

THE NUCLEAR DEAL WITH INDIA

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An “as if” kind of deal

For many years, supporters of nuclear non-proliferation have been caught between the unrealistic hope that India and Pakistan will abandon their nuclear weapons and the controversial prospect of accepting them as nuclear weapon states (NWSs). On the one hand, there is no particular reason to believe that India, Pakistan and Israel will dismantle their nuclear arsenals any sooner than any of the five recognized NWSs. The paternalistic language of UN SC Res. 1172 of 6 June 1998 is no longer instrumental, if it ever was. On the other hand, treating these “hold-out” states for what they are has been anathema: the NPT recognizes five NWSs only; the NSG guidelines make full-scope safeguards a precondition for nuclear transfers; and some NPT parties joined the Treaty on the understanding that no other states would openly declare a nuclear weapon capability¹.

Recent discussions of ways to get beyond this dilemma have often addressed the three hold-outs in joint fashion. One such option would be to commit them to behave “as if” they were members of the NPT. This was French policy for quite a while, until it became a regular member in 1992. Concretely, it would oblige them not to assist others in acquiring nuclear weapons (art. I of the NPT), to abide by the rules of international nuclear transactions (the safeguards requirement of art. III.2), and to dedicate themselves to nuclear disarmament (art. VI). So far, they are not under any such legal obligation. In addition, they should be asked to join other elements of the non-proliferation regime such as the CTBT, the MTCR and the NSG guidelines, and work for an FMCT.²

The US-India Joint Statement issued after the meeting of President Bush and Prime Minister Singh on July 18, 2005, offers an “as if” kind of deal, but for India only. Emanating from the Next Steps in Strategic Partnership (NSSP) Initiative launched in January 2004, India would acquire the same benefits and advantages as other states “with advanced nuclear technology” (euphemism for NWS). In return, it would assume the same responsibilities and practices. The deal treats India for what it is, i.e. a de facto NWS. It legitimizes Indian nuclear weapons, yet without formally recognizing India as a nuclear power.

Rationale

Having declared itself a nuclear weapon power in 1998, after years of vacillation, India began to make three basic foreign policy transitions: from the normative to the pragmatic; from ideas of collective security to balance of power; and from the notion of disarmament to arms control. It has turned around from being

¹ Among them Algeria, Argentina, Brazil, Japan, South Africa and South Korea.

² Sverre Lodgaard, “Making the Non-Proliferation Regime Universal. Asking the non-parties to behave “as if” they were members”, Working Paper No. 7, the International Commission on Weapons of Mass Destruction, September 2004. See also Sverre Lodgaard, P.R. Chari, Pervais Iqbal Cheema and George Perkovich, “Making the non-proliferation regime universal”, paper inspired by a roundtable discussion organized by the Norwegian Institute of International Affairs and the Islamabad Policy Research Institute in Islamabad, 11-12 March 2005.

world champion in criticizing the NPT for being discriminatory, and the big powers for being hypocritical, to supporting and promoting the Treaty and the regime it harbours. It became ripe and ready to commit itself to the non-proliferation regime. The Joint Statement clinches it.

Basically, the non-proliferation rationale for such an arrangement is simple. To lean on India to eliminate its nuclear arsenal and join the NPT as a NNWS is unrealistic to the point of being counterproductive. Neither can it join as a NWS, for the NPT recognizes five NWSs only and can, in practice, not be amended. Better, then, to treat India for what it is – a NWS – and to commit it to the non-proliferation regime on an “as if” basis. In the long run, policies are best when based on facts and not on fiction. In view of all the pressing proliferation concerns both in the state and non-state paradigms, the universality of the regime is more important than ever. The deal is a step in that direction. On the same logic, Pakistan would be next in line.

India, Pakistan and Israel never joined the NPT and broke no international legal commitment by going nuclear. For some years, they have been the only non-parties to the NPT, North Korea apart. The Joint Statement breaks the stalemate surrounding this “three state problem”. Rather than continuing to isolate India and have no impact, it should be engaged and committed to non-proliferation standards.

The critical question, however, is if the gain comes at the cost of diminished commitments by NPT parties. Does it amount to reward for imprudent behaviour?

