UNITED STATES-INDIA CIVILIAN NUCLEAR AGREEMENT: A FRESH PERSPECTIVE ON NON-PROLIFERATION REGIME

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INTRODUCTION

On October 10th 2008, the Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy [FN1] became operationalized between the United States and India following the signing of the deal by the Indian External Affairs Minister and the US Secretary of State [FN2]. Much has been written and debated about this US-India Civilian Nuclear Agreement since July 2005 when an intention of entering into such an agreement was first announced by the US President Bush and the Indian Prime Minister Manmohan Singh [FN3]. Where, proponents view it as an important policy shift in dealing with a strategically important de facto nuclear weapons state on the outside of the Non-Proliferation Treaty [FN4], critics have slammed this agreement as being a breach of international law and seeking to reward a State’s recalcitrance in face of global nuclear weapons proliferation concerns [FN5].
As much the rhetoric against the agreement challenges US obligations under the NPT [FN6], US-India Civilian Nuclear Agreement is legally defensible and represents a rearrangement of policy functions not only in terms of achieving the relative effectiveness of goals of non-proliferation but also for a larger global partnership [FN7]. Through an analysis of the legal standing of this agreement and an examination of tactical considerations on part of both the countries which went into the forging of this deal, this paper would demonstrate that by signing this deal United States has not only managed to get monitored a hitherto unchecked Indian nuclear program to much extent but has also overcome the nuclear obstacle which had been thwarting a constructive engagement of these two democracies.

Part I provides an insight into India’s nuclear program and a brief background of the Non Proliferation Treaty [FN8] and the Nuclear Suppliers Group [FN9], Part II involves a legal analysis of the US-India Civilian Nuclear Agreement and its validity under the international law by a resort to the method of treaty interpretation and Part III discusses the policy implications of this agreement on the issues of global non-proliferation and US-India strategic relationship.

I. A BRIEF BACKGROUND OF ISSUES CENTRAL TO US-INDIA CIVILIAN NUCLEAR AGREEMENT

India’s nuclear program and its probable direction of growth lie at the heart of the US-India Civilian Nuclear Agreement. Both the critics and proponents have emphasized upon the Indian nuclear program by highlighting either its nuclear weapons feature or the energy needs aspect. Nonetheless, it is important to examine the history and growth of India’s nuclear program and the subsistence of the NPT and the NSG especially in the wake of the proponents’ argument.
about India’s responsible behavior as distinct from some other nations with similar aspirations [FN10].

A. India’s Nuclear Program: Genesis and Development

Indian nuclear program started in mid forties which is around the time country obtained independence and the will to venture into the area of atomic energy is evident from the June 1946 statement of Pt. Nehru, soon to be the first Prime Minister of India;

“As long as the world is constituted as it is, every country will have to devise and use the latest scientific devices for its protection. I have no doubt India will develop her scientific researches and I hope Indian scientists will use the atomic force for constructive purposes. But if India is threatened, she will inevitable try to defend herself by all means at her disposal” [FN11].

However, at that time India, under the leadership of leadership of Pt. Nehru who was a champion of non-alignment and disarmament [FN12], resisted the option of an explicit weapons program even though it maintained an ambitious nuclear program and started taking active steps in the direction of achieving self-reliance in tapping atomic energy. Subsequent years witnessed a change in the country’s nuclear policy and development took place both in civilian as well as military nuclear program.

Civil Nuclear Program:

Indian civil nuclear program has largely centered on its energy needs. A high population growth coupled with limited energy reserves led to a very early recognition of use of atomic reactors for producing electricity. Carrying on this theme the government, while focusing on
having a strong research and development base, initiated development of various nuclear fuel related activities including construction of reactors and advancement of mining facilities [FN13].

There was also an awareness of limited supplies of natural uranium as against vast resources of thorium which lead to the devising of a three-stage plan by Dr. Homi Jehangir Bhabha, chief architect of India’s nuclear program and which now constitutes the guiding principle of Indian nuclear power investment strategy [FN14]. The first stage focuses at using pressurized heavy water reactors (PHWRs) to produce electricity and plutonium from indigenous uranium. In the second stage, the plutonium produced in the first stage would be used to fuel fast breeder reactors (FBRs) to produce more plutonium and uranium-233 and finally in the third stage, the uranium-233 would be used to irradiate thorium in advanced heavy water reactors to generate electricity. At present, India has 17 operational nuclear power plants (five are under construction) out of which twelve PHWRs are already in operation and the country has started work on the second phase of the three-stage plan [FN15].

Energy Scenario: One of the most important arguments in favor of the deal is diversification of India’s energy profile in face of a rapidly increasing demand for electricity. At present coal provides 69% of electricity but the reserves are limited [FN16]. So, nuclear power represents an option for provision of clean and efficient energy for the Indian multitude with reduced carbon emissions [FN17]. Currently, the operating nuclear reactors are generating 4,120 MW of electricity which is 2.9% of installed base and the NPCIL (National Power Corporation of India Limited) aims at generating 20,000 MW of power by 2020 [FN18] and to supply 25% of electricity from nuclear power by 2050 [FN19]. Theoretically, India plans to achieve this growth in nuclear power generation through the implementation of the three stage plan. However,
studies show that implementation of this plan as envisaged by Dr. Homi Bhabha would not only be tedious but expensive and slow because the fast breeder reactors to be utilized in the second stage breed plutonium very slowly and would consequently affect the third stage of the plan [FN20].

This power generation situation is largely indigenous and was prompted in the wake of international isolation; India met with after its testing of nuclear weapons. However, fruition of international civilian nuclear agreements would provide India with a regularized access to imported natural uranium and higher unit output reactors [FN21] leading to a more economical and faster way of nuclear power generation.

**Nuclear Weapons Program:**

A newly independent India attached vital importance to exploitation of atomic energy for peaceful purposes but so far had not expressly desired a weapons program. In fact it had been at the forefront of disarmament initiatives starting as early as 1948 when India proposed limiting use of atomic energy to peaceful purposes [FN22]. However, sixties witnessed a shift in the Indian nuclear policy, widely held to be a necessary corollary to two developments. One was the acquisition of a 40 MW reactor from Canada, CIRUS which achieved criticality in July 1960 [FN23]. Second important development was increased tensions with China from 1959 leading to the Sino-Indian War and resulting in India’s humiliating defeat in 1962. The aftermath of this war saw the first formal demand for development of nuclear weapons which was later joined by other voices after the Chinese testing in 1964, the most vociferous of which was Dr. Homi Bhabha.
Internationally, in 1966-67 negotiations for NPT had started which India termed discriminatory and declared its policy of adoption of principles of non-proliferation and disarmament but only till it was universal and when there were no permanent nuclear powers [FN24]. India which had been taking prominent initiatives in the field of non-proliferation and disarmament, voted against NPT and in the same year China exploded a thermonuclear device [FN25].

Finally on 18th May 1974, India’s first nuclear device named ‘Smiling Buddha’ was tested at Pokhran, Rajasthan [FN26]. This device used plutonium from CIRUS reactor but it produced a very low yield of 8-12 kilotons which supports the assertion that it was an experimental test device and not a weapon in deployable form [FN27].

This testing was met with withdrawal of all nuclear cooperation by US and Canada [FN28]. The international sanctions seriously affected the civilian nuclear program prompting indigenous Indian efforts including development of a large research reactor called Dhruva and a uranium enrichment facility. An interesting aspect of the Indian nuclear weapons program was that it was primarily advocated and managed by the scientists at BARC (Bhabha Atomic Research Center) with no interference from military or civilians. In fact the legacy founded by Dr. Homi Bhabha which directly answered to the Prime Minister had been largely been responsible for the 1974 test [FN29].

In March 1998, Bhartiya Janta Party came to power which had openly advocated a nuclear India for decades. By this time, BARC had developed a thermonuclear device and a boosted fission device using reactor grade plutonium. Analysts feel that Indian nuclear decision, at that
time was more of a result of a fragile state of domestic politics exacerbated with the rise to power of a fundamentalist party [FN30].

