



If India Tests? The Implications for the Indo-U.S. Civil-Nuclear Deal

Justine Isola

Justine Isola is Visiting International Fellow at the Institute for Defence Studies and Analyses, New Delhi

August 26, 2010



Summary

By some calculations, the chances that India will test a nuclear weapon in the coming years are not high. But if India again surprises the world as it did in 1998 with five nuclear explosions in the desert of Rajasthan, then conversations on the implications for the Indo-U.S. civil-nuclear deal will begin. The record of debate on testing during negotiations reflects the depth of American concern that testing will lead to unstable nuclear escalation and the lengths the U.S. went to in order to deter India from conducting new tests. But it also underscores U.S. resolve to forge a new relationship with India despite evident disagreement on a thorny issue. Studying the finely wrought language of the deal reveals some persisting ambiguity about how the deal would be affected if India were to resume testing. However, in the event of a test, it's a safe bet that several factors will play into determining U.S. response: the preferences of U.S. leaders, domestic lobbying, and geopolitical balance of power considerations. This response will be constrained by the strength of the U.S.-India relationship. Further, due to India's deepening nuclear ties with the rest of the world, any U.S. response may have only a modest impact on India.

The conclusion of the Indo-U.S. civil-nuclear deal in the fall of 2008 marked the end of three years of negotiations between the U.S. and India. Completion of the deal should not, however, obscure the history of domestic debate within the U.S. and India on how the terms of the deal apply. One issue on which lack of consensus notably persists within the U.S. is how the deal would be affected by India testing a nuclear weapon. As a Carnegie Endowment publication released during the thick of negotiations predicted, on the topic of nuclear testing, “[t]he ambiguities of this agreement invite future disputes and recriminations.”¹ More recently, a Council on Foreign Relations backgrounder on the deal echoed this sentiment, referring to the repercussions of testing as “a potential area of dispute.”² Examining U.S. laws on nuclear exports and cooperation suggests that the President would have to take some mandatory steps in response to a test. But (s)he would also have some discretionary authority. Looking at public statements and government debate on the issue of testing when Congress was negotiating the terms of the deal only underscores this lingering uncertainty about what India can expect from the U.S. if it resumes testing. However, several factors will certainly play into determining whether testing would jeopardize the agreement: who is in power in Washington, the strength of domestic interest groups, and balance of power geopolitics. Analysis of these factors suggests that the increasingly close ties between the U.S. and India may leave the U.S. with limited options for influencing India’s behaviour. Burgeoning nuclear ties between India and the rest of the world may further mean that the end of U.S. nuclear cooperation would have only a modest impact on India.

The letter of the law

U.S. President Bush and Indian Prime Minister Singh’s July 18, 2005, joint statement on civilian nuclear cooperation ushered in a heated debate between their two governments on the terms of this partnership.³ Testing emerged as one of the most contentious issues from the start. Despite Prime Minister Singh’s promise in the joint statement to continue India’s unilateral moratorium on nuclear testing, many non-proliferation advocates in the U.S. were unhappy that the proposed agreement on cooperation did not explicitly prohibit Indian testing. The stakes were nuclear escalation in an unstable South Asia and the spectre of Indian testing triggering global proliferation. Some noted that the terms of

¹ See chart accompanying Sharon Squassoni’s “Issues in U.S.-India Nuclear Cooperation,” *Proliferation Analysis*, November 7, 2007, <http://www.carnegieendowment.org/npp/publications/index.cfm?fa=view&id=19697>.

² Jayshree Bajoria and Esther Pan, “The U.S.-India Nuclear Deal,” *Backgrounder*, Council on Foreign Relations, Updated November 20, 2009, http://www.cfr.org/publication/9663/usindia_nuclear_deal.html.

³ “Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh,” July 18, 2005, <http://www.armscontrol.org/print/3292>.

the deal could in fact make it easier for India to test.⁴ Others simply saw not tying the deal to India signing the Comprehensive Test-Ban Treaty as a missed opportunity for non-proliferation.⁵ They pushed for stronger language on the consequences of testing.

