

INDO-US NUCLEAR DEAL
STUMBLING BLOCKS OR STEPPING STONES?
A STATUS REPORT

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A year has passed since President Bush and Prime Minister Manmohan Singh signed the July 18, 2005 Joint Statement ushering in a new era of Indo-US nuclear cooperation. The American legislative process, the IAEA negotiations, and the Nuclear Suppliers Group could each pose challenges to the US-Indo agreement. This article examines the potential stumbling blocks that might derail the deal.

POTENTIAL PITFALLS IN THE US LEGISLATION

In June 2006, the US House International Relations Committee and the Senate Foreign Relations Committee approved bills permitting the President to waive portions of the Atomic Energy Act. If the bills become law, they will enable Indo-US nuclear cooperation to operationalize the July 18, 2005 agreement. The Indian press has followed this process very closely, debating the benefits and drawbacks of the American legislation. Most of the debate has been properly focused, taking into consideration only the portions of the bills that are material and remembering that the process is far from over. The paragraphs that follow lay out guideposts, highlighting which sections of the bills are relevant, and which parts of the legislative process matter most.

Before examining the text of the two bills, a quick primer on the American legislative system: Every bill that becomes law in America must be passed in identical forms by both the House of Representatives and the Senate and then signed into law by the President. The legislative process begins when a Representative or a Senator introduces a bill. For instance, Senator Richard Lugar introduced the India-related nuclear legislation in the Senate. Next, the bill is referred to a committee with expertise on the legislation. If the bill is approved by the committee, it is sent to the full chamber for a vote.

This is where the process stands at present: Versions of the nuclear legislation have been approved by the House and Senate international relations committees. On July 26, 2006, the House of Representatives approved its bill endorsing nuclear cooperation with India by a vote of 359 – 68. The next step is for the Senate to approve its version. Once the Senate does so, likely in September, two additional steps remain. As the bills are not identical, they must be reconciled in what is called a conference committee, which consists of senior members from both chambers. The conference committee will reconcile the bills, producing

identical versions for each chamber to consider. After the House and Senate have passed the reconciled bill, it will be signed by the President, and will become law.

In the paragraphs below, I examine the text of the House and Senate bills, including provisions which could present roadblocks to the Indo-US nuclear partnership. It is important to note at the outset that the House and Senate bills provide a glimpse at what might be in the final legislation. However, until the conference committee releases the final bill, the public will not know how the law will read. This analysis concentrates only on the operative portions of the legislation. Some debate in India has centered on non-binding "Sense of the Congress" provisions in the legislation. Simply put, as this language is non-binding it will have no impact on the Indo-US nuclear relationship.

THE HOUSE BILL

The House bill permits the President to waive relevant portions of the Atomic Energy Act, so that Indo-US nuclear cooperation can occur. What are the possible stumbling blocks in the House bill? First, the House bill requires India to produce a credible separation plan for its civil and military nuclear facilities. Second, the House version requires India to complete an IAEA safeguards agreement in perpetuity before the President can waive the pertinent sections of the Atomic Energy Act. Third, the President must also be able to demonstrate that India and the IAEA are making "substantial progress" toward concluding an Additional Protocol. Fourth, the Nuclear Suppliers Group (NSG) must decide by consensus to permit nuclear cooperation with India. Additionally,

the bill states that the nuclear cooperation agreement between the US and India will only come into force if the final Indo-US nuclear agreement is approved by a congressional joint resolution.

Accordingly, in the House bill there are three ways the nuclear deal could be derailed. First, if India and the IAEA are unable to reach a safeguards agreement, and are not making substantial progress on an Additional Protocol. Second, if the NSG does not, by consensus, permit India to receive American nuclear assistance. Third, if the nuclear cooperation agreement is not approved by a joint resolution.

THE SENATE BILL

The Senate bill would also exempt India from the relevant sections of the Atomic Energy Act, enabling Indo-US nuclear cooperation. The possible obstacles in the Senate version are more numerous and nuanced than in the House legislation. The Senate bill, like the House bill, requires India to produce a credible separation plan for its civil and military nuclear programs. Additionally, India must provide the IAEA with a complete declaration regarding its civil nuclear facilities and materials. India is also required to complete an IAEA safeguards agreement in perpetuity and to make substantial progress toward an Additional Protocol based on the IAEA's model Additional Protocol. Lastly, the final Indo-US nuclear agreement must be approved by a congressional joint resolution.