On 11th May 1998, the Indian Prime Minister, Atal Behari Vajpayee announced that India conducted three underground nuclear tests consisting of a thermonuclear device, a fission device and a low yield device and on 13th May 1998, it detonated two more sub-kiloton nuclear devices which completed the testing series known as ‘Operation Shakti’. On 26th May, the Indian government declared a unilateral moratorium on further testing [FN31]. In August 1999, Indian government released a proposed nuclear doctrine propositioning a policy of no-first use and credible minimum deterrence. However, this doctrine had no official standing [FN32].

An interesting facet of Indian nuclear weaponization is that it started as one of the leaders for disarmament advocating a complete elimination of nuclear weapons but over the decades its nuclear policy came to be largely shaped by regional security concerns especially in face of geographical proximity to a nuclear armed China [FN33].

B. NON-PROLIFERATION TREATY(NPT)

**Genesis of the NPT:** The world at the end of the Second World War found itself confronted with the colossal power of unleashed atomic energy amply demonstrated by the destruction of Hiroshima and Nagasaki. United States, which at that time was the only country possessing nuclear weapons, realized the mortal consequences of a nuclear weapons world and proposed giving them up (especially during that era of cold war when United States knew that Soviet Union was already on its way to developing a nuclear bomb).
Acheson-Lilienthal Report was the first endeavor in this direction that proposed ownership of all fissile material by an international agency which would release small amounts to nations for peaceful uses [FN34]. This report of March 1946 was followed by the Baruch Plan (in June 1946) requiring worldwide inspections for uranium and bomb making facilities before United States gave up its weapons and it argued for an international punishment devoid of a veto if a country violated. The plan was out rightly rejected by Soviets. In the same year United States Congress adopted Atomic Energy Act of 1946 which prohibited any transfer of nuclear weapons or information to anyone [FN35]. However the Atomic Energy Act strictures had started getting loosened in 1950s and in 1958 an amendment permitted transfer of nuclear weapons material and information to nations that had ‘made substantial progress in development of nuclear weapons’, which criteria was fulfilled only by Britain at that time [FN36].

In 1949, Soviet Union tested its first atomic weapon and the same year North Atlantic Treaty took effect. From 1949 till 1965, efforts at reaching an agreement (between US and USSR) on non-proliferation of nuclear weapons were majorly affected by U.S. interest in preserving NATO and Soviet intent of destroying it. More specifically, Soviet Union was hostile to the creation of a multilateral force or MLF which would be armed with American-owned nuclear warheads on American-made Polaris missiles and subject to some form of allied control [FN37].

On the other hand, gradual acquisition of nuclear weapons by one country after the other coupled with stymied discussions on a non-proliferation agreement was alarming other nations of the world. The provision of a nuclear umbrella to US allies (under NATO agreements whence the United States’ weapons were deployed in NATO areas while still remaining under U.S.
control) and a similar protection by Soviet Union to its allies was a major concern of several non-aligned nations. In fact post-1998 nuclear testing, Jaswant Singh, Chairman of Planning Commission of India described nuclear security paradigm as a club ‘extending from Vancouver to Vladivostok’ and stated that while other parts of the world was protected by the nuclear powers, there was a security vacuum in the southern part of erstwhile Soviet Union [FN38].

In 1961, Irish Foreign Minister presented a draft resolution on ‘Prevention of wider dissemination of nuclear weapons’ which was unanimously adopted. This draft is considered as the first step to adoption of 1968 NPT. By 1965, US proposal of an MLF had lost support both at home and with NATO allies [FN39]. The next two years witnessed negotiations on various versions of the Draft when non nuclear weapon states expressed concern over their vulnerability in event of their renouncing weapons. The three nuclear weapon states (US, USSR, UK) at that time made formal declarations about their obligation to act in event of aggression or threat of aggression with nuclear weapons against a non-nuclear weapon state [FN40].

On July 1, 1968 Non-Proliferation Treaty was opened for signature and it was signed by three out of five nuclear weapon states with France and China choosing not to ratify the treaty (which finally joined in 1992).

NPT as in existence: The Non Proliferation Treaty as it exists today has 189 members (with only four sovereign states remaining outside-India, Israel, Pakistan and North Korea. It is interesting to note that North Korea was previously a party to NPT and then it withdrew from the treaty). In May 1995 NPT was extended indefinitely. For non-nuclear weapon states, this treaty is an agreement to forego nuclear weapons and to carry out peaceful uses of nuclear energy under the international safeguards. For nuclear weapon states, it also represents an undertaking to pursue
disarmament [FN41]. The treaty is widely interpreted as postulating three pillars of non-proliferation, disarmament and right to peaceful use of nuclear technology. Articles I, II and III embody commitments by NWS and NNWS to work towards non-proliferation of nuclear weapons, articles IV and V assert the inalienable right of parties to peaceful use of atomic energy and article VI talks about the good faith negotiations towards achieving complete disarmament [FN42].

The goal of non-proliferation is perched on the pedestal of a system of safeguards and inspections under the aegis of International Atomic Energy Association (IAEA) which was created in 1957. The twin objectives of non-proliferation and peaceful use of energy are achieved through IAEA applications which reports to the General Assembly of the United Nations [FN43].

It is important to note that Article IX of the Treaty defines nuclear weapon states as those having exploded a nuclear device prior to January 1, 1967. Many controversial issues today are seen stemming from this provision as it militates against the evolution of the treaty with changing times. While, India continues to allege that the treaty is unfair and discriminates amongst the nations on the criteria of ‘haves’ and ‘have nots’, others feel that the treaty has been successful in ensuring global security and has capped the growth in number of nuclear weapon states [FN44].

C. NUCLEAR SUPPLIERS GROUP (NSG)

One of the central postulates of the NPT was peaceful use of atomic energy which entailed access to nuclear materials and facilities by the nations. Realization that same materials could be
used for military purposes, led to the formation of Zangger Committee in 1970 aimed at regulation of export of nuclear material and equipment to non-nuclear weapon states. The Committee also chalked out a list of items that are especially designed and prepared for the development of nuclear weapons and termed it as the ‘Trigger List’ as any such item would trigger the application of IAEA safeguards in case of an export to a country outside the NPT [FN45].

Curiously, NSG as in its present form was a direct consequence of the nuclear testing conducted by India in 1974. The already prevalent fear that materials and technologies transferred for peaceful purposes could be diverted to military use was reinforced with India’s testing [FN46]. A series of meetings at London from 1975 to 1978 lead to formation of NSG which incorporated Zangger Committee’s Trigger List along with few more technologies in the NSG guidelines and published as INFCIRC/254 [FN47]. Also, it was decided to apply trade restrictions on all countries and not just those outside NPT making the guidelines applicable to all non-nuclear weapon states.

The revelations of Iraqi weapons program in 1991, demonstrated that even dual-use equipment, materials and technology needed to be regulated [FN48]. Consequently, Dual-Use Guidelines came into being and were published as Part II of INFCIRC/254 and the Trigger List became Part I of INFCIRC/254 [FN49].

The 1995 NPT Review Conference made acceptance of IAEA full scope safeguards [FN50], a necessary precondition, for transfer of any nuclear material or technology to a non-nuclear weapon state. In a way this conference required transfers of any trigger list items only under the application of full scope safeguards [FN51]. Waiver granted to India (a non-NPT state)
from requirement of full scope safeguards on all facilities, therefore assumes significance and is unprecedented [FN52].

II. LEGAL VALIDITY OF US-INDIA CIVILIAN NUCLEAR AGREEMENT

Critics argue that US-India civilian nuclear agreement is a violation of the NPT which is a multilateral treaty, and hence, a consequent violation of international law [FN53], by the United States (India cannot be termed a violator because it is not a member of the NPT). Such a statement finds acceptance on the wider thought platform where exchange of nuclear material with any nation, which is not a party to the NPT, is viewed as assistance for development of nuclear weapons [FN54], considering the fact that production of weapons and peaceful use of nuclear energy are strongly intertwined [FN55]. An analysis of NPT and its Preamble and the evolved conditions, however, does not support such a view, but lends credence to the argument that US-India Civilian Nuclear Agreement is not a violation of the NPT.