It was against this backdrop that Congress was conducting hearings on amending U.S. domestic law to loosen nuclear export legislation – the first hurdle to approving the civil-nuclear deal. The U.S. Atomic Energy Act (AEA) requires a formal agreement delineating the terms of civil-nuclear cooperation and stipulates that several criteria be met before such a “123 agreement” – so-called after section 123 of the Act – can go into effect. Congress had to exempt the proposed U.S.-India 123 Agreement from some of those criteria. Specifically, Congress had to excuse India from full-scope safeguards on all of its nuclear facilities and allow exports even though India had tested nuclear weapons in 1998. These were two requirements negotiators recognized early on as impossible to meet.⁶

President Bush signed the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act into law on December 18, 2006, granting the above exemptions and preliminary approval to the civil-nuclear deal. This legislation arguably comes down clearly on the consequences of future tests:

■ It specifies that all waivers “shall cease to be effective if the President determines that India has detonated a nuclear explosive device after the date of the enactment of this title.”⁷

■ And it does not exempt India from an Atomic Energy Act provision that in the event of a test, a partner country must return nuclear material and equipment acquired through trade.⁸

Of course, the President retains the authority subsequently to waive the AEA’s termination of cooperation requirements if he determines that the “cessation of such exports would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defence and security.”⁹ Whether or not the U.S.

⁴ See Michael Krepon’s comments at Arms Control Association briefing, “The Senate and the U.S.-Indian Nuclear Deal: Issues and Alternatives,” November 14, 2006, <http://www.armscontrol.org/print/3230>.

⁵ See Paul K. Kerr, “U.S. Nuclear Cooperation with India: Issues for Congress,” *Congressional Research Service*, November 5, 2009, p. 14.

⁶ Kerr, p. 33.

⁷ See section 106 “Inoperability of Determination and Waivers” of Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006.

⁸ See section 123(a)(4) of the Atomic Energy Act.

⁹ Kerr, p. 32.

would in fact require India to return all transferred materials could well depend on what was transferred. If for example, India had only received supplies inconsequential for proliferation at the time of termination, the U.S. would not likely require the return of materials. But the Hyde Act and the Atomic Energy Act clearly provide Congress with unambiguous grounds (some would say mandatory obligations) for ending the deal and requiring India to return nuclear material if India were to again test weapons.

In debating the Hyde Act, the U.S. Congress also addressed concerns that the civil-nuclear deal would make it easier for India to test. For example, then-Senator Obama had proposed an amendment to the bill to “clarify United States policy in order to deter nuclear testing by foreign governments.”¹⁰ This amendment, which encourages limits on Indian reactor fuel reserves in order to make testing more difficult in the event of a cut-off of supplies, appeared in the final version of the Hyde Act as Section 103 (b) (10).¹¹

Following passage of the Hyde Act, the next hurdle to wrapping up the civil-nuclear deal was garnering Congressional approval for the 123 Agreement reached between leaders in Washington and New Delhi in July 2007. The 123 Agreement’s language on testing is not as clear-cut as that of the Hyde and Atomic Energy Acts. 123 agreements usually explicitly prohibit testing. But India had successfully prevented the agreement from including language explicitly stating that renewed nuclear testing would lead to termination of U.S. supplies. The provisions of the 123 Agreement thus raised some questions about whether the U.S. would in fact act decisively were India to test.¹² Congress scrutinized the 123 Agreement’s compliance with the testing provisions of the Hyde and Atomic Energy Acts, focusing on the following passages:

■ The 123 Agreement states that “[e]ither Party shall have the right to terminate this Agreement prior to its expiration on one year’s written notice to the other Party.”¹³

¹⁰ “United States-India Peaceful Atomic Energy Cooperation Act,” *Congressional Record*, November 16, 2006, p. S10985. For more on Senator Obama’s positions on the civil-nuclear deal see Brahma Chellaney, “Obama’s India-Nuclear Legacy,” *Asian Age*, June 18, 2008, <http://chellaney.spaces.live.com/blog/cns!4913C7C8A2EA4A30!622.entry>.