At the heart of this question is the problem of recognition. Unless international law has a life of its own entirely disconnected from the realities of the world, de jure recognition of India will follow. For instance, the question will have to be clarified in connection with the establishment of a nuclear weapon-free zone in Central Asia. Should India be asked to extend security assurances along with the recognized nuclear weapon states? What would be more important, assurances by the UK and France or assurances by India?

Recognition

In the following analysis of arguments for and against recognition, “recognition” is therefore used in the full de jure sense of the term.

First, Japan and others have indicated that if the nuclear club is enlarged beyond the five, they may have to reconsider their non-nuclear status. The difficulties of doing so in the consensus-minded Japanese political system, and the pain that the nuclear issues evoke among the victims of nuclear bombing, should not be underestimated. However, India has in effect been a NWS for a long time: if Japan can live with the reality of Indian nuclear weapons, they should be able to live with the formality of it as well. Indeed, if Japan's nuclear policy hinges on the formality of the matter, international leaders should be warned that granting NWS status to India could have severe unintended consequences, and asked to engage Japan at the highest levels to clarify its nuclear future.

Second, none of the countries which entered the NPT on the understanding that there would be only five NWSs – Algeria, Argentina, Brazil, Japan, South Africa and South Korea - may credibly claim that their security is jeopardized by the nuclear

weapon acquisitions in South Asia. As India acquires missiles of longer range, some of them may come within their reach. Still, it would be far-fetched to argue that the formal aspect – recognition of the nuclear facts – is a factor upsetting their security calculations. States base their security policies on tangible facts, not on formalities.

However, there is a category *between* tangibles and formalities - political perceptions of prestige and civilizational pride - which affect security policies. For instance, deterrence relies not only on tangible facts but also on impressions of willpower. Recognition would be a sign of success and strong will on the part of those who were determined to follow through on their nuclear ambitions. In a sense, recognition would not only recognize their nuclear assets, but their assertiveness and willpower as well, leaving some other states a bit inferior in comparison.

Third, from being harshly criticised in 1998, recognition would be a relief for India. The Joint Statement clearly takes it off that hook. This should not be seen as a concession, however: to drop a policy which did not work is no reward to others.

Fourth, does recognition bring a bonus in terms of higher status in the international system? It probably does. Karl Marx wrote that the most effective power is the structural one at the root of the system, which functions without being used. In international politics this is the military power, and nuclear weapons are the strongest expressions of great force. At least in rudimentary terms, states distinguish between the mightier and the less mighty, and adjust their behaviour to that ranking order. Nuclear weapons have not been used since 1945, but they remain attractive because they translate into power and weight in the international system. As long as they are perceived this way, they function accordingly. Hence the importance of reducing the role of nuclear weapons in national security policies.

Higher status for some means lower status for others. For instance, there is a feeling among the Japanese that higher status for India leaves Japan at a loss. While today, India's nuclear programme may be invoked *against* a permanent seat in the UN Security Council, in the long run this argument may dissipate in favour of gross size and weight, to which its nuclear weapons contribute. Such feelings are, moreover, easily exacerbated by other factors. Especially when relations with China are strained – e.g. for historical reasons or because of territorial conflicts in the South China Sea - many Japanese might feel more self-confident and secure if they were to change their nuclear course.

Fifth, the Joint Statement offers full access to civil nuclear technology in return for non-proliferation commitments. Some may see this as a reward for imprudent behaviour, others as a win-win situation. If it leaves the impression that hereafter, threshold countries could move ahead to test and subsequently be recognized as NWSs and gain wide access to nuclear technology for civilian purposes – on the Indian precedent - the implications are unfortunate for the cause of non-proliferation. If so, giving India access to the nuclear reactor market is a bad idea. However, no other case is quite comparable to India (and Pakistan). Other states wanting to go nuclear would have to renege on their NPT commitment.

Sixth, are there other ways in which recognition of India as a NWS would encourage other states to follow suit? Could NPT members contemplating acquisition

of nuclear arms prepare themselves under the umbrella of the Treaty, give three months notice of withdrawal, and then try to soften the pressure levelled on them by offering to walk in the path of India and abide by the provisions of the NPT “as if” they were members?