This part of the paper is going to examine this issue of legal defensibility of the US-India Civilian Nuclear Agreement vis-à-vis the NPT, on the touchstone of principles governing treaty interpretation.

Treaty Interpretation:

Before taking upon the interpretation of the NPT and its objectives, it is necessary to discuss treaty interpretation as a subject, to some extent, considering the colossal role it plays in shaping the international law and governance [FN56].
Under international law any statement about the legitimacy or illegitimacy of an action, has to be legally defensible and supported by the principles of international law. The question haunting the international law scholarship, however, had been about the determination of infallible standards which could be employed for gauging the relative legality of international actions by nations. The first attempt at establishing a system of uniformity, in this aspect of customary international law, was undertaken by the International Law Commission in its 18th session when it set forth seventy five draft articles on the law of treaties which comprised of Section 3(Articles 27-29), on the topic of treaty interpretation [FN57]. While expositing on the rules and principles of interpretation, the Commission noted that there are various divergent views about the rules to be employed for interpretation. Accordingly, the Commission confined itself to identifying few general principles, primarily in reference to methodology adopted by the Permanent Court of Arbitration and the International Court of Justice [FN58]. This report along with the private writings of some Rapporteurs to the International Law Commission went into the adoption of the Vienna Convention on the law of Treaties which today more or less finds universal application in this arena.

The rule of interpretation as contained in Article 31(1) and Article 31(3) (b) of the VCLT is being employed here for the relative evaluation of the legality [FN59] or legitimacy [FN60] of the US-India Civilian Nuclear Agreement with respect to the mandate of the NPT.

**Article 31(1) and US-India Civilian Nuclear Agreement:**

Article 31(1) mention that a treaty has to be interpreted as per its textual meaning with reference to its object and purpose [FN61]. To understand the application of this clause, it is
necessary to briefly examine the background of rule of interpretation which went into the codification of customary international law on treaties.

Sir G.G.Fitzmaurice, as Special Rapporteur to the International Law Commission [FN62], had conducted a study of the law and procedure of the International Court of Justice, from where he had distilled theories of treaty interpretation on the basis of different schools of thought [FN63]. Two major doctrines identified by him were, Doctrine of Textual Interpretation and Teleological method:

- **Doctrine of Textual Interpretation**: This was the majority approach of the ICJ and it advocated treaty interpretation as deciphering the ordinary meaning of the words contained in the text [FN64].

- **Teleological Method**: According to this approach, a treaty is interpreted by reference to the objects, principles and purposes of the treaty.

The textual method of interpretation also finds expression in the Institute of International Law’s discussion of the principles surrounding the interpretation of treaties. Though the understanding depicts the presumption of parties’ intentions as having been expressed in the text, yet the note of caution is that ordinary meaning is not be determined in abstract and should be ascertained in light of objects and principles which is what reflected in Article 31(1) of the Vienna Convention on Law of Treaties [FN65].

So, a reading of Article 31(1) shows that the first part refers to the textual analysis [FN66] and second part seeks to qualify this analysis by the object and purpose of the treaty, which in essence proposes textual approach as the method of treaty interpretation contained by a
teleological approach. Simply put, textual interpretation is the primary method employed here which has to be in sync with the object and purpose of the treaty.

An effort to evaluate the validity of the US-India Civilian Nuclear Agreement would thus, involve an application of both the approaches in examining the NPT.

For a textual analysis of the NPT in reference to US-India agreement, it is necessary to refer to Article I and Article III of the NPT. Under Article I, United States, being a NWS, undertakes not to transfer any nuclear weapons or devices directly or indirectly to any recipient nor assist, encourage or induce a NNWS to acquire nuclear weapons or devices [FN67].

Article III (1) provides for the application of full scope safeguards for any nuclear transfer to a ‘non-nuclear weapon state Party to the Treaty’. Article III (2) prohibits the supply of nuclear material by member States to ‘any non-nuclear-weapon State’ for peaceful purposes unless the source or special fissionable material is subject to safeguards as required by clause 1 of this article [FN68].

What is noticeable in Article III (2) is the absence of words ‘party to NPT’ while referring to the recipient state. So, this clause does not express the intention that the recipient State has to be a party to the treaty; which omission is significant in the sense, that it then includes India as a probable recipient State [FN69]. The second part of this clause provides for application of safeguards, as required by IAEA mentioned in Article III(1) [FN70] to such a transfer of nuclear material but those are in reference to ‘states party to NPT’ [FN71].
In a nutshell, the situation is that though the language in Article III (3) proposes a state not party to the treaty (India) as a possible recipient but nothing in the text talks about the safeguards applicable to such a recipient. This textual conundrum leads to three possible interpretations;

- First: Any nation party to the treaty can sell or transfer any nuclear material to a nation which is not a party to the treaty, without any applicable safeguards. However this interpretation goes against the principles and objectives of nuclear non-proliferation as an unregulated transfer of nuclear materials increases the chances of proliferation [FN72].

- Second: A country party to the treaty cannot transfer any nuclear material to any non-party nation unless full scope IAEA safeguards are applicable; in keeping with the Article III (1). Though this interpretation has a good acceptance especially in view of the 1995 NPT Review conference which mandated application of full scope safeguards to further the objective of non-proliferation [FN73], but it is textually contradictory. India is a NWS not party to NPT but the safeguards enunciated by article III (1) are meant for NNWS party to NPT.

- Third: Any country party to the treaty can sell or transfer nuclear material to a non-party nation if all such material or technology is subject to safeguards of IAEA. The strength of this interpretation lays in the fact that article III (2) states that no nation party to treaty would transfer any source or fissionable material unless ‘the source or fissionable material’ is subject to safeguards required by this article. It is possible to argue here that the objective is to subject the ‘transferred material’ to the safeguards and words ‘required by this article’ only refer to process of safeguards application
that is through agreements with IAEA, as described in first part of article III (1) and that the safeguards are not supposed to be full scope; in such a case [FN74].

It is worth noting that US-India Agreement [FN75] as well as agreement of the Government of India with the IAEA [FN76], provides for extensive application of IAEA safeguards not only to the nuclear material and equipment transferred but also to any special fissile material used in or produced through the use of transferred nuclear material or equipment and in perpetuity [FN77]. This would also include several indigenous Indian reactors, to be placed under the safeguards which theoretically could have supported military programs [FN78].

Views are divergent upon the second and third interpretation; where critics find second interpretation to be more forceful, the proponents find third interpretation to be better suited to NPT interpretation in a situation which was not envisaged at the time of framing of the treaty [FN79].

Though the text does not foreclose either of the interpretations, a pure textual approach advocating an interpretation only in terms of actual wording of the text [FN80] provides an edge to the third interpretation as against second interpretation which derives its strength from principles and objectives of the treaty.

Yet Article 31(1) of the VCLT does not advocate a purely textual approach but seeks to contain textual analysis by reference to object and principle of the treaty.

Broadly, at the time of drafting of the treaty, objects and principles of the NPT were twofold; to prevent the acquisition of nuclear weapons by States other than the already existing five NWS
and to prevent diversion of nuclear material meant for peaceful purposes which it seeks to achieve through a system of checks operated by the IAEA.

Critics’ argument, which also resonates in the second interpretation as discussed above; is that U.S.-India civilian nuclear agreement militates against these objectives of the NPT. By supplying nuclear material to a country which does not subscribe to the international standards of non-proliferation and which in spite of the existence of an international mandate against acquisition of nuclear weapons, chose to do so, U.S. has betrayed these objectives of the NPT. So, on a teleological basis, this agreement loses ground.

Notwithstanding, a deeper and more pragmatic analysis reveals that due to the application of strict IAEA safeguards and adoption of Additional Protocol [FN81] by India, this agreement has actually established a parallel NPT regime where even though India is not an NPT member but it essentially fulfills all the requirements of NPT to be a recipient state of nuclear materials for peaceful use [FN82]. In fact the objective behind imposition of full scope safeguards in case of supply of any nuclear material to a NNWS is to impede an acquirement of nuclear weapons by such a nation. Whereas in the present circumstances, nuclear material would be transferred to a country which already has a nuclear weapons program.