¹¹ Section 103(b)(10) of the Hyde Act states, “Any nuclear power reactor fuel reserve provided to the Government of India for use in safeguarded civilian nuclear facilities should be commensurate with reasonable reactor operating requirements.” Chellaney’s article is the source for information about Obama’s amendment appearing in the final version of the bill.

¹² For further discussion of perceived inconsistencies between the Hyde Act and the 123 Agreement, see Proceedings of the Brookings Institution, July 30, 2008, Washington, D.C. “The U.S.-India Nuclear Agreement,” participants Stephen P. Cohen, Strobe Talbott, R. Nicholas Burns, and Robert Einhorn, <http://www.scribd.com/doc/6397716/Steve-P-Cohen-The-USIndia-Nuclear-Agreement-the-Brookings-Institution>.

¹³ All citations from version of “Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement)” released by U.S. Department of State, August 3 2007, merln.und.edu/archivepdf/india/State/90157.pdf.

■ However, the agreement advises both the U.S. and India to “consider the relevant circumstances” and “take into account whether the circumstances that may lead to termination or cessation resulted from a Party’s serious concern about a changed security environment or as a response to similar actions by other States which could impact national security.”

■ Further, the agreement urges both countries to “recognize that exercising the right of return” to compel India to send back any nuclear material acquired from the U.S. “would have profound implications for [U.S.-India] relations.”

■ Finally, the agreement also spells out how the U.S. would help India work with other countries on ensuring its fuel supply if the U.S. were to cease supplying to India.¹⁴

Such stipulations provide manoeuvring room for India to defend a decision to test as a response to a new security threat from countries such as China or Pakistan and arguably, for the U.S. to find creative ways to respond.

Primary sources from when Congress was conducting hearings on the deal offer some clues to how the U.S. could interpret the above language in future scenarios. For example, correspondence between Chairman of the House Committee on Foreign Affairs Tom Lantos and State Department assistant secretary for legislative affairs Jeffrey T. Bergner reflects Congressional concern about what was left unsaid in the 123 Agreement.

■ In response to the question “Would any of these commitments continue to apply if India detonated a nuclear explosive device? If so, under what circumstances?”, the State Department offered reassurances that the U.S. would have the right to cease nuclear cooperation with India “immediately.”¹⁵

■ In response to concern that the fuel supply assurances would mitigate the effects of U.S. cut-off, the State Department clarified that the purpose of these assurances was to “guard against disruptions of fuel supply to India that might occur through no fault of India’s own.”¹⁶

■ In response to a question about how provisions for a “lifetime” supply for India’s safeguarded reactors was consistent with Senator Obama’s amendment on limiting fuel

¹⁴ “The United States will support an Indian effort to develop a strategic reserve of nuclear fuel to guard against any disruption of supply over the lifetime of India’s reactors. If despite these arrangements, a disruption of fuel supplies to India occurs, the United States and India would jointly convene a group of friendly supplier countries to include countries such as Russia, France and the United Kingdom to pursue such measures as would restore fuel supply to India,” *Ibid.*

¹⁵ “Questions for the Record submitted to Assistant Secretary Bergner by Chairman Tom Lantos House Committee on Foreign Affairs,” October 5, 2007, Question 16.

¹⁶ *Ibid.*, Questions 17 and 18.

reactor reserves, the State Department replied simply, “[w]e do not read these provisions to be inconsistent.”¹⁷

■ Finally, when asked why the agreement does not contain “explicit” language on “actions that would give the U.S. the right to terminate nuclear cooperation” in the event of a test, the State Department answered that the agreement “provides for a clear right for the U.S. to terminate nuclear cooperation and a right to require the return of equipment and materials subject to the agreement in all of the circumstances required under the Atomic Energy Act, including if India detonated a nuclear explosive device...”¹⁸

These exchanges offer some insight into how the U.S. could interpret the provisions on testing and termination in the various components of the civil-nuclear deal should India ever again test. In underscoring the U.S. *right* to end cooperation and request the return of nuclear materials, the State Department does not specify whether such a response would be *mandatory*.

