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The Henry J. Hyde Act and the 123 Agreement: An Assessment

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The approval by the US Congress will be the last step in the conclusion of the Indo-US civilian nuclear deal². Following which President George .W. Bush signature will be the final seal of approval required to make India's entry into the nuclear club a de jure reality. This reality has followed a long and treacherous route with its inception in the Henry .J. Hyde Act and the controversial 123 Agreement.

The U.S. Atomic Energy Act was amended by the Henry J. Hyde Act of December 2006. This allowed the U.S. administration to conclude a 123 agreement with India for commencing nuclear trade between Washington and New Delhi. The 123 agreement provides the operational basis for the Indo-US nuclear deal and lays the foundation for the eventual law that would allow US companies to commence nuclear trade with India. However it is the congress which holds the greatest importance in the Indo-US nuclear saga; it can be the only impediment to an already slam dunk nuclear future for the two states.

The U.S. Congressmen will be looking for any inconsistencies between the Hyde Act and the 123 agreement before any final decision is made. In the year long negotiations over the final terms of the pact, it appeared that the Indian government had been set to seek exceptions or privileges before it allowed international access to its nuclear market. In several matters the sought privileges went beyond most of other 123 agreements the U.S. has concluded with foreign governments. This policy brief lists the

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² The deal was announced by President Bush and Prime Minister Manmohan Singh in their joint statement on 18 July 2005.

concessions granted to India in the 123 agreement and its comparison with the provisions in the Hyde Act.

The present research attempts to compare the Hyde Act and the 123 Agreement. It has three sections. The first section discusses concessions granted to India in the 123 agreement in the areas of nuclear tests, fuel assurances, and fuel reprocessing. Second section details the provisions in the Hyde Act regarding the above stated issues. Finally, the Indo-US deal has been analyzed in the context of its implications for the regional security environment and the international non-proliferation regime.

Concessions to India:

Nuclear Tests: India's right to conduct nuclear tests was one thing the Indian negotiators fought for. Although India pledged in July 2005 to continue a nuclear testing moratorium, New Delhi opposed any explicit provision in the 123 agreement terminating cooperation if it conducts a nuclear test in the future. Such termination provisions are standard features of U.S. agreements with non-nuclear-weapon states.

The U.S.-Indian agreement does not contain the word "test," nor is there an automatic trigger to cease cooperation for any activity or violation by either country. Prime Minister Manmohan Singh on 13 Aug 2007 asserted the pact "does not in any way affect India's right to undertake future nuclear tests." India could choose to test, according to U.S. officials, but that does not mean that there would not be repercussions. India has a sovereign right to test but that, under U.S. law, the president would have "the right to end the agreement."

Article 2 of the 123 agreement maintains that countries will implement cooperation "in accordance with its... national laws." The U.S. Atomic Energy Act mandates an end to nuclear trade with a non-nuclear-weapon state that conducts a nuclear test. The president could waive such a termination but Congress has the power to nullify that waiver by passing a resolution in opposition.

Right of Return of Nuclear Exports: U.S. law also holds that Washington retains a right of return of its nuclear exports if the recipient conducts a nuclear test. But India fought against including such a provision. The agreement does authorize each country to seek a right of return in the event that it chooses to terminate the agreement, which requires one year's notice in writing and consultations before taking effect. But the agreement also aims to dissuade such a move by stressing that "exercising the right of return would have profound implications" on the two countries' relations.

Fuel Assurances: Another unique feature is the inclusion of "fuel assurances" for India. These provisions commit the United States to "support" New Delhi in establishing a "strategic fuel reserve" in case foreign fuel supplies are ever halted. In such an event, the United States pledged to assist India in acquiring nuclear fuel supplies from other sources.

The 123 agreement specifies that the U.S. fuel assurances apply to "any disruption." Some interpretations, however, hold that for U.S. to fulfill its pledge the disruption need come from sources beyond India control, e.g. market disruptions or inability on the part any American company to fulfill its promise (Answers to the 45 questions provided on 16 July 2008). Moreover, President Bush has said the U.S. fuel assurances to India are only "political commitments" and shall not be mistaken for binding legal obligations.

Fuel Reprocessing: In addition to fuel assurances, New Delhi secured a U.S. commitment in principle to permit India to reprocess U.S.-origin spent fuel. Reprocessing involves the separation of plutonium from nuclear fuel after it has been used in a reactor. The U.S. policy is to deny countries advance reprocessing rights because it is considered proliferation risk (plutonium can be used to make nuclear weapons). By securing this right of reprocessing U.S.-origin spent fuel India has become the third country in the privileged league that formerly comprised only Japan and the European consortium EURATOM.

However, for this India would be required to construct a new reprocessing facility under International Atomic Energy Agency (IAEA) safeguards to handle U.S.-origin spent fuel, as well as that of other countries. Furthermore, it would require that both governments agree on “arrangements and procedures” under which India will be allowed to reprocess U.S.-origin spent fuel. The anticipated period for such talks to begin after a request by either party is six months and should conclude within one year.