It is important to rule this possibility out. The deal with India ought to be cast in a framework of intensified efforts to make the non-proliferation regime universal and further proliferation more difficult. New procedures should, anyhow, be devised to make it harder to leave the NPT.³ The P-5 could raise the costs of withdrawal by elaborating a set of agreed reactions to be communicated in advance and set in motion once a member state notifies the other parties and the UN Security Council that it has in mind to withdraw. A variety of ideas have been aired recently. India should be asked to participate actively in the development of such measures to ensure that an arrangement along the lines of the Joint Statement would make proliferation more, not less, difficult.

Seventh, as noted above, recognition of India qua NWS would make it possible to draw it into arms control arrangements from which it is now excluded. For instance, it could be asked to extend negative security assurances to members of nuclear weapon-free zones. Also, one could imagine a bilateral no-first-use commitment between India and Russia, on the model of an existing exchange of letters between the leaders of Russia and China containing such a commitment. For that matter, a trilateral agreement to this end might be considered. Given that we are dealing with a NWS that has come to stay, it would be unwise not to extract arms control commitments from it.

The specifics: strengths and weaknesses

Does the US-India agreement effectively exploit the non-proliferation opportunities that “full civil nuclear energy cooperation and trade” offers? What can be achieved in the implementation process to enhance the non-proliferation gains?

(1) Identifying and separating civilian and military nuclear facilities and programs in a phased manner and declaring them to the IAEA. India has a comprehensive program including 10 unsafeguarded power reactors run on natural uranium and heavy water. They have apparently not been used for weapons purposes so far, and will probably be placed on the civilian side of the demarcation line. The fast breeder reactor at Kalpakkam presents more of an issue. It is unsafeguarded and lends itself to production of fissile materials, but has hardly been used for weapons purposes so far.⁴ In the Indian debate, some participants criticize the deal on national security grounds, arguing that it will constrain the weapons programme and,

³ Jozef Goldblat, “On the right to withdraw from arms control treaties”, Policy Briefs on the Implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, the Norwegian Institute of International Affairs, April 2005.

⁴ There are 10 unsafeguarded power reactors and 4 safeguarded ones. The Cirus and Dhruva reactors at BARC, Trombay, are dedicated to military uses, and the unsafeguarded Fast Breeder Test Reactor in Kalpakkam also lends itself to weapons production. India has 3 reprocessing facilities. The ones at BARC and Kalpakkam are unsafeguarded; the one at Tarapur is under safeguards when safeguarded material is reprocessed, otherwise not. There are two enrichment plants: a pilot facility at BARC and a bigger one at Rattehalli near Mysore. They are unsafeguarded. The Rattehalli plant is reportedly meant to produce uranium enriched to 30-45 per cent for use in ATV submarines.

specifically, that the breeder reactor must be placed on the military side of the separation line.

The Joint Statement does not say that it is up to India alone to determine where the line should go. However, there appears to be no criteria indicating which facilities to safeguard, and the US may be ambivalent about it. Different considerations point in different directions: many non-proliferation proponents favour significant constraints on the military programme; others favour a growing Indian arsenal out of geopolitical considerations, to counter China. Therefore, the decision about which facilities to declare civilian is, in practice, likely to rest with India.

(2) Voluntarily placing its civilian nuclear facilities under IAEA safeguards.

While the IAEA applies safeguards to select facilities in the USA, Russia and China, France and the United Kingdom have separated their civilian and military programs, applying Euratom/IAEA safeguards to all civilian programs. This is the precedent that comes closest to the deal with India. Safeguards on all civilian facilities has the additional advantage of facilitating Indian participation in an international cut-off agreement.⁵

Some Indian facilities are under facility-specific safeguards arrangements known as INFCIRC/66 agreements. India should ask the IAEA to apply such safeguards to all facilities designated as civilian. INFCIRC/66 agreements provide for safeguards in perpetuity, precluding withdrawal of any plant or activity for national security purposes at some later stage. Furthermore, India agreed to apply an additional safeguards protocol to its civilian facilities. This is welcome from the point of view of making such protocols an integral part of a new, enhanced international safeguards standard. However, the Model Additional Protocol of 1997 was adopted in order better to detect undeclared activities in NPT member states, so the value of this undertaking is limited.