Eleventh-hour controversy and persisting post-deal ambiguities

The clarifications provided by the State Department did not put an end to debate about Indian testing. In fact, the testing controversy remained live even after President Bush signed the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, the legislation that approved the 123 Agreement. For example, before sending the bill to the President, the Senate rejected an eleventh-hour amendment to end nuclear exports if India were to test nuclear weapons.¹⁹ And even so, the Indian government was taking no chances. Secretary of State Condoleezza Rice had arrived in New Delhi several days after Congress approved the bill and was expected by many to get Indian Foreign Minister Pranab Mukherjee’s signature on the agreement.²⁰ But the Indian government insisted that President Bush sign first, reportedly in the hope that Bush would make a final statement speaking to India’s concerns about continued fuel supplies if India were to conduct a test.²¹ On October 8, 2008, President Bush signed the bill without the much-sought after explicit language on the repercussions of testing. In his statement, he noted simply that the legislation authorizing the 123 Agreement “does not change the

¹⁷ Ibid., Question 19.

¹⁸ Ibid., Question 35.

¹⁹ Bajoria and Pan. Amendment was S.AMDT.5683 to H.R. 7081 “To prohibit nuclear trade with India in the event that India detonates a nuclear weapon and to impose certain certification, reporting, and control requirements.” The amendment was introduced and rejected on October 1, 2008. The Senate passed H.R. 7081 the same day.

²⁰ Rama Lakshmi, “Glitch Delays Signing of India Nuclear Pact,” *The Washington Post*, October 5, 2008.

²¹ Ibid.

fuel assurance commitments that the United States Government has made to the Government of India, as recorded in [the agreement].”²²

Just weeks after Bush signed the 123 Agreement, *The Washington Times* ran an editorial chastising his administration and Congress for approving the deal and urging the incoming Obama administration to end cooperation if India were to resume testing.²³ Citing “serious concerns” about the deal’s compliance with the standards of the Hyde Act, the authors argued that “the next administration must make it clear that conditionality or not, the U.S. will cut off nuclear supplies if India conducts another test.”²⁴ The Obama administration has not released such a statement.

More recently, disagreement on the testing issue contributed to delays resolving the latest successfully concluded aspect of the nuclear deal – the terms of the agreement that will allow India to reprocess spent fuel. In an April 5, 2010, interview, the Carnegie Endowment’s Mark Hibbs was asked about what would happen to the reprocessing agreement if India were to test a nuclear weapon. Hibbs explained that although “[t]he arrangements do not explicitly state that an Indian nuclear test would be grounds for suspending U.S. consent to reprocessing ... the United States could base suspension upon its determination that a test constituted a serious threat to U.S. national security.”²⁵ An Arms Control Association report on the terms of the reprocessing agreement clarifies how the repercussions of testing could play out, citing the language of the agreement: The “sole grounds” for seeking suspension are “exceptional circumstances limited to” a determination by either party that “continuance of reprocessing of U.S.-obligated material at the Facility would result in a serious threat to the Party’s national security” and a determination that “suspension is an unavoidable measure.”²⁶

The testing issues, it appears, will not be laid to rest anytime soon.

Forecasting U.S. response

The above overview provides ample evidence of the primacy of the testing issue in negotiations about the civil-nuclear deal and persisting post-deal ambiguities. As this analysis demonstrates, despite vigorous debate and careful examination of the language of each component of the deal, U.S. response to an Indian test is arguably uncertain. Those who want to predict U.S. response should also be mindful that whatever the deal

²³ Lawrence J. Korb and Winny Chen, “U.S. must suspend deal if India tests another nuke,” *The Washington Times*, November 11, 2008.

²⁴ Ibid.

²⁵ Mark Hibbs, “Moving Forward on the U.S.-India Nuclear Deal,” *Carnegie Endowment*, Q&A, April 5, 2010, <http://carnegieendowment.org/publications/index.cfm?fa=view&id=40491>.

