



CENTER for ARMS CONTROL & NON-PROLIFERATION

ANALYSIS OF THE ADMINISTRATION'S DRAFT LEGISLATION TO CHANGE US LAWS TO FACILITATE NUCLEAR COOPERATION WITH INDIA

The legislation submitted by the Bush Administration seeking a waiver of US laws concerning nuclear trade with India would significantly curtail Congressional oversight. In addition, as Congress examines the possibility of carving out an exception for India, key pieces of information necessary to make an informed decision are missing, including the detailed separation plan for military and civilian reactors, the negotiated agreement with India (the "123 agreement"), and India's safeguards agreement with the International Atomic energy Agency (IAEA).

Implication of the legislation for Congressional oversight

The Administration's draft legislation introduced by request as S. 2429 and H.R. 4974 (which would require a simple majority in both Chambers of Congress for passage) requests that Congress *exempt* a proposed agreement for cooperation with India (as yet to be negotiated) from several key sections of the Atomic Energy Act, but also requests that this agreement be treated as a *non-exempted* agreement. The legislative language states in section XX(a)(1):

"the President ...may exempt a proposed agreement for cooperation with India...and such an agreement for cooperation shall be subject to the same congressional review procedures under sections 123(b) and 123(d) as an agreement for cooperation that has *not* been exempted from any requirement contained in section 123(a)." (emphasis added)

Under the proposed legislation, the Administration's decision to export nuclear material and technology would take effect unless both Chambers of Congress reject the decision within 90 days. In addition, Congress would have to muster the 2/3 +1 vote necessary to override a Presidential veto of any potential Congressional decision to oppose the agreement.

In contrast, if Congress waits for the Administration to submit the proposed agreement on nuclear cooperation with India when it is finally negotiated (which may well take up to a year) or to request Congressional permission to engage in nuclear cooperation with India without first passing this proposed legislation, Congress would have need a majority of votes $\frac{1}{2} + 1$ (as opposed to 2/3+1) in both Chambers to allow the change in policy; if Congress did not act, the decision to export nuclear material and technology to India could not be implemented.

Thus, this proposed legislative language, if passed without further conditions, would undermine Congress's prerogative (having to act to allow the change in policy by a majority of votes) by allowing the change in policy unless Congress objects by a vote of 2/3 +1, and by voiding Congress's role in reviewing and approving nuclear export licenses (as codified in the Atomic Energy Act).

The Administration proposed legislative language in Sections XX (a)(1), XX(a)(2) and XX (a)(3), would waive the following sections of the Atomic Energy Act (to allow nuclear cooperation and the export of nuclear materials and technology to India):

- **Section 123(a)(2):** bars nuclear cooperation with any non-nuclear-weapon state unless IAEA safeguards are “maintained with respect to all nuclear materials in all peaceful nuclear activities within the territory of such state, under its jurisdiction, or carried out under its control anywhere.”

- **Section 128:** prohibits the export of nuclear material and technology to any non-nuclear weapon state “unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export.” This section also requires Congress to approve export licenses for nuclear technology and material. Moreover, it permits an exception to this rule if the President determines that denying exports to a specific country would be “detrimental to US nonproliferation objectives or national security or defense.” The Administration has not asked for this exception. However, if India had made significant concessions such as agreeing to cap its fissile material production as part of the deal, the Administration could have called for such an exception arguing that withholding cooperation if India had agreed to a fissile material cut-off or other significant concession would be “detrimental to US nonproliferation objectives.”
- **Section 129:** Prohibits the export of nuclear material or technology to any non-nuclear-weapon state which has **detonated a nuclear device**, terminated or abrogated IAEA safeguards, materially violated an IAEA safeguards agreement, or “engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices, and has failed to take steps which, in the President’s judgment, represent sufficient progress toward terminating such activities.” This section also prohibits exports to any country found to have violated a nuclear cooperation agreement with the United States, assisted a non-nuclear-weapon state’s development of nuclear weapons and not taken sufficient steps to terminate this assistance, or transferred reprocessing technology to a non-nuclear weapon state without US approval. This section contains a clause similar to that included in section 128 which would allow exceptions to take place with Congressional approval.
This section is relevant as India conducted nuclear weapons tests in 1974 and 1998, and used Canadian assistance and US material (heavy water) in the 1974 (and possibly in the 1998) tests.

