist who think that this deal will only further escalate the proliferation of nuclear arms in the region, besides creating new geo-political tensions on the global scale. According to them the agreement is overly beneficial for India and lacks sufficient safeguards to prevent New Delhi from continuing to produce nuclear weapons. From the view point of those who favours the deal, the act and the decades of India's nuclear isolation had resulted in capping the country's nuclear power generation capacities to an extent of just 3,900 MWe in over 60 years of independence. As a result, out of a total installed generation capacity of about 145,000 MW of electricity, 70 is accounted for through thermal fuel and 20 percent by hydro, with nuclear energy contributing to just two percent. The remaining capacities come by tapping the various sources of non-conventional energy such as solar, wind, biomass and tidal waves. As compared to coal, gas or oil, energy output per unit mass of nuclear fuel is million times larger than the former. As a result of this nuclear Deal India could generate some 20,000 MWe (unit of nuclear power) by 2020 *i.e.*, within a span of 10 year, it means the share of nuclear energy will increase from 4% to 10% by the year 2020.

France is an excellent example of how energy security can be realized through nuclear

route in an environmentally benign way. Today, France reprocesses and recycles almost the entire spent fuel that arises from its fleet of PWRs. France is also the host for ITER[7] project which would demonstrate to the world how one can augment global energy supply through almost unlimited fusion energy. India is happy to be a partner in this global effort in which almost half of the humanity is participating. India is committed to make in-kind contribution through equipment manufactured in the country costing around Rs.2000 Crores.

India's demands on nuclear issues primarily focussed on two aspects: first, acknowledging India as a Nuclear Weapons State (NWS) along with other five recognised nuclear powers. Though many would consider that the nuclear status is not for others to confer on us, as it is known India is a state with nuclear weapons. Secondly, allowing India to access the nuclear technology, especially for civilian purposes. Though India could never become a party to the NPT, New Delhi informally expected that at least the US would recognise it as a NWS publicly and provide access to nuclear technology for civilian purposes. India also expected that the US would not object, if any other state willingly provides nuclear energy for civilian purposes to her.

VIENNA CONVENTION ON TREATIES AND 123 AGREEMENT

A treaty, the typical instrument of international relations, is defined by the 1969 Vienna convention on Law of Treaties as an "agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[8] Since the 123 agreement requires a congressional consent and is founded on U.S laws (The U.S Atomic Energy Act, 1954 and The Hyde Act, 2006), it is a treaty under the U.S definition as well and will be bound by the international law.[9]

Article 2.2 of the 123 Agreement specifically states that it is an agreement "to enable full civil nuclear energy cooperation between the Parties." It contemplates such cooperation on "an industrial or commercial scale." Under Article 16, the agreement shall enter into force on a date on which the Parties exchange diplomatic notes informing each other that they have completed all applicable requirements. The legal status of the 123 Agreement is that it has not yet entered into force and, even after it comes into force, India and the United States would have to enter into further agreements to fulfil the objectives on an industrial or a commercial scale. Therefore, the 123 Agreement is an enabling agreement and no more. "Operationalising" the 123 Agreement would mean that the Parties would have to complete all pre-requirements, exchange diplomatic notes and agree upon the date on which the 123 Agreement would come into force. Even after it comes into force, there is nothing automatic, and it would be necessary to enter into further agreements.

7. The ITER experiment (ITER means "the way" in Latin) is designed to demonstrate the scientific and technological feasibility of fusion energy for peaceful purposes. Following on from today's largest fusion experiments worldwide, ITER aims to provide the know-how to build subsequently the first electricity-generating power station based on magnetic confinement of high temperature plasma - in other words, to capture and use the power of the sun on earth, http://www.iter.org/pdfs/presskitITEReng.pdf (last visited on 12/09/08)

8. Article.2(1)(a) of Vienna Convention on Law of Treaties, for full text, visit, <http://untreaty.un.org/ilc/texts/instrum ents/english/conventions/1_1_1969.pdf> (Last visited on 18/09/08.)

9. Sec. 11 (n) of the U.S Atomic Energy Act, 1954 defines the term, "international arrangement", as follows:

"International arrangement means any international agreement hereafter approved by the congress or any treaty during the time such agreement or treaty is in full force and effect, but does include any agreement for cooperation."