Apart from that, in order to safeguard against diversion of material, the agreement propositions an application of safeguards supervised by the IAEA. Whatever apprehensions are there regarding the diversion of nuclear material for military use are largely offset by the Separation Plan [FN83] and the imposition of unilateral moratorium on testing by India which forms an integral part of this agreement [FN84].
Talking about object and principles, the spirit of the non-proliferation regime is and has been dissuasion of acquisition of nuclear weapons. Still, it is now an actuality that India is a NWS and the world must adapt to this reality. The next step is then ensuring a responsible behavior on the part of such a nation which has acquired weapons beyond the confines of the treaty and enlisting its support in non-proliferation efforts; which this agreement effectively seeks to achieve. From being completely outside the non-proliferation regime, India is now bound by its unilateral moratorium on testing and its commitment to advance the goal of non-proliferation [FN85]. Engaging a nuclear pariah into a role of responsibility towards non-proliferation of nuclear weapons; thus, cannot be stated to be a violation of the NPT regime though it signifies a different approach to achieving the same goals.

**Article 31(3) (b) and US-India Civilian Nuclear Agreement**

Article 31(3) (b) talks about the consideration of ‘subsequent practice’ of the treaty members, which could establish an agreement with the interpretation proposed in relation to the background and circumstances of the treaty [FN86].

Historically, this principle resonates, both, in the works of the International Law Commission and the private writings of Sir Fitzmaurice where he deduced six principles of interpretation from the jurisprudence of Permanent Court and the International Court [FN87].
The International Law Commission, in its commentary on the draft articles [FN88] described subsequent practice as being the ‘objective evidence of understanding of the parties as to the meaning of the treaty’ [FN89]. At the same time, it was emphasized that the subsequent practice has to be in keeping with the textual meaning [FN90]. Sir Fitzmaurice, in his study of law and procedure of the International Court not only reinforced the importance of Subsequent practice as a means of interpretation but held it even more sacrosanct than a resort to travaux preparatoires. Though, unlike the International Law Commission, he did not assert that subsequent practice has to be in confirmation of the textual meaning of the treaty, but classified this method, more, as symbolizing the rules of evidence and procedure [FN91]. He went to the extent of stating that though the rules may be contrary to the parent instrument, yet, if they have been acted upon, those might lead to the establishment of practice which then is an effective criterion of interpretation [FN92].

The question then is what has been the subsequent practice of the States which granted legality to nuclear cooperation with India without it being an NPT member state? In answer, it is argued that subsequent practice has to be determined from the objective actions of the States which in a way treads into the evidentiary realm of law, as averred by Sir Fitzmaurice [FN93] and that can be summarized as herein;

- In July 2006, the US House of Representatives passed the Henry J Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 which stipulated US cooperation with India on nuclear issues and exempted India from signing the NPT for such an arrangement [FN94].
On September 6th 2008, the Nuclear Suppliers Group [FN95] granted an exemption to India from complying with the full scope safeguards required under its guidelines, for peaceful transfer of nuclear material and thus stamping a seal of approval on the US-India Civil Nuclear Agreement.

The NSG waiver was welcomed by major international players in nuclear non-proliferation field as Russia, Australia, United Kingdom, Germany [FN96] and France [FN97].

The Australian government in October 2007 stated that the NPT did not prohibit the transfer of nuclear material and equipment to India if appropriate safeguards were in place and did not rule out the possibility of export of Australian uranium to India subject to a bilateral safeguards agreement [FN98].

On September 30th 2008, India and France signed an agreement for civil nuclear cooperation and thus France became the first country to sign an agreement with India after the NSG waiver was granted [FN99].

On October 8th 2008 President Bush signed the legislation on Indo-US nuclear deal which was operationalized on October 10th 2008 [FN100].

On November 10th 2008, Britain lifted ban on export of sensitive nuclear technology to India for civilian uses and decided to consider applications for items on the NSG Trigger list and Dual-Use list [FN101].

On December 5th 2008, Russia signed an accord with India for the construction of four new nuclear energy reactors in the state of Tamil Nadu [FN102].
The various instances of endorsement of a civil nuclear cooperation with India not only by United States but many other countries reverberates the sentiment that such a cooperation does not amount to a violation of international law but is an evidence of an evolved understanding of the parties regarding the meaning of the Non-Proliferation Treaty.

On the other hand, it can also be argued that Non-Proliferation Treaty has a membership of 189 nations [FN103] whereas the NSG has a membership of only 45 nations [FN104], which effectively means that the grant of exemption for an exchange of nuclear cooperation with India has been ratified by even less than one fourth of the nations party to the treaty and that cannot constitute ‘subsequent practice’ by State parties. Statistically, this argument is correct and justified.

Nonetheless, it has to be remembered that NSG comprises of all those nations which are the most prominent players in the non-proliferation regime and compose the cartel implementing guidelines for nuclear exports [FN105]. Apart from this, no NPT member state, which is not a member of the NSG, has officially voiced any concerns regarding the issue nor, there had been any lodging of protests with any international body. There is an absence of both an express agreement and an express dissent by those States, which could be presumed to constitute an acceptance of this changed understanding of concept of non-proliferation. The International Law Commission also disagreed with the use of word “all” in reference to parties as it wanted to avoid misconception that every state should have individually engaged in the practice.

Even though there was no official dissension, yet newspaper sources do indicate that some NSG members expressed dissatisfaction over the agreement (but the official sources, at the most, have referred to India as being a special case) [FN106]. Nevertheless, it has to be accepted that
this agreement was the best available option to get India involved with the international non-proliferation regime and perhaps the ‘subsequent practice’ here indicates a shift in international policy to deal with a country which in spite of possessing nuclear technology had so far refused to be a part of the official non-proliferation regimen.

However, once again such an analysis gives rise to the argument that this practice, in effect, leads to an amendment or a modification of the treaty. According to the Vienna Convention on the Law of Treaties, an amendment has to be unanimous between the parties and a modification is between certain parties only [FN107]. It is again asserted that subsequent practice here cannot be termed to be an amendment or a modification because exchange of nuclear material with a non NPT member, has not been prohibited per se by the NPT. The central concern of the NPT is non-proliferation of nuclear weapons which is actually being advanced by the US-India Civilian Nuclear Agreement as it seeks to bring hitherto unprotected Indian nuclear establishments under the IAEA safeguards and at the same time it is in keeping with the NPT spirit of encouraging peaceful use of nuclear energy in developing areas of the world [FN108].

III. ANALYSIS OF THE STRATEGIC POLICY SHIFT REPRESENTED BY THE US-INDIA CIVILIAN NUCLEAR AGREEMENT

The US-India nuclear agreement is unprecedented in itself considering the widespread ramifications it would entail in terms of global non-proliferation and US-India strategic relationship. There is a difference of opinion about the relative character of these ramifications with proponents predicting an era of bigger responsibilities and camaraderie and critiques branding the deal as a harbinger of nuclear doom [FN109]. All said and done, the agreement is now a reality and signals a major change in the US foreign policy outlook. This part of the paper
is presenting an assessment of the deal in regard to non-proliferation regime and US foreign relations.

Policy analysis vis-à-vis Global non-proliferation movement:

A world view of nuclear non-proliferation comprises of religious adherence to the NPT postulates without an encroachment upon right of peaceful use of nuclear energy, which is ensured by the safeguards and inspections arrangement of IAEA. Based upon this sentiment, the international model of non-proliferation, till now, had rested upon a system of international isolation and hard economic sanctions in case of a violation by a country. International legal scholarship is divided upon the relative success of this model of compliance with non-proliferation principles. Where some quarters, believe in the potency of sanctions and advocate sterner measures to bring in line the wayward [FN110], proliferation activities by Iran and North Korea while within the confines of NPT and testing of 1998 by India in spite of international isolation after 1974 testing, undercuts the optimism of this argument.