²⁶ Daniel Horner, *Arms Control Today*, “India, U.S. Agree on Terms for Reprocessing,” May 2010, http://www.armscontrol.org/act/2010_05/US-IndiaReprocessing).

says, the president and a simple majority in Congress could enact freestanding legislation to end cooperation.²⁷ For these reasons, in addition to mining the relevant legislation to identify triggers for termination, onlookers should consider how factors such as the makeup of leadership in Washington, pressures from domestic interest groups, and geopolitical context could play a decisive role in shaping this response.

■ *Who's in power in Washington* – Studying the copious record of debate on testing is a reminder of the fact that the Bush administration and Congress did not see eye to eye on all aspects of the deal. With a new president and newly elected members of Congress, some of these fault lines may again appear in the future. President Obama's statements and positions as a senator give reason to believe he would favour acting decisively if India were to test. Some observers have even contended that the Obama administration has been deliberately slow to implement the civil-nuclear deal, perhaps reflecting residual opposition to its terms.²⁸ If the American public does not re-elect Obama for a second term, this calculus would shift. Turnover in Congress after the upcoming midterm elections could also shake things up.

■ *Domestic interest groups* – No matter who is in the White House, any President deciding whether or not to terminate cooperation would want to factor into consideration the growing influence of the Indian American lobby in the U.S. and its perception of a U.S. response.²⁹ The deal signified an elevation of U.S.-India partnership. Ending the deal could be similarly symbolically significant. Business interests will also shape the nature of U.S. response. Some critics of the nuclear deal have long held that business interests drove the initiative.³⁰ And economic self-interest could certainly reduce the likelihood of U.S. termination. American companies such as GE Hitachi and Westinghouse that are poised to construct nuclear reactors in Andhra Pradesh and Gujarat will not want to be cut out of Indian markets.³¹ According to a U.S.-India trade group, such business may be worth \$130 billion by 2030.³²

²⁷ See Michael A. Levi and Charles D. Ferguson, "U.S. India Cooperation: A Strategy for Moving Forward," CSR No. 16, June 2006, Council on Foreign Relations, p.19.

²⁸ Raja Karthikeya, "India's CTBT debate: Conviction or Con'fusion," published on the website of the Center for Strategic and International Studies (<http://csis.org>), Sept. 28, 2009.

²⁹ For coverage of the growing influence of the Indian American lobby see Mira Kamdar, "Forget the Israel Lobby. The Hill's Next Big Player Is Made in India," *The Washington Post*, September 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/28/AR2007092801350.html>.

³⁰ See for example J. Sri Raman, "The U.S.-India nuclear deal – one year later," *Bulletin of the Atomic Scientists*, October 1, 2009, <http://www.thebulletin.org/web-edition/features/the-us-india-nuclear-deal-one-year-later>.

³¹ Randy Woods, "India names sites to host reactors by GE Hitachi, Westinghouse," *Nucleonics Week*, October 22, 2009.

³² Mark Hibbs, "Moving Forward on the U.S.-India Nuclear Deal," *Carnegie Endowment*, Q&A, April 5, 2010, <http://carnegieendowment.org/publications/index.cfm?fa=view&id=40491>.

■ *Balance of power geopolitics* – Concern about preserving the balance of power in Asia and assessing the motives that may have led India to test in the first place will also play a role in determining U.S. response to an Indian test. India may in the future want to expand its nuclear arsenal or increase the credibility of its thermonuclear deterrent in response to developments in neighbouring countries. If India were to test following overt territorial aggression by China or Pakistan, then it is probable the U.S. government would indeed excuse Indian tests. If India were to test in the wake of testing by China or Pakistan, it is again possible that the U.S. would tolerate a reciprocal act, though it is hard to imagine officials in Washington not feeling compelled to respond in some shape or form.