We have to apply the principles of international law and the principles of interpretation of statutes. *Article 16.4* of the 123 Agreement states that the "Agreement shall be implemented in good faith and in accordance with the principles of international law." Under customary international law as well as the Vienna Convention on the Law of Treaties, 1969, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. When the 123 Agreement is voted "up" by the US Congress – that is, ratified by the US Congress – it will be the last expression of the legislature on the subject and will prevail over any earlier domestic law. Besides, under Article VI (2) of the US Constitution, all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. In any view of the matter, the Hyde Act, which is a domestic law, cannot bind India and cannot interfere with the implementation of the 123 Agreement which, when ratified by the US Congress, will be a bilateral treaty between two sovereign countries.[10]

Further, *Article 2.1* of the Vienna convention says that, "Each party shall implement this agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements." This clause has been interpreted by some of the critics to this deal to mean that "the 123 agreement is subject to all the present internal laws of the U.S Government, right from the U.S Atomic Energy Act, 1954 to Hyde Act, 2006, all inclusive. Not only that, it will be subject to these present laws and to any new law that may be enacted in future".[11]

Now the question arises whether the 123 Agreement gets precedence over the Hyde Act, 2006 or not. The phrases "in accordance with" and "subject to" necessarily imply the same. Nicholas Burns, the U.S. Under Secretary for Political Affairs and a key member of the U.S. negotiating team, has also in his one of the statement has asserted the 123 agreement will be implemented in the manner fully consistent with the Hyde Act, 2006. It is also the general principles of the International Law that any international agreement must be incorporate into its municipal law to be enforceable.

The latter part of the interpretation that the agreement will be subject to future laws and amendments to present laws would seem to be not quite correct. This is because of *Article 16.4* of the 123 Agreement which states that, "This agreement shall be implemented in good faith and in accordance with the principles of international Law". The international Law being referred to here is The Vienna convention on Law of treaties. *Article.27* of the convention (on internal laws and observance of treaties) says: "A party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty". The Convention defines Treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." As per this definition, an agreement such as the 123 Agreement is a treaty and the provisions of the Convention will apply to it. If the Agreement has to be implemented in accordance with *Article 2.1 and Article 27* of the Vienna Convention in a self-consistent manner, our conclusion follows immediately. *Article 2.1* ensures that the Agreement will be implemented consistent with all the present laws and the Vienna Convention ensures that a Party cannot invoke a future law or future amendments that violate the Agreement.

10. Excerpts of Shri P. Chidambaram's (Finance Minister of India) speech on the Motion of Confidence in the Lok Sabha, available at http://www.sarvajan.com/2008/07/hyde-act-123-agreement-and-india.html, (Last visited on 18/09/08.)

11. 123 Agreement and internal Laws – By R.Ramchandran, http://www.hinduonnet.com/2007/09/19/stories/2007091950081000.htm, (Last visited on 18/09/08.)

The Tarapur experience where the U.S invoked the Nuclear Non-proliferation Act, 1978 to deny supplies pursuant to the Indo-U.S nuclear co-operation of 1963 following Pokharan- I Test of 1974 is often cited as an example of the U.S invoking a later law to violate an international agreement could not have had any reference to the Vienna convention because it came force only in 1980. Further, *Article. 4* validate this point by saying that:

> "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".[12]

But yet again the critics to the deal had raised another problem that the U.S has not yet ratified the Vienna convention, though it has signed it when it was opened for signature in 1969, and hence India could not make any reference to the convention like that discussed above (Article. 27) and 'material violation' (Article 14.3). However, according to experts in international law, most of the Convention's provisions are considered to be binding even on countries that are not formally parties to the Convention, such as the U.S. Indeed, U.S. officials have often stated that they accept much of the Convention as reflecting binding customary international law. It is also important to mention that under the convention both 'treaty' and 'executive agreements' are binding as because as per the U.S Constitution treaty is an agreement which is made with the consent and advice of the senate and therefore, International agreements not submitted to senate are called executive agreements. But the 123 agreement cannot be called executive agreement since it has to passed to through the senate and must get congressional approval as per Sec.104 of The Hyde Act, 2006 and therefore it is a treaty under the U.S laws and will be bound by international law.

Article 46 of the Vienna Convention on Law of treaties, states that:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

Also formally, *Article 18*[13] of the Convention says that, upon signing a treaty, a nation is "obliged to refrain from acts which would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty." The U.S. has not formally rejected the Convention. With regard to the U.S. commitment to abiding by it in the implementation of the Indian 123 Agreement, in particular Article 27, whether the administration's position is acceptable on face value or not depends on one's perspective based on the U.S.' track record of honouring binding agreements post-Vienna Convention.