(3) Adherence to the Nuclear Supplier Group (NSG) guidelines. Refraining from transfer of enrichment and reprocessing technologies to states that do not have them and supporting international efforts to limit their spread. According to the Guidelines for Nuclear Transfers agreed by the Nuclear Suppliers Group (NSG), trigger list items or related technologies can only be transferred to a NNWS when the receiving state has brought into force an agreement with the IAEA for safeguards on all source and special fissionable material in its current and future peaceful activities. So far, this has ruled out nuclear transfers to India. The Joint Statement takes India out of the category of NNWS, places it on a par with “other leading countries with advanced nuclear technology, such as the United States”, and aims at “full civil nuclear energy cooperation”. Full access to civil nuclear technology is a big

⁵ A cut-off agreement requiring that in the NWSs, safeguards would apply only to reprocessing and enrichment plants, would introduce another element of discrimination into the non-proliferation regime. On the one hand, there would be the NNWSs, required to put all their activities under safeguards, and on the other, the NWSs who should be trusted not to divert nuclear material from their unsafeguarded civilian reactors, fuel fabrication plants etc. To avoid yet another differential treatment in favour of the NWSs, all civilian activities should be placed under safeguards also in these countries. See David Fischer, “Some aspects of a cut-off convention”, Halting the Production of Fissile Materials for Nuclear Weapons, Research Papers No. 31, UNIDIR 1994.

proposition which could have been offered to various degrees depending on Indian concessions on other related matters. However, the deal does not do that.

Some years ago, the full-scope safeguards requirement for nuclear transfers was important in order to bring more countries into the NPT and NPT-type safeguards (INFCIRC/153). That objective has been fulfilled. All NNWSs have joined the NPT and its safeguards system. There is not more to achieve by stressing the full-scope safeguards requirement. On the contrary, it is by accepting India (Pakistan and Israel) as a NWS that the safeguards coverage can be further extended.

Today, the equivalent to the full-scope safeguards request – first made in the 1970s and adopted by the NSG in 1992 – is the attempt to make the Additional Protocol part of a new, enhanced safeguards requirement for nuclear transfers. Hopefully, it will succeed, although there is a long way to go. (Protocols are in force in less than half of the NPT member states). India's acceptance of the Protocol is a step in this direction.

India's record of compliance with the rules of international nuclear commerce sheds credibility on its commitment to go by the NSG guidelines and refrain from transferring fuel cycle technologies to states that do not have them. It pledges, furthermore, to "support international efforts to limit (the) spread (of enrichment and reprocessing technologies)". This is a general expression of support for enhanced international efforts to constrain the proliferation of fuel cycle facilities, in line with President Bush's proposal of February 2004.

(4) *Secure nuclear materials and technology through comprehensive export control legislation.* The United States wants India to institutionalize world-class export controls. Under SC. Res 1540 India is already committed to the strongest possible non-proliferation practices in this regard. The commitment is unconditional. Legally, the Joint Statement therefore does not add to the obligations already undertaken. Neither does it add anything in practice, for concrete export control improvements can just as well be worked out on the basis of Res. 1540.

The commitment under art. I of the NPT is not limited to the government sphere. The governments must see to it that the private sector, too, complies with it. The same goes for the safeguards obligation under art. III.2. To live up to these commitments, effective export control systems and proper reporting routines to the IAEA are needed. Under an international legal arrangement to this effect, other states can legitimately raise questions about their export regulations and, also, offer their cooperation in establishing more effective domestic control systems. The NSG guidelines do not have that status - they are often referred to as a gentlemen's agreement – but SC Res. 1540 has.