Eventually, the Administration must submit to Congress the text of a peaceful nuclear cooperation agreement. However, **the Administration proposed legislative language requests that Congress make changes to US laws before such an agreement is negotiated and available for review.**

Determinations to be made by the President:

The proposed legislative language provides that these waivers would apply only if the President determines that India has completed several actions. These actions include:

- India provides the United States and the IAEA with a “credible” plan to separate its civilian and military facilities and filed a declaration of this separation plan with the IAEA.
 - *The definition of “credible” is not specified.*
- India and the IAEA negotiate and implement a safeguards agreement for India’s civilian facilities.
 - *India is supposed to negotiate India-specific safeguards with the IAEA, so these would not be traditional safeguards that the IAEA applies.*
- India is “making satisfactory progress” with the IAEA “toward implementing an Additional Protocol that would apply to India’s civil nuclear program.”
 - *The parameters for identifying “satisfactory progress” are not specified.*
- India is working with the United States toward the conclusion of a Fissile Material Cut-Off Treaty.
 - *The United States has in the past years effectively blocked negotiation of a verifiable FMCT while India and Pakistan have refused to commit to capping their fissile material production, adding to the uncertainty about the meaning of “India working with the United States toward the conclusion of a multilateral FMCT.”*
- India supports the prevention of the spread of enrichment and reprocessing technologies (that produce nuclear weapons-usable material).
 - *While India may claim that it supports the preventing the spread of enrichment and reprocessing technologies, India itself acquired and used, and has stated its intention to continue using indefinitely, reprocessing technology to make its nuclear weapons.*

- India applies comprehensive export controls and adhering to the Missile Technology Control Regime and Nuclear Suppliers Groups guidelines.
 - *A March 2006 report by the Institute for Science and International Security (ISIS)*¹ outlines how India has circumvented other countries' export controls to acquire and transfer nuclear technology and that its procurement methods leak sensitive technology.
 - *In a recent policy paper, Dr. Richard Speier details how India has adapted its space launch technology which continues to benefit from US assistance for use in its Inter-continental Ballistic Missile (ICBM) program that is developing an ICBM that could target the United States.*²
- Nuclear Testing: The legislative language includes a clause in the proposal stating that if the President determines that India has detonated a nuclear device after this act goes into effect, the requested exemption for India will no longer apply.

These determinations on which the exemption would be based would all be made by the President, not Congress, although the President would submit to the Senate Foreign Relations and the House International Relations Committees a report justifying his determination that the required actions have taken place. However, once the proposed legislative language is passed, as the Administration has requested, it would be much more difficult for Congress to impose further conditions or take action if Congress disagreed with the President's determinations. If the proposed legislation is passed, the President would be authorized to submit a proposed nuclear cooperation agreement to Congress, and if no joint resolution rejecting the agreement were adopted by a 2/3 +1 margin (overriding a Presidential veto), the proposed agreement would go into force after the expiration of a 90-continuous-session day period.

Questions Congress should ask the Executive Branch:

Congress should seek information from the Administration on several key points for the negotiation of an agreement, including:

- Termination of cooperation
 - Congress should ask about what actions or (lack thereof) would allow for termination of cooperation by the United States and India, and what provisions would be triggered if cooperation were terminated (such as would India have to return any benefits or technology obtained through cooperation under this agreement before termination?)
- Funding IAEA safeguards and inspections:
 - Congress should seek information about who would pay for the implementation of IAEA safeguards for India which would cost about \$20 million; would India be required to provide this funding, or would US taxpayers have to assume the costs?
- List of which reactors are under safeguards:
 - Congress should have full knowledge of which reactors will be covered by the agreement before making any decision about allowing cooperation.
 - Another issue which will escape Congressional approval is the classification of future reactors, which under the proposed deal would be made solely by India without any say from the United States.
- Reprocessing of nuclear fuel provided to India under the agreement
 - Will the United States will permit or prohibit India from separating plutonium out of spent fuel from the safeguarded civilian reactors for its nuclear weapons program?

¹ Dr. David Albright and Susan Basu, *India's Gas Centrifuge Program: Stopping Illicit Procurement and the Leakage of Technical Centrifuge Know-How*, available at <http://www.isis-online.org/publications/southasia/indianprocurement.pdf>

² Dr. Richard Speier, *India's ICBM: "On a Glide Path to Trouble"*, available at <http://www.isis-online.org/publications/southasia/indianprocurement.pdf>

Consultation with Congress remains vital to a viable and informed decision on whether to reverse long-standing US policy.

The Administration has pursued negotiations with India that would require changes in long-standing US laws without consulting Congress. Now Congress, which was not consulted before the hasty announcement of a deal with India in July 2005 or before the Administration reached a last-minute agreement on the separation plan in March 2006, is being asked to formally give up much of its oversight prerogative afforded to it through existing US laws, by giving the Administration added leeway to proceed with its negotiations with India.

Timing

Many of these issues may be resolved or explained over the next year or so, and thus, at a minimum, Congress should wait to take action until then. In addition, the main reason that the Administration was pressing for swift action in Congress -- to have the changes in US laws in place prior to the May meeting of the Nuclear Suppliers Group -- no longer applies as the Nuclear Suppliers Group, during its Consultative Group meeting did not place the US proposal to carve out an exception for India on its agenda for the May meeting (despite Administration efforts to have this item included).

Congress should take the time to examine carefully these proposed changes to US laws and to Congressional oversight.

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