INDIA'S SEPARATION PLAN AND ITS IMPLEMENTATION: AN ASSESSMENT

As per the preamble of the 123 agreement India has affirmed that it will support the

12. For full text please visit, <http://untreaty.un.org/ilc/texts/instrum ents/english/conventions/1_1_1969.pdf> (Last visited on 18/09/08.)

13. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

objectives of IAEA and its safeguards systems and its importance in the development and use of nuclear energy for peaceful purpose. Even though India is not a signatory to NPT (Non-Proliferation Treaty) it has voluntary accepted IAEA safeguards for thermal civil nuclear reactors. It is important to mention that as per Art.104 (b)(1) of the Hyde Act, 2006 separation of civil-Military nuclear was a perquisite for the grant of waiver authority and congressional approval under Sec.123 of the Act (Hyde Act, 2006). Some of the critics argue that separation plan is not mentioned anywhere in the agreement expressly and hence it is flaw in the agreement. These contentions are not correct; firstly Article 5.6 indirectly talks about the separation plan, it summarily says that in return of continuous fuel supply and other assurances India will have to place its civilian nuclear facilities under the IAEA safeguards in perpetuity and the same is also mentioned in Sec.104 (b)(2) of The Hyde Act, 2006. Therefore, from the study of these Articles of the 123 agreement along with The Hyde Act, 2006 it reveals that the whole purpose and policy of the U.S is prevent the proliferation of nuclear weapons and encourage use of nuclear energy for peaceful purposes and not to disrupt the continuous fuel supply promise or interfere in the domestic nuclear programme of India. It is important to mention herein that India has not accepted safeguards on its Indigenous Fast Breeder Reactor programme and only thermal nuclear reactors are put under the safeguard. About 35% of nuclear capacity will be out of safeguard. Therefore, India's Research and Development is not at all affected by putting some of the thermal nuclear reactors under the safeguards. The detail of safeguards is provided under *Article.10 (2)* of the agreement, which says that:

> "Taking into account Article 5.6 of this agreement, India agrees that nuclear material and equipment transferred to India by the U.S.A pursuant to this agreement and any nuclear material, non-nuclear material, equipment or components so transferred shall be subject to safeguards in perpetuity in accordance with the India-specific Safeguards Agreement between India and the IAEA (identifying data) and an Additional Protocol when in force."

Therefore, from the above it can be inferred that the safeguards have to be perpetuity in respect of the material, equipment or technology transferred under this agreement. Further Article.10.4 of the 123 agreement provides for contingencies when IAEA may find it difficult to execute the safeguards program in India. It states:

> "If IAEA decides that the application of safeguards is no longer possible, the supplier and recipient should consult and agree on appropriate verification measures".

This Article flows from the Hyde Act 2006 under Sec.104 (d)(5)(B)(iii) wherein its is provided as under:

> "In the event the IAEA is unable to implement safeguards as required by an agreement for cooperation arranged pursuant to sec.123 of the Atomic Energy Act, 1954, appropriate assurance that arrangements will be put in place expeditiously that are consistent with the requirements of sec.123a (1) of such Act regarding the maintenance of safeguards as set forth in the agreement regardless of whether the agreement is terminated or suspended for any reason"

From the above it can be inferred that the civilian nuclear facilities which will be under the perpetual safeguard and in case the safeguards are not possible the supplier and the recipient should consult and agree on appropriate verification measures. There are apprehensions that if IAEA failed to implement the safeguards for any reasons, will the US then depute its own experts and inspectors for the said purpose. No as per

the researcher it cannot as India is bound only by the clause of the 123 Agreement which provides for consultation and appropriate verification measures and not by the provisions of the Hyde Act, 2006 which s the U.S Domestic Law enacted just in order to facilitate the 123 Agreement between the two countries and comply with its own laws and procedure. The key elements of India's separation plan, as outlined in the March 7, 2006, Implementation document presented to the Indian Parliament, are as follows:[14]

- Eight indigenous Indian power reactors will be placed under an India-specific safeguards agreement, bringing the total number of Power reactors under safeguards to 14 of 22 (6 are already under Safeguards). The 123 agreement which was finalized on August 2007, outlined that the deal must be subject to approval from IAEA, the Nuclear Suppliers Group (NSG) and the Congress.
- Future power reactors may also be placed under safeguards, if India declares them as civilian.
- Some facilities in the Nuclear Fuel Complex (*e.g.*, fuel fabrication) will be specified as civilian in 2008.
- Nine research facilities and three heavy water plants would be declared as civilian, but are "safeguards-irrelevant."