Again, like its House companion, the Senate legislation contains language on the Nuclear Suppliers Group. The language in the bills, though, is materially dissimilar, and warrants a closer look. Both bills permit nuclear commerce with India if the NSG

decides by consensus to allow India to receive nuclear assistance. However, the Senate version would prohibit nuclear commerce with India if the NSG also approved an additional exemption for any other non-nuclear weapon state that does not have full scope safeguards. This additional proviso is aimed at preventing China from seeking a similar NSG exemption for nuclear commerce with Pakistan, as will be discussed later.

In sum, there are several ways the nuclear deal could falter, according to the current Senate version of the legislation. First, if India refuses to provide a credible separation plan or a complete declaration of its civil facilities. Second, if India does not conclude an IAEA safeguards agreement. Third, if India fails to make substantial progress on an IAEA Additional Protocol. Fourth, if the NSG cannot reach a consensus decision approving nuclear cooperation with India *or* if the NSG, while deciding to permit nuclear cooperation with India, also permits nuclear commerce with another nation that does not have full scope IAEA safeguards. Fifth, if the Congress fails to pass a joint resolution approving the US-India nuclear agreement.

An additional point should be made. The nuclear agreement notwithstanding, the Senate legislation prohibits technology exports to India for uranium enrichment, fuel reprocessing, or heavy water production unless certain conditions are met. The first condition is that the facility receiving these exports from the United States must be either a multinational facility participating in an IAEA-approved program to provide alternatives to national fuel

cycle capabilities or is a facility participating in a bilateral program to develop a proliferation-resistant fuel cycle. The second condition is that the President must determine that the export will not enhance India's ability to produce nuclear weapons or fissile material for military purposes. If either of these two conditions are not met, then the export is prohibited.

This proviso in the Senate legislation could prove very tricky if included in the final legislation. It sets a high standard for India and the United States to meet. India needs enrichment technology to wean its dependence on foreign nuclear fuel. Yet India is unlikely to permit a multinational nuclear facility on its soil. Accordingly, if this set of conditions becomes law, the only way that India could receive enrichment technology is if the US exports enrichment technology to a facility participating in what would presumably be a bilateral Indo-US program to develop a proliferation-resistant fuel cycle.

Though the final text of the US legislation will not be available until autumn, both the House and Senate versions contain conditions which could derail the nuclear deal. Much of the onus is on India to meet its commitments vis-à-vis the IAEA. Even so, once the IAEA and NSG deliberations are complete, the US Congress will still have one last chance to stop the nuclear partnership when it votes on the final nuclear agreement joint resolution. In the unlikely event that the Congress believes that the nuclear agreement, the IAEA negotiations, or the NSG decision are unacceptable, it can still refuse to approve the agreement.

THE IAEA

As noted above, the US legislation is contingent upon India's negotiations with the IAEA. India and the IAEA are in the process of negotiating a safeguards agreement. Diplomats from India have termed the negotiations as "productive" and "fruitful" publicly, but it is difficult to ascertain whether the negotiations are on track. Given the silence of Indian diplomats, the negotiations may not be as productive as claimed.

Press reports suggest several Indian concerns are causing trouble with the IAEA negotiations. Some assert that India should not enter into an IAEA agreement before the necessary US legislation comes into force. Others contend that India should not conclude an IAEA agreement without "ironclad" nuclear fuel guarantees being received as promised by the Prime Minister. Still others argue that the IAEA and America are now expecting India to agree to safeguards that meet the IAEA's universal model rather than embody an India specific arrangement. Only time will tell if India and the IAEA conclude an agreement acceptable to both parties. It is worth emphasizing that if India fails to conclude an IAEA safeguards agreement, the deal will fail.

THE NUCLEAR SUPPLIERS GROUP

Concurrently, lobbying is taking place behind the scenes between the nations of the Nuclear Suppliers Group. The Nuclear Suppliers Group (NSG) is an association of 44 nuclear supplier nations which seeks to halt the proliferation of nuclear weapons by carefully limiting nuclear exports. The Nuclear Suppliers Group makes decisions by consensus; that is, for a decision to be reached, each of the 44

countries in the Group must assent. By design, the consensus rule makes transfer of nuclear materials and know-how from one state to another very difficult. This strict procedure which has helped curb proliferation may however pose difficulties for the Indo-US nuclear partnership.