(5) *Working with the United States for the conclusion of a multilateral Fissile Material Cut Off Treaty.* Neither is this a new commitment. It was part of the policy package to soften the shockwaves created by the 1998 tests, along with a moratorium on new nuclear tests, flexibility on joining the CTBT, a nuclear no-first use pledge, and a minimum deterrence posture. The proposition is actually a non-starter: Ten years have passed since the CD negotiated a mandate for FMCT negotiations; no negotiations have taken place; and the prospects got even dimmer when the Bush

administration stated that an FMCT would not be verifiable. The plea is an act of cynicism: India promises to work towards a treaty not expected to come about. In the meantime, its fissile material production can continue. Since India has modest uranium reserves, reactor fuel from other countries arguably leaves more for weapons production.

Four of the five recognized NWSs have issued a moratorium on further production of fissile materials. China seems to have stopped all fissile material production too, but without announcing it. Sceptics of the deal see the lack of such a commitment by India as a serious weakness. However, had a cap on fissile material production been made a pre-condition for the US-India agreement, an agreement would probably not have been possible.

(6) *Continuing the moratorium on nuclear testing.* This is the least that the Joint Statement could contain. India made a unilateral declaration to this effect in 1998; it has agreed with Pakistan not to be the first to resume testing; and the Joint Statement adds a bilateral commitment not to test to the United States.

Signature of the CTBT would have been an achievement. However, since the US has been looked for ways to erase its own signature of the Treaty, it stands to reason that it has not been in the best of positions to ask India to sign.

(7) *Adherence to the missile technology control regime (MTCR).* India has an advanced missile programme, so the commitment to abide by MTCR rules is significant. India already has a good record of compliance with these rules.

(8) *Disarmament.* This is an empty category. The Joint Statement contains no such commitment. While the 187 members of the NPT are all under an international legal obligation to work for nuclear disarmament (art. VI), the non-members are not. In view of the dismal disarmament record of NWSs parties to the Treaty, the same undertaking by India would not necessarily make much of a difference. However, if it were committed in reference to art. VI, it could be held accountable in the review process of the NPT and be asked to respond to questions in other settings where nuclear disarmament is discussed, on a par with the other NWSs. Today, there is no basis for such requests.

Traditionally, India has had a high profile on disarmament issues, and it continues to support the drafting of a nuclear weapon convention that seeks to abolish nuclear weapons worldwide. The United States, on the other hand, is at best lukewarm in relation to art VI. Similar to the test-ban issue, the Administration could not be expected to press India to undertake commitments that the Administration itself belittles.

Prospects

While the parties pushed the Joint Statement ahead of schedule, the outcome remains distant. US legislation must be changed, and the NSG has only heard a first briefing of the deal, raising questions about it, but without going much into substance.

Russia, France, the UK and allegedly also China take a positive view of the deal. China may wish to emulate the US-India deal in relation to Pakistan – and if an

agreement along the lines of the Joint Statement is accepted by the US Congress, a similar US deal with Pakistan is likely to follow. Big power military suppliers are carefully observing the outcome to guide their own future sales. Other NSG members, wedded to the non-proliferation standards that have evolved over the years, probably received the news with some surprise and dismay, and are now raising a number of critical questions about the deal. Still, within the NSG the opposition will probably be modest, and in part subdued. The US executive may therefore try to win early acceptance from the NSG. However, this will be opposed by many other members who would like to wait for implementation of it in order to know more precisely what to endorse or reject. Negative feelings about the deal will translate into issues of procedure and timetable and arguments to go last, not first. Obviously, sequencing is important for the outcome of this important initiative, especially in the United States.

Presumably, states that have relinquished nuclear weapons to become members of the NPT, such as South Africa and the Ukraine, strongly resent the deal. States like Argentina, Brazil and Egypt, which have explored a nuclear weapons option, but voluntarily chosen NPT membership instead, probably resent it, too. The states which explicitly based their NPT membership on the premise that the international community would not recognize any additional NWS likewise. All in all, misgivings about the deal seem strongest outside the NSG.

While the Joint Statement is bilateral, the repercussions will be global. The other countries outside the NPT – Pakistan, Israel and North Korea – will be watching. So will countries that may contemplate violation of the Treaty.

Last not least, the agreement is part of a much broader cooperation package inspired by geopolitical considerations. More than anything else, these considerations have probably been the main drivers of the deal.