The ideological achievement of this agreement is the acknowledgement that the non-proliferation regime needs to venture out of its 1970s mindset in face of the realities of today’s world when non-state actors pose a bigger challenge and there is a need for a policy of engagement with these de facto nuclear weapon states in order to ensure a responsible behavior. The traditional all or nothing approach of NPT creates a vacuum [FN111] and this agreement with India has sought to fill that vacuum by ensuring India’s adherence to objectives of NPT and engaging it in a dialog of commitment to international obligations.
At the same time, a statement that the US-India Civilian Nuclear Agreement would eventually lead to India destroying its nuclear weapons and joining NPT is quixotic; nonetheless vociferous oratory of this agreement leading to an increase in the weapons stockpile of India is highly debatable. The critiques’ argument is three fold;

- An absence of full scope safeguards would lead to India diverting civilian nuclear material to its nuclear weapons program;

- There would be an increased availability of domestic uranium for weapons production;

- This agreement may induce other nations to fashion similar deals and thus may weaken the international non-proliferation efforts and this constitutes the key issue.

These arguments are being dealt in three parts:

a. Theoretically absence of full scope safeguards means that the country retains its rights over its military program which is against the NPT mandate. However fears of this situation leading to diversion of materials for weapons development are misplaced due to certain factors:

- Unlike other non-nuclear weapon states parties to NPT, India already has a fully capable nuclear weapons complex. Its non-civil facilities constitute the full nuclear cycle and therefore it would have no incentive in transferring any materials or technology from civil facilities to military uses [FN112]. One study about India’s nuclear program shows that even with the most modest estimate of its uranium
reserves, India can produce a much larger stockpile of nuclear weapons than it currently has [FN113].

- The second part of this argument relates to application of safeguards which do not cover all the facilities. Nevertheless, by virtue of this agreement fourteen out of twenty two [FN114] Indian reactors would be under safeguards as against only four reactors [FN115] which had been under IAEA inspection till now. This aspect underlines the notion that something achieved is better than nothing and it brings civilian reactors under IAEA inspections system which was earlier beyond it and could have constituted possible sites of proliferation. [FN116].

- There is much consternation about the eight PHWRs which have been kept out the safeguards along with two plants for reprocessing of spent fuel from these reactors. Critics claim that this indicates an intention to create a huge nuclear arsenal. However, it is a fact that there occurs a reduction in electricity generation when PHWRs are subjected to production of weapons grade plutonium and that is why it is highly doubtful that India would resort to this usage instead of satisfying the country’s huge energy demand [FN117].

- India has committed to establish a new reprocessing facility to reprocess the safeguarded material under IAEA safeguards [FN118]. Also the agreement provides for application of safeguards on all nuclear materials and equipment transferred pursuant to the agreement as well as on material produced through the use of such material, in perpetuity [FN119].
- India has committed to sign and adhere to an Additional Protocol with the IAEA, which would ensure a reporting to IAEA on exports of all NSG trigger list items and thus would contribute to efforts aimed at tracking proliferation [FN120].

All this factors make it clear that critics’ argument of diversion of transferred material to weapons production lacks realism. On the contrary, an absence of such an agreement would only result in India burning more coal to respond to the energy demand and raise environmental concerns.

b. Second argument propounded by the various critiques to this agreement is that it increases the potential for indigenous Indian uranium to be available for weapons production. For the purpose of examination of this argument, it is necessary to note that India has a low uranium deposit which is an important premise of this Agreement. As per an IAEA estimate [FN121], India’s domestic uranium reserves are about 95,000 metric tons which might be considered modest for civil use but is substantial for weapon production.

Though this argument cannot be disregarded, yet it has to be considered that there are no significant constraints on India’s capability to produce as many nuclear weapons as it desires, even in absence of the agreement.

Moreover, India’s main problem is not low uranium reserves but the limitations of its mining and milling capacities. So if the government expands it’s mining and milling capacities, towards which it has already started working, it can improve its energy supply to much extent and then it is in a position to produce as many weapons without any
outside assistance and at the same time generate up to 40 GWe-years of electricity [FN122]. In short India can produce a much bigger nuclear weapons stockpile then it currently holds whether or not it receives outside uranium.

On the contrary by entering into international nuclear agreements India is binding itself to international obligation of peaceful use of nuclear material. It is highly improbable that India which is trying to emerge as a regional power and has also made a bid for U.N Security Council permanent membership would jeopardize its aspirations by resorting to further testing and thereby earning the ire of international community.

c. Third concern of the critics that this agreement provides an incentive to other nations to follow the suit, does hold some ground. This concern is twofold.

First aspect of the concern about other nations trying for a similar deal may be dispelled to much extent due to certain factors;

First, India has been able to get back into the nuclear cooperation club after thirty years of international isolation. During these years, India relied upon indigenous resources and technology to fulfill its energy needs which came at a huge economic cost. However, due to its size and natural ebullience, it could grow economically in spite of the sanctions. But in case of any other nation trying to emulate its example, this might not be the situation. Any country attempting to follow India’s footsteps would first have to tide through years of international alienation in every possible manner and risk its economic sustainability, which might not be possible as happened in the case of Pakistan which felt a strong impact of sanctions after its 1998 testing [FN123].
Second, the criteria outlined by Congress in the Hyde Act seems to be tailor made for India and it is extremely unlikely that any other nation would be able to comply with it. Hyde Act mentions that the country must have demonstrated responsible behavior in respect of non-proliferation of technology [FN124]. This in itself is not in compliance at least for Pakistan and North Korea considering the revelations about Pakistan’s ‘nuclear father’ running a global Wal-Mart of nuclear weapons [FN125] and reports of North Korean missile transfers to Iran, Libya, Egypt, Pakistan and Syria [FN126]. It also requires that the beneficial country must have a functioning and uninterrupted democracy [FN127]. The governance record of Pakistan, North Korea or Iran would undercut this requirement. Even though it can be argued that a new legislation could be enacted to amend the Hyde Act, but it is highly unlikely that such an action would be able to garner enough political will. Some NSG members as Germany and Australia have mentioned India to be a special case and stated that a nation as Iran would not be able to get the NSG waiver [FN128]. On the same lines it is highly unlikely that a similar China-Pakistan deal would get through considering Pakistan’s proliferation record and fragile domestic politics.

More disquieting is the apprehension that this agreement could be interpreted as legitimizing of a nuclear weapons program beyond the NPT mandate and this apprehension is not ill-founded. There are chances that states as North Korea (which adopted an approach of use and throw, by availing of the benefits of NPT membership and then withdrawal from it to detonate its own atomic bomb) and Iran (which has been involved in diversion of safeguarded nuclear material to feed its weapons program) might view this agreement as a weakening of non-proliferation movement. These fears cannot
be easily allayed but at the same time it can also be reasoned that this agreement could be viewed as a policy of rewarding for a clean non-proliferation record. In the end the concerns at both the sides have to be balanced.

In a nutshell, US-India Nuclear Agreement represents a middle path; an approach of choosing something over nothing in two contrasting situations.

In one situation, the truism of the times is that India is a nuclear weapons state which it developed without the authorization of NPT and so it remains outside the international nuclear community. The world continues with its hard-line approach refusing to acknowledge this reality and hoping that coercion would one day lead this second most populous country of the world to destroy its weapons and adhere to NPT. All this is while India being under no moral obligation to exercise restraint keeps the world guessing about its nuclear program and continues with its indigenous technology and a vast pool of engineers and scientists to fulfill its energy demands (though at an economic cost which might not be the situation for long if going by the statistics [FN129]). Here the global non-proliferation movement has achieved nothing except clinging to an unrealistic hope.

In another scenario, the US-India agreement signifies a shift in non-proliferation policy by venturing out of the 1970s NPT mindset and recognizing India as a nuclear power. By doing so, US has cast its relations with India into a set of mutually enforceable obligations where India has committed to a unilateral moratorium on nuclear testing, placement of its 65% civilian nuclear facilities under IAEA safeguards, harmonization and adherence to MTCR and NSG guidelines and an undertaking to work towards the conclusion of Fissile Material Cut-Off Treaty [FN130] in return for a diversification of its energy profile.
The fabric of this Agreement is woven out of a desire to incentivize a nation if it demonstrates a history of responsible behavior and commitment to act in conjunction with sacrosanct international mandates.