The following facilities and activities were not on the separation list:

- Eight indigenous Indian power reactors.
- Fast Breeder test Reactor (FTBR) and Prototype Fast Breeder Reactors (PFBR) under construction.
- Enrichment facilities.
- Spent fuel reprocessing facilities (except for the existing safeguards on the Power Reactor Fuel Reprocessing (PREFRE) plant).
- Research reactors: CIRUS (which will be shut down in 2010), Dhruva, Advanced Heavy Water Reactor.
- Three heavy water plants.
- Various military-related plants (e.g., prototype naval reactor).

It is important to mention herein that after getting the approval of the NSG in Vienna India is free to export nuclear trade with any of the countries such as France and Russia and if U.S does not fulfil its commitment as per the 123 agreement by not supplying continuous fuel and maintenance of Fuel reserve India can take the help of any of the 45 countries of the NSG group. The only thing U.S can do in case nuclear transfers to India are suspended or terminated pursuant to the provisions of The Hyde Act, 2006 or any other U.S laws is to prevent transfer of nuclear equipment and technology from other participating Governments in NSG or from any other source. Therefore, whether U.S will cooperate with India in future or whether India is mortgaging its sovereignty is a matter of hypothesis and predictions which only the coming time can reveal. But as per the 123 Agreement India is nowhere in loss except putting its thermal nuclear reactors under the safeguard which is the only perquisite United States has made with India in order to secure civil nuclear cooperation from U.S and other countries of the world especially the NSG (Nuclear Suppliers Group) of 45 countries. In the process India is going to sign an agreement with France for supply of the nuclear fuel to India, the agreement will be signed in December, 2008. Therefore, as per the researcher the provisions of the 123

14. "Implementation of the India-United States Joint Statement of July 18, 2005: India's Separation Plan," tabled in Parliament on March 7, 2006. Available at http://indianembassy.org/newsite/press_release/2006/Mar/sepplan.pdf, (last visited on 12/08/09.)

Agreement are more or less in favour of India. India can still bravely argue that it will be bound only by the language of an international agreement and not Hyde Act and that if the U.S invokes Hyde to renege on the 123 Agreement, India will have recourse to international Law. But in the absence of any arbitration clause, international law allows only for abrogation or an appeal to International Court of Justice.[15] Even if India cuts-off nuclear commerce with India, it had an alternative to move towards the NSG group for fuel supplies, thanks to the waiver given by the NSG at meeting in Vienna.

CONCLUDING OBSERVATION

Concluding, in my opinion the Indo-U.S Nuclear Deal is a major success for the Indian Government from the energy security point of view and for the United States from the Non-proliferation point of view by bringing India into non-proliferation regime indirectly by voluntarily submitting its nuclear facilities under IAEA safeguards in return for continuous fuel supply and transfer of sensitive Nuclear technology and reprocessing rights of fuel transferred. It is also important to clear the doubt of the critics of this Deal that India will be completely bound by the Hyde Act is totally untrue. The Hyde Act is a domestic US legislation, whose main function is to allow nuclear cooperation with India, it's an enabling legislation. It's the 123 agreement that is binding on the US and India and not The Hyde Act, 2006 as it is U.S internal procedure in the implementation of the 123 Agreement. Therefore, contrary to misguided rumours, the deal does not take away our sovereign right to conduct test. True, in the unlikely event of our performing another nuclear test (and especially if we are the first to do) there is a good chance that the deal may be in jeopardy though there is no ban on testing in the 123 agreement. This has been known all along.

The single biggest gain is the removal by the 45 member NSG of ban on the nuclear commerce and high technology denial regime that has been in place for almost 33 years. The immediate tangible gain is that India will be able to access the global market for importing uranium to fuel its civilian power reactors, which have been operating at sub-optimal level due to fuel shortages. The deal also permits building up of fuel reserve. By allowing the U.S, France and Russia to construct reactors here, it will significantly speed up growth of our nuclear power capacity. The bottom line for India is that it is now free to do nuclear commerce with any country it wants. It is not tied to the Americans now. It is for the U.S to resolve its internal dilemma in regard to the supply of fuel and dual use technologies to India.

Another major achievement of the deal is access to global high technology inventory and R&D involved in this domain will enhance India's technological capabilities. This access will have long term economic, technological and military benefits. At the country level, there are really no risks or hidden disadvantages of the nuclear agreement. National interest comes first – and, last. The nuclear agreement reinforces national security. And, in addition, gives the country numerous other benefits and advantages. It's really a win-win for India.

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15. Siddharth Vardarajan, "Congressional riders turn 123 Agreement into lame duck". The Hindu, Saturday, September 27, 2008, Hyderabad.