The agreement also provides the option for the two countries to conclude future arrangements to trade reprocessing and enrichment technologies. The Hyde Act limits such transfers to India to the limited scenarios in which the recipient is a multinational facility involved in an IAEA-approved project or a facility involved in a multinational project to develop a “proliferation-resistant fuel cycle.” However, the 123 agreement is silent on this point. Essentially US concessions to India under the 123 Agreement cover three points:

- the right to terminate the Agreement if India conducts a nuclear test;
- assurances of the supply of nuclear fuel to India in the event that India suffers a disruption in supply; and
- the reprocessing of spent fuel produced from US-origin nuclear fuel.

Hyde Act and the 123 Agreement

The Henry Hyde Act gave the Bush Administration authority to waive certain requirements of the US law in order to permit civilian nuclear cooperation between the US and India. The legislation required that any resulting agreement could only be implemented with congressional approval. Therefore it is considered as an enabling Act.

There are some inconsistencies between the Hyde Act and the 123 Agreement. There are things that are spelled out in the Hyde Act but not in the 123 agreement (such as the testing issue). Again, the Hyde Act provided waivers for certain provisions of the 1954 Atomic Energy Act and not for others. For example, it provided a waiver to halt exports to India after the 1998 nuclear test, but it does not make clear that U.S. nuclear assistance/exports will be suspended in case India tests again.

There are certain provisions of the 123 agreement that don't appear to meet the requirements of the Hyde Act or Atomic Energy Act. For example, giving India long-term, advance consent to reprocess is not in sync with congressional intentions when the Atomic Energy Act (AEA) was amended in 1978 to include "prior approval" to reprocess U.S.-origin spent fuel.

Similarly, Section 123 a. (4) of the Atomic Energy Act requires that the US has the right of return if a non-nuclear weapon state conducts a nuclear weapon test, or terminates or abrogates an IAEA safeguards agreement. The section regarding termination of cooperation or the right of return in the 123 agreement with India does not mention any of these circumstances. Rather, it urges both parties to take into account whether there is a changed security environment or whether actions (i.e., tests) were in response to similar actions by other states.

Furthermore, the fuel assurances spelt out in the 123 agreement seemingly contradict the "sense of Congress" portion of the Hyde Act. Although nonbinding, it is significant in terms of being a general Congressional guidance on the matter. It states that the United States "should not seek to facilitate or encourage the continuation of nuclear exports to India by any other party" if the United States ends cooperation under law. In addition, the U.S. legislators in a joint explanation of the Hyde Act noted that any fuel assurances should be relevant to disruptions caused by "market failures or similar reasons, and not due to Indian actions" violating its commitment.

The Hyde Act is also clear on the issue of letting India develop a "strategic fuel reserve"—something spelled out in both the 123 agreement and the India-IAEA safeguards agreement. India vigorously pursued the inclusion of this provision in both the agreement to safeguard itself against any future fuel disruptions (India was denied fuel for its Tarapur reactor after it detonated a nuclear device in 1974). The Hyde Act clearly states that "any nuclear.....fuel reserve provided to.....India.....should be commensurate with reasonable reactor operating requirements."

Conclusion

The Indo-US nuclear deal had to pass through various stages before it reached where it is now. These include the Indian Nuclear Separation Plan (March 2006), the Hyde Act (December 2006), the 123 Agreement (August 2007), India-IAEA safeguards agreement (August 2008), and ultimately a waiver by the NSG (September 2008). There have been differences of opinion with regards to interpretation of the terms of reference and their respective understanding with regards to these various agreements and arrangements including the Indian propensity to conduct nuclear tests; fuel assurances; development of strategic fuel reserves; and transfer of technology. Political statements by both the parties are instrumental in giving insight into the way the deal is likely to be implemented in effect.

Thus while the Indian side insists on its right to conduct nuclear tests in the future, the U.S. and other NSG member countries' interpretation of the arrangements suggests an understanding that a future Indian nuclear test is most likely to result in the termination of agreement(in case New Delhi chooses to exercise that right). Likewise, on the question of fuel assurances to India there appears divergence in understanding for US considers 'conditions of supply' as an indication of political good will and part of US "political commitments" having no legal connotations or legal obligations. Conversely, the Indian perspective on the issue is that it is a necessary condition of supply and can lead to a termination of agreement by India if need be so. Similarly on the issue of 'transfer of sensitive technology to India', there appears/ exists a near consensus or a shared opinion within the NSG member states to exercise "utmost restraint" for the transfer of technology to the recipient.

Despite these reservations or other points of divergence exhibited by the Indian position on the issue caused due to New Delhi's interpretation of the various provisions in the agreement, nothing has stopped the de jure acceptance of India in the nuclear club. Today, the international non-proliferation community is once again poised to see the passage of India to come to age as a legally accepted nuclear weapon state with full rights to the global nuclear trade. In this context the last stage of U.S. Congressional approval

may prove to be the only impediment to this acceptance. The Congress that is scheduled to adjourn by 26 September has apparently decided not to follow its tradition 30 day discussion period in the case of Indo-US deal hence creating a window of opportunity for the US and India-nuclear deal lobbyists to get the law passed within the US congress with least amount of friction. In what appears to be positive development for India, some media reports indicate that, given the economic stabilization package that is being worked on, the Congress may not formally adjourn on September 26 but extend for a week till October 3. In the face of this challenging and interesting move to the success and ascent of India as the new nuclear state, the world is not sure whether the Congress can be a serious impediment. Nonetheless, the future of the non proliferation regime and the strategic stability within South Asia will be dependent on the US Congress to be the devil's advocate to an already sure victory.