**Policy analysis vis-à-vis US-India relations:**

Historically, the decades following Indian independence from the British rule witnessed confused relations between the two biggest democracies of the world. Times during the cold war saw India spearheading non-aligned movement and then gradual warming of its relations with erstwhile Soviet Union. At the same time, Washington was seen forging a stronger relationship with Pakistan with which India had a long history of hostilities. The demise of Soviet Union and at the same time an opening of Indian economy brought a degree of closeness between Indo-US relations but is was still far from a constructive engagement primarily due to the roadblock posed by issue of nuclear cooperation.

The US-India nuclear agreement symbolizes the abstraction of this roadblock and a paving of way for an ‘engagement of democracies’ after decades of being ‘estranged democracies’, as aptly described by Karl Inderfurth [FN131]. This agreement is widely seen as providing a channel of communication which had been lacking in the previous years.

Broadly this agreement seeks to achieve an advancement of US-India strategic relations in four main areas. Firstly, the agreement establishes a ‘convergence of geostrategic interests’ [FN132] between two biggest democracies of the world- one of which is a super-power and the other is an emerging global power. The two countries have a potential to build a strong relationship both politically and privately. The immediate neighborhood of India as comprising Bangladesh, Nepal
and Sri Lanka is going through political upheavals and both India and United States have an interest in democratic resolution of disputes. Apart from that India is making a bid for a permanent membership of the Security Council and in that it has been strongly supported by United States which views India as a lodestar of democracy befitting a more responsible global status.

Secondly, signing of this agreement opens up a myriad of opportunities for a more involved economic relationship. Already, United States is India’s biggest trading partner and this deal would open multi-billion dollar opportunities at several levels and several sectors. The U.S companies would be able to sell reactors as well as technology to India and as per an estimate by U.S-India Business Council; the deal would herald a business of around $150 billion [FN133]. India is already an important partner in U.S corporate circles with more than 60% of US Fortune 500 companies outsourcing work to India [FN134]. Due to a burgeoning economy, India is predicted to require over 800,000 MW of power by 2030 and its teledensity has grown to 21.20%. These two sectors alone have a tremendous growth potential [FN135].

Thirdly, two countries have a major contributor role in combating terrorism and areas of defense. Post 9/11, United States policy outlook has undergone a major shift in its approach to terrorism and related activities and India has been a victim of terrorism for two decades now. United States has an interest in enlisting Indian efforts in its war on terrorism and preventing the proliferation of weapons of mass destruction especially in the hands of non-state actors which is a grave concern of both the countries. It is noteworthy that a major accomplishment of this agreement is procurement of Indian support on both ideological and logistical grounds in the containment of non-state actors out to acquire nuclear weapons. Also the security of energy lanes
in the Indian Ocean is an area of mutual cooperation. Apart from that, in the defense area, recent times have witnessed increased military cooperation evident by joint exercises [FN136].

Lastly, analysts have been identifying this agreement with a China containment strategy on the part of the United States. Though, officially any such intention has been denied but a rising authoritarian China is a matter of concern for both the countries. India’s long standing border dispute with China, a legacy of 1962 Indo-China War and not so covert nuclear transfers to Pakistan teamed with its recent activities concerning strategic constructions in India’s backyard [FN137] have been making New Delhi uneasy. At the same time, an aggressive China seeking to expand its power in Southeast Asia would not be a comfortable situation for Washington.

Thus this strategic alliance between India and United States would not only go a long way in furthering the objectives of non-proliferation regime though in an unconventional manner but also turn out to be a mutually beneficial symbiotic relationship between the two countries.

**CONCLUSIONS**

The initiative taken by President Bush and Prime Minister Manmohan Singh in July 2005 reached fruition in October 2008. The US-India Civilian Nuclear Agreement is now a reality and heralds an era of not only a better global collaboration between the two countries but also a major strategic shift in the global non-proliferation regimen.

Nonetheless this agreement is only an instance of policy shift representing a change needed to expand the reach of non-proliferation regime. The Non-Proliferation treaty in its present form
serves to highlight the divide between NWS and NNWS and does not find itself in principles of fairness or justice. As stated by Selig S. Harrison, this ‘treaty is based on a legalistic fiction that underpins discrimination’ [FN138].

What has to be understood is that an expectation that countries which have already developed nuclear weapons would destroy those and join the ‘club’ while the five nuclear powers continue to retain those, is completely unrealistic. But this does not mean that efforts at containment of spread of nuclear weapons should be given up. Instead an engagement of countries towards the conclusion of Fissile Materials Cut-Off Treaty would constitute the best solution in the present security environment [FN139] along with active efforts in the area of non-proliferation.

The need of the times is a fundamental change in the character of the Non-Proliferation Treaty along with a progression towards conclusion of FMCT with a focus upon non-state actors as potential areas of nuclear weapons proliferation.

[FN1]. The framework of this agreement was provided by the joint statement between the Indian Prime Minister Singh and U.S. President Bush in 2005 available at http://www.whitehouse.gov/news/releases/2005/07/20050718-6.html. The joint statement was operationalized by the Hyde Act which was passed to modify the requirements of section 123 of the U.S. Atomic Energy Act 1954, 68 Stat. 919 (1954) as amended 42 U.S.C. 2153, to permit nuclear cooperation with India. The Hyde Act is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5682enr.txt.pdf. After the approval of this agreement by the Senate, on October 8, 2008, it was signed into law by the President Bush and is now called United States-India Nuclear Cooperation Approval and Non-Proliferation Enhancement Act, see http://www.whitehouse.gov/news/releases/2008/10/20081008-4.html. The text of the Agreement is available at http://www.hcfa.house.gov/110/press091108h.pdf.
The deal was signed between the Secretary of State and External Affairs Minister at New Delhi. The text of speech of Indian External affairs Minister is available at http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20080068367&ch=633593108366771250

The text of the July 18, 2005 joint statement is available at http://www.whitehouse.gov/news/releases/2005/07/20050718-6.html, see supra note 1

see Treaty on Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S.161 (hereinafter NPT). India was a proliferation concern for the world as it remains outside the NPT and this agreement seeks to cap an area of proliferation concern. By the terms of this agreement, India has committed to place more than half of its nuclear facilities under international safeguards along with a perpetual placing of all transferred materials and technology under these safeguards.

The critics’ viewpoint is that this agreement seeks to provide legitimacy to India’s nuclear weapons program and may provide encouragement to nations with nuclear ambitions, especially countries like North Korea and Iran. see The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime, 33 Brook. J. Int’l. 719 (2007-2008). Also see The Global Partnership: The Final Blow to the Nuclear Nonproliferation Regime?, 21 N.Y. Int’l L. Rev. 69.

Under the NPT, Article I mandates that no nuclear weapons state party to the treaty should transfer to anyone any nuclear weapons or devices or control over such devices nor should it assist or encourage any non-nuclear weapon state to manufacture or acquire any nuclear weapons. see supra note 4, Article I. Due to this clause, critics find U.S. in violation of the treaty as the terms of the agreement contemplate transfer of nuclear material (uranium etc.) and technology (heavy water production technology etc.) to India. See supra note 1, text of the Agreement article 2(2), article 5 & article 6. Any nuclear cooperation is supposed to be an inducement to development of nuclear weapons

The US-India agreement as would be demonstrated, is legally defensible and heralds a stronger relationship between the two countries. The NPT caps the number of Nuclear Weapon States(hereinafter NWS) at five with the assumption that no other nation would ever acquire nuclear weapons and this agreement rises over such an assumption by acknowledging India as a de facto NWS. The agreement affirms cooperation between both the states possessing advanced nuclear technology having the same benefits and advantages, which places India at the same nuclear technology platform as U.S. see also supra note 1, opening statement of the text of the Agreement.

see supra note 4, NPT, also available at http://www.un.org/events/npt2005/npttreaty.html
[FN9]. The Nuclear Suppliers group comprises of 45 nations and is committed to the goal of non-proliferation of nuclear weapons. Ironically this group came into being after India tested an atomic device in 1974. available at http://www.nuclearsuppliersgroup.org/testo_home.htm. See Part II.