Several NSG countries may oppose the deal. Japan and Australia have worked diligently for many years to uphold the existing non-proliferation regime, and may fear the proliferation consequences of the deal. In addition to being NSG states, Brazil, Ireland, New Zealand, Slovenia, South Africa, and Sweden are also members of the New Agenda Coalition, a loose association of nations dedicated to nuclear disarmament. It is also likely that Switzerland and Luxembourg share similar non-proliferation concerns. Significant objections from several of these nations, either singly or in concert would scuttle the deal.

However, as William Potter of the Monterey-based Centre for Nonproliferation Studies has noted, China is the real wild card in the NSG. China understands that the Indo-US nuclear partnership heralds an attempt to restructure the world order. America wants a strong India capable of balancing China. India wants to become a global power, with a military and economy on par with its ambitions. Conversely, China's "all weather" ally in South Asia, Pakistan, will continue to fall farther behind India in military and economic power if the deal is implemented. China relies on Pakistan to be a thorn in India's side and to keep India off balance. If Pakistan cannot serve this purpose, India becomes a greater threat for China.

What will China do? At present, diplomats in China are monitoring the US legislation closely, and considering possible strategies. Like political leaders in any country, decisions are frequently made nearer deadlines, and the Chinese most likely have not decided on a final course of action. That said, several scenarios are possible. At present, Chinese diplomats are sounding out the positions of the countries which might have an interest in opposing the nuclear partnership, especially the New Agenda Coalition nations and the Scandinavian countries. If China generates enough opposition to the deal, it can prevent a consensus within the NSG and thereby block the agreement.

Alternatively, China may, as a last resort, seek a special exemption for Pakistan in the NSG. This scenario becomes more probable if the Senate version of the NSG language is adopted. Recollect that this legislation proscribes nuclear cooperation with India if the NSG approves an additional exemption for a country like Pakistan, which has not accepted full scope safeguards.

It is certainly arguable that China will not want to isolate itself if other countries appear unwilling to challenge the Indo-US partnership and are unreceptive to an exemption for Pakistan. If this is the case, China may simply acquiesce. Should this final scenario occur, China may seek to bolster Pakistan's economy in the years to come, and perhaps covertly supplement the Pakistani nuclear program.

The interconnectedness of the NSG deliberations, the IAEA negotiations,

and the American legislation might also be highlighted. The American legislation will not go into force until the NSG has given the deal its blessing and India's agreement with the IAEA is finalized. India fears finalizing an IAEA agreement before the American law is finalized. China and the other NSG members are hesitant to agree to a special exemption for India without knowing the final language of the American law and the details of India's IAEA agreement. What is evolving in this situation is a dilemma of trust. Resolving this dilemma will require delicate and calibrated diplomacy in Washington, New Delhi, Vienna, and also Beijing.

This analysis has focused on the potential challenges that could derail the nuclear deal. By its nature, an examination on these lines presents worst case scenarios, focusing on every potential obstacle. However, it is worthwhile to take a moment and look forward five years. What does the future hold?

The Indian and American governments have raised the stakes on the nuclear deal; hence the costs of backing away from the July 18, 2005 Joint Statement have become prohibitive. If India backs away, it will not become a global power. India would remain in a nuclear limbo, neither accepted by the Western nations that enforce the non-proliferation regime nor condemned as a nuclear proliferator. If America backs away, it could push New Delhi and Beijing closer together.

Consequently, though it may take time, America and India will resolve any differences they may have about the American legislation. Likewise,

India's negotiations with the IAEA may not be easy, but they will eventually be concluded to New Delhi's satisfaction. And, in the NSG, Thucydides ancient axiom, "The strong do what they can and the weak suffer what they must" will once again rule, as American lobbying will convince the reticent nations not to block an exemption for India. China, fearing isolation, will acquiesce, and will likely begin planning to boost overt and covert support for Pakistan. India will get its nuclear assistance, and America will have strengthened India to emerge as a global power.

The American legislation, the IAEA negotiations, and the Nuclear Suppliers Group could each pose challenges to the US-Indo nuclear partnership; however, rather than stumbling blocks, these steps to finalizing the deal will most likely be stepping stones to India's emergence as a global power.