It should also be noted that the U.S. will probably have to impose sanctions on India regardless of what steps (if any) it takes with respect to ending nuclear cooperation. The Glenn Amendment to the Arms Export Control Act mandates that the U.S. cease assistance to any non-nuclear weapons state involved in the transfer or use of a nuclear explosive device, although the president has authority to delay imposing sanctions if he deems they would be “detrimental to the national security of the United States” and waive them entirely with Congress’s approval.³³ This was the law triggered in 1998 when India conducted five nuclear explosions in the desert of Rajasthan. But the impact of such sanctions has been debated.³⁴ The political will to maintain sanctions against India (and Pakistan, which had conducted its own nuclear tests following India’s tests) seems to have been lacking as penalizing India became less important than securing business opportunities and India’s partnership on emerging regional security concerns. Congress repealed sanctions against India less than two years after they went into effect.³⁵

As the above snapshots of the factors that could determine a U.S. response to Indian testing suggest, people-to-people, business, and security ties between the U.S. and India have only grown since then. These factors (with the exception of the make-up of U.S. leadership) demonstrate the ways in which U.S. response to Indian testing could be complicated by the transformation of the U.S.-India relationship since the end of the Cold War. Increasing partnership may limit the scenarios under which the U.S. would end the civil-nuclear deal or take supplementary steps such as imposing sanctions.

Why ending the deal may not matter to India

Understanding how India will be impacted by a U.S. response to testing is as important

³³ See Section 102(b) of the Arms Control Export Act. India is a non-nuclear weapons state as defined by the Nuclear Nonproliferation Treaty.

³⁴ For a comprehensive discussion of the impact of the 1998 sanctions against India and Pakistan see Robert M. Hathaway, “Confrontation and Retreat: The U.S. Congress and the South Asian Nuclear Tests,” *Arms Control Today*, January/February 2000, http://www.armscontrol.org/act/2000_01-02/rhjf00.

³⁵ Ibid.

as considering the nature of the response. There is good reason to believe that India would not be adversely affected by a cut-off of U.S. nuclear supplies. Even if the U.S. stops nuclear cooperation with India, several other countries are poised to step in and begin exporting fuel and technology to India. Shortly before Congress approved the deal, the Nuclear Supplies Group agreed to exempt India from the usual rules governing global nuclear trade, freeing India to cooperate with other NSG member states on nuclear trade. India currently has bilateral nuclear agreements in place with the U.S., France, Russia, Kazakhstan and Canada.³⁶ The NSG exemption opening up trade with India may in fact be the most significant legacy of the civil-nuclear deal. As George Perkovich explains,

“[i]f India were to test a nuclear device after several years of receiving fuel imports, it would be able to withstand interruption of foreign fuel supplies, especially if in the intervening period India increases its own uranium mining operations.”³⁷

This analysis suggests that Senator Obama was prescient when pushing for limits on Indian reactor fuel reserves. In the future, however, cut-off of U.S. supplies may not be a sufficient tool for preventing Indian proliferation.

Conclusion

By some calculations, the chances that India will test a nuclear weapon in the coming years have never been high, deal or no deal. But if India again surprises the world as it did in 1998, then conversations on the implications for the deal will undoubtedly be about more than its finely wrought language. The above record of debate on testing speaks to the depth of American concern that testing will lead to unstable nuclear escalation and to the lengths the U.S. went to in order to deter India from conducting new tests. But the end result of those negotiations also underscores U.S. resolve to forge a new relationship with India despite evident disagreement on a thorny issue. In the event of a test, it's a safe bet that the preferences of U.S. leaders, domestic lobbying, and geopolitical balance of power considerations will play a role in determining U.S. response. The effect of that response on an India that is itself deepening ties with the U.S. and diversifying its partnerships is equally worth contemplating.

³⁶ Urjit R. Patel, “Crucial Deadline for Nuclear Energy Business in India,” The Brookings Institution, http://www.brookings.edu/opinions/2010/0817_nuclear_energy_india_patel.aspx.

³⁷ George Perkovich, “Global implications of the U.S-India deal,” *Daedalus*, Winter 2010, p. 26.