[FN11]. see India’s Nuclear Program by M.V. Ramana available at http://www.inesap.org/bulletin16/bul16art02.htm

[FN12]. Id. In 1954 Indian Prime Minister Nehru proposed a ‘standstill agreement’ on suspension of testing of nuclear weapons which was again approached in proposals to UN in 1956 and 1959. This proposal later resulted in the Partial Test Ban Treaty of 1963. See also India’s nuclear capability, her security concerns and the recent tests by B.M. Udgaonkar available at http://www.ias.ac.in/currsci/jan25/articles20.htm

[FN13]. India’s nuclear power program has been largely indigenous due to its exclusion from global nuclear trade till now. The passing of Atomic Energy Act in 1948 and establishment of Department of Atomic Energy and Nuclear Power Corporation of India Ltd. were key events in the nuclear power industry development of the country. For history of nuclear power development in India see http://www.world-nuclear.org/info/inf53.html. Also see http://www-pub.iaea.org/MTCD/publications/PDF/cnpp2003/CNPP_Webpage/PDF/2002/Documents/Documents/India%202002.pdf.


[FN16]. see supra note 13, Nuclear Power in India

[FN17]. Proponents at both the sides has propounded this deal to be a constructive response to India’s energy needs, see http://www.brookings.edu/opinions/2008/0801_india_cohen.aspx. Also see comments of the External Affairs Minister of India at the signing of the agreement available at http://www.state.gov/secretary/rm/2008/10/110916.htm

[FN18]. see India’s energy profile available at http://en.wikipedia.org/wiki/Nuclear_power_in_India

[FN19]. Id. also see supra note 13

[FN20]. see supra note 14 regarding envisaged growth of nuclear power in India and feasibility of three stage plan.

[FN21]. Id. Also see page 50

[FN22]. India had been proposing uniform disarmament measures both before and after testing of nuclear weapons while been advocating a complete elimination of weapons by all nations. Also see India’s Disarmament Initiatives available at http://www.ias.ac.in/cursci/jan25/articles20.htm

[FN23]. See India’s Nuclear Weapons Program available at http://nuclearweaponarchive.org/India/IndiaOrigin.html

[FN24]. see On to Weapons Development: 1960-1967 available at http://nuclearweaponarchive.org/India/IndiaWDevelop.html During the negotiations for non-proliferation, India adopted a stance of universal nuclear disarmament with no permanent nuclear club and this stance has formed Indian nuclear policy till now.

[FN25]. Chinese testing of a thermonuclear device in 1967 and its troop advance in disputed areas is also considered to have provided the bomb lobby with a stronger footing for testing. See India’s First Bomb: 1967-1974 available at http://nuclearweaponarchive.org/India/IndiaFirstBomb.html


[FN27]. Id.

[FN28]. In all terms India’s nuclear isolation started after its first testing in 1974. Both U.S. and Canada which had provided with the nuclear reactor and heavy water, withdrew all nuclear collaboration. See The “Peaceful Nuclear Explosion” and After available at http://www.inesap.org/bulletin16/bul16art02.htm

[FN30].There had actually been no political consensus on testing since 1974. The nuclear establishment comprising BARC and the Atomic Energy Commission found support with the coming to power of BJP which had made development of Indian nuclear deterrent an important election manifesto policy. See domestic policies available at http://findarticles.com/p/articles/mi_m2242/is_1643_281/ai_96210737/pg_8. Also see The 1998 Election available at http://nuclearweaponarchive.org/India/IndiaShakti.html

[FN31].Immediately following the 1998 tests, Indian Prime Minister declared a unilateral moratorium on testing and a possible nuclear weapon ‘no first use’ agreement with Pakistan. For details see http://nuclearweaponarchive.org/India/IndiaNPower.html

[FN32].The draft report on Indian Nuclear Doctrine was prepared by an advisory board but has been never made explicitly official. See http://nuclearweaponarchive.org/India/IndiaNPower.html

[FN33].See supra notes 12. Proponents feel that a history of responsible nuclear behavior coupled with longstanding democratic traditions proposes India as an eligible candidate for nuclear cooperation in spite of its refusal to sign NPT. See also supra note 10, How to regulate Nuclear Weapons by Selig S. Harrison


[FN36].Id. pg. 62

[FN37].Id. pg. 64. Also see page 73; during the Pastore hearings, the Soviet delegate announced that MLF was the principal obstacle to agreement on non-proliferation.


[FN39].see supra notes 35, pg. 70-72. MLF was a major concern for the erstwhile Soviet Union during the negotiations for conclusion of NPT. Only after MLF lost support both at home and with NATO allies, could the negotiations for NPT get back on track.

[FN40].One of the major concerns for NNWS was aggression by NWS to which NWS had pledged their obligation to act in their defense in any such scenario.
[FN41]. See supra note 4, Article VI.

[FN42]. *Id.* NPT

[FN43]. A contentious issue during the negotiations regarding application of international safeguards on nuclear facilities was that while safeguards applied to all facilities in non-nuclear weapon states but those applied only to some nuclear facilities of nuclear powers, which many non-aligned nations found discriminatory. Also see supra note 35.


[FN45]. See supra notes 9. Int’l Atomic Energy Agency [IAEA], *Communications Received from Certain Member States Regarding Guidelines For the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254 (20 March 2006); *also available at* http://www.nuclearsuppliersgroup.org/guide.htm. The NSG guidelines comprising materials listed by Zangger Committee were published as IAEA document Part I which till date govern transfer of items especially designed for nuclear use.

[FN46]. See Nuclear Weapons Program under India’s Nuclear Program, Part A.

[FN47]. See supra notes 9. Also see *http://en.wikipedia.org/wiki/Nuclear_Suppliers_Group#History*

[FN48]. *Id.*

[FN49]. See supra note 9

[FN50]. Full-Scope safeguards refer to IAEA safeguards on all current and future nuclear activities of non-nuclear weapon states. Int’l Atomic Energy Agency [IAEA], *Communication of 10 May 2005 received from the Government of Sweden on behalf of the participating Governments of the Nuclear Suppliers Group*, at para 13, IAEA Doc. INFCIRC/539 (30 May 2005); *also available at* http://www.nuclearsuppliersgroup.org/PDF/infcirc539r3.pdf.


[FN52]. See Part II, Article 31(3) and U.S.-India Civilian Nuclear Agreement

[FN53]. See supra note 6

[FN54]. NPT or its Preamble does not make an express prohibition for supply of nuclear material or technology to a non-member state. See NPT supra note 4
Uranium required for peaceful use is also required for producing weapons grade plutonium which is used for weapons production. Due to this reason, because weapon and peaceful activities are intertwined, India presented a Separation Plan. This Plan is available at http://www.hcfa.house.gov/110/press091108f.pdf

Treaty interpretation is a tool used to assess the validity of any action in compliance or in violation of a treaty norm. It has long been a controversial topic and ILC finally codified it in Vienna Convention on Law of Treaties.

The report of International Law Commission was submitted to the General Assembly and the text adopted by ILC in its 18th session in 1966 was part of this report. The report also appears in the Yearbook of International Law Commission, 1966, vol.II available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; article 27-29

Id. also see Commentary to article 27 of the text adopted

Word ‘legality’ is used in reference to the rhetoric that NPT being a legally binding instrument on U.S has been breached

Word ‘legitimacy’ has been used in reference to the allegations of the agreement being ethically wrong in terms of non-proliferation regime


see supra note 57. Sir G.G.Fitzmaurice was appointed by the International Law Commission at its seventh session in 1955. The ILC work on Law of Treaties is also available at http://untreaty.un.org/ilc/summaries/1_1.htm

see private writings of Sir Fitzmaurice published as (1951)28 BYIL 1 at pg.1, 7-8 & (1957)33 BYIL 204 at pg.211

Id. see (1951)28 BYIL 1 at page 7 under the Doctrine of Textual Interpretation

see supra note 61; Article 31(1) of the VCLT

Id.

Article I is not applicable here because the U.S.-India agreement does not contemplate transfer of any nuclear weapons or devices or control over those. Second part of this article talks about any assistance or inducement which could be an alleged effect of this agreement due to transfer of source or fissionable material, is also not applicable as this prohibition is in respect of non-nuclear weapon state whereas India has already acquired
nuclear weapons and is a NWS, in actual terms. Also see Policy analysis vis-à-vis global non-proliferation in Part III of this Paper.

[FN68].see supra note 4, NPT Article III (1)

[FN69].India is a non-nuclear weapon state (hereinafter NNWS) as per NPT. See Article IX, NPT. So, India is a potential state in the category described here. It is receiving nuclear material under the agreement being a NNWS and is not a party.

[FN70].IAEA stand for International Atomic Energy Agency. The main goal of IAEA is to aid in providing nuclear energy for peaceful purposes to members of NPT and at the same time regulate the usage of transferred material. The safeguards of IAEA may be found at http://www.iaea.org/Publications/Documents/Infcircs/part13.shtml

[FN71].see supra note 4, NPT Article III (1); the opening words of this article are each non-nuclear weapon State ‘Party to the Treaty’

[FN72].see Principles And Objectives For Nuclear Non-Proliferation And Disarmament NPT/CONF.1995/32/DEC/2; also available at http://www.fas.org/nuke/control/npt/text/prin_obj.htm

[FN73].Id. clause 11 & 12

[FN74].Second part of article III (1) regarding application of safeguards to all source or fissionable material is in direct contradiction with second part of article III (2) which refers to application of safeguards only to material transferred. This peculiar situation arose because the safeguards envisioned by NPT are for a NNWS whereas the facts herein relate to a NWS. Ideally, within NPT, a NWS is not subject to full scope safeguards but since India is not a NWS as defined under NPT, the attendant circumstances cannot be interpreted as per any fixed criteria within the NPT.

[FN75].see supra note 1


[FN77].Article 10(2) of the agreement provides that the safeguarded material and any material produced by the use of such material or technology would remain under the safeguards for all times. see Nuclear Proliferation Assessment released by the U.S government at page 17 para 2 under the application of safeguards available at http://www.hcfa.house.gov/110/press091108e.pdf

[FN78].Id. page 27, para 2
[FN79].see supra note 74

[FN80].see supra note 64, Doctrine of Textual Interpretation, by Sir Fitzmaurice

[FN81].India has committed to sign an additional protocol with the IAEA which would entail bigger responsibilities. See supra 29. Nuclear Proliferation Assessment at page3 &4

[FN82].This agreement seeks to create a parallel NPT regime as India is a de facto NWS and if it had been within NPT as a NWS it would not have needed full scope safeguards.

[FN83].In the Assessment Report, U.S government observes that since India already has nuclear weapons, it does not have an incentive in diversion of safeguarded material. Supra 29 at page 23 para 1


[FN85].see also Reasons discussed in Part III of this paper, Policy Analysis vis-à-vis Global Non-Proliferation movement; pg. 25

[FN86].Article 31(3) mentions the word ‘context’ which signifies a consideration of other criteria as subsequent practice, along with the text and its preamble as explained in article 31(2)

[FN87].see (1957)33 BYIL 204 pg. 211 & 223-225

[FN88].see supra 57, report of the International Law Commission

[FN89].Id. see Commentary on Article 27 paragraph 3(b) at page 221 & 222.

[FN90].Id.

[FN91].see supra note 64 at page 20; The Court’s Formulation of Principle V (principle of subsequent practice)

[FN92].see supra 64; footnote 1 at page 22 about contrary rules of procedure leading to establishment of practice

[FN93].see supra notes 64 on principle of subsequent practice; see also supra note 87, pg.223 & 224


[FN96]. United Kingdom stated that NSG waiver would make a significant contribution to global energy available at http://afp.google.com/article/ALeqM5h_W2NyrBzDRaCnMi5-HFUuzjLG0g

[FN97]. This deal had initial support from France, Russia, Japan, Australia which welcomed the NSG ratification. Also see http://timesofindia.indiatimes.com/India_got_the_waiver_because_of_its_rise_as_global_power/articleshow/3472841.cms


[FN99]. see Pranab Dhal Samanta, India, France ink nuclear deal, first after NSG waiver, Indian Express, October 1, 2008; also available at http://www.indianexpress.com/news/india-france-ink-nuclear-deal-first-after-nsg-waiver/368048/

[FN100]. see http://www.whitehouse.gov/news/releases/2008/10/20081008-4.html

[FN101]. The British decision to lift a ban was communicated to the House of Commons in a written statement, available at http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20080072100


[FN103]. see supra note 4, NPT

[FN104]. see supra note 9, membership of NSG

[FN105]. Id.

[FN106]. see supra note 57; page 220. Even though no NSG member dissented expressly i.e officially, yet some newspaper reports indicate dissension especially on the part of China, Germany and New Zealand; some newspaper reports are available at http://news.xinhuanet.com/english/2008-09/08/content_9853075.htm, http://www.dw-world.de/dw/article/0,2144,3629002,00.html, http://in.reuters.com/article/oilRpt/idINPEK7195620080901

[FN107]. see supra note 61, Vienna Convention on Law of Treaties Part IV

[FN108]. see supra note 4, Article IV, para 2

[FN109]. see supra note 5; Critics viewpoint
[FN110]. see Averting Catastrophe: Why the Nuclear Non-Proliferation Treaty is losing its Deterrence Capacity and How to Restore it; 28 MIJIL 337 (Winter 2007)

[FN111]. see also Recent Legislation; 120 Harv. L. Rev. 2020 (2006-2007) at page 2025

[FN112]. see supra notes 77; page 22-23

[FN113]. see supra note 14; pg.39-40

[FN114]. see supra note 77; pg. 10

[FN115]. Id. pg. 8

[FN116]. Ever since India conducted its first test in 1974; it has been isolated from world nuclear trade. Yet it was not deterred and it developed weapons and tested again in 1998 which were again followed by international sanctions. However all these coercive measures for almost 35 years could not force India into joining NPT. The message is clear that coercive measures have failed at least in respect of this particular country and so the U.S.-India agreement represents a change in non-proliferation policy in order to expand its reach and achieve the maximum. See also Condoleeza Rice, Our Opportunity with India, The Washington Post, March 13, 2006; also available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200978.html

[FN117]. see supra note 14, Making Sense of U.S.-India Civilian Nuclear Cooperation; pg.48

[FN118]. see supra note 77 Nuclear Proliferation Assessment; pg. 20

[FN119]. Id. page 4

[FN120]. Id.

[FN121]. Id. page 27

[FN122]. see supra note 14; Analysis by Ashley J.Tellis pg.47-48

[FN123]. see supra note 110; pg.392

[FN124]. see supra note 94; § 102(6)(A), 120 Stat. at 2727

[FN125]. see http://www.washingtonpost.com/wp-dyn/content/article/2006/04/21/AR2006042101627.html

[FN126]. see http://www.armscontrol.org/factsheets/northkoreaprofile

[FN127]. see supra note 94; § 102(6)(B), 120 Stat. at 2727

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[FN128]. Various NSG members after the waiver expressed the opinion that any other country in a similar situation might not have got the exemption and that India was a special case. In fact Germany specifically pointed to Iran. See also India Got the waiver Because of its Rise as Global Power, The Times of India, September 11, 2008; statement of Australian Foreign Minister also available at http://timesofindia.indiatimes.com/India_got_the_waiver_because_of_its_rise_as_global_power/articleshow/3472841.cms, also see http://www.dw-world.de/dw/article/0,2144,3629002,00.html.

[FN129]. Study by Ashley Tellis suggests that an improvement in milling and mining capacity may ultimately lead to better electricity generation and reduce Indian dependence on outside uranium; see also supra note 14; pg.45-48

[FN130]. see supra note 77; pg. 4 & 5

[FN131]. see ‘The U.S. and India expanding engagement agenda’, a chapter from ‘U.S. – India Relations’ by Karl F. Inderfurth, appearing in the report of The Asia Foundation entitled America’s Role in Asia: Asian and American Views


[FN134]. see Overcoming Operational Challenges of Investing in India; 1650 PLI/Corp 101

[FN135]. Id.

[FN136]. see supra note 132; Cooperation between the two countries has taken place both in the field of defense industrial trade and defense ties evident by joint defense exercises.


[FN139]. see http://www.fas.org/nuke/control/fmct/