

# Note

## Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime

Kate Heinzelman<sup>†</sup>

I.	INTRODUCTION .....	447
II.	A NEW SET OF THREATS: U.S. NONPROLIFERATION POLICY AND INDIA AS A STRATEGIC PARTNER.....	450
	A. <i>The Terms of the Deal</i> .....	450
	B. <i>The NPT and the International Nonproliferation Regime</i> .....	451
	C. <i>India: From Nuclear Weapons Pariah to Strategic Partner</i> .....	452
	D. <i>U.S.-India Relations: Beyond Nuclear</i> .....	455
III.	THE U.S.-INDIA DEAL FROM THE STANDPOINT OF INTERNATIONAL LAW .....	457
	A. <i>Different Contracts: From the NPT to the U.S.-India Deal</i> .....	458
	B. <i>The Critics' Arguments in Greater Detail</i> .....	459
	C. <i>Why the Deal May Not Be as Bad as It Seems</i> .....	460
	1. <i>Marginal Gains and Real Incentives</i> .....	462
	2. <i>History of Nuclear Exceptions</i> .....	465
	3. <i>The Moral Dividing Line</i> .....	467
	4. <i>Unilateralism &amp; Exceptionalism</i> .....	468
	5. <i>Inroads and Accountability</i> .....	470
IV.	INFIRMITIES IN THE DEAL: TIMING, INCENTIVES, AND PERPETUITY .....	472
	A. <i>Incentives</i> .....	473
	B. <i>Termination</i> .....	475
	C. <i>Perpetuity</i> .....	477
V.	CONCLUSION.....	478

### I. INTRODUCTION

In 2006, the U.S. Congress passed legislation enabling a U.S.-India civil nuclear deal that would permit the United States to export nuclear materials and equipment to India notwithstanding India's refusal to sign the Treaty on

---

<sup>†</sup> Yale Law School, J.D. expected 2009; Yale University, B.A. 2004. Many thanks to W. Michael Reisman and Lori Fisler Damrosch for their comments on earlier drafts, and to Sameer Ahmed, Zachary D. Kaufman, and *The Yale Journal of International Law* for their editorial assistance. The title comes from a speech by President George W. Bush referencing his plans to change the U.S.-Russia relationship in recognition of post-Cold War realities and his intention to move from a "nuclear balance of terror" to an era of "common responsibilities and common interests." George W. Bush, President of the U.S., Remarks by the President to Students and Faculty at National Defense University (May 1, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010501-10.html>.

the Non-Proliferation of Nuclear Weapons (NPT).<sup>1</sup> Following the passage of the Act, President Bush and Prime Minister Singh completed a bilateral “123 Agreement”<sup>2</sup> to exempt India from restrictions on trade in civil nuclear materials and place fourteen of India’s twenty-two nuclear reactors, and all civil reactors built thereafter, under International Atomic Energy Agency (IAEA) safeguards.<sup>3</sup> Despite recent assurances from U.S. diplomats that “we are 90 percent of the way there,”<sup>4</sup> the U.S.-India civil nuclear deal has since faltered, with dissension from within India now threatening to shut down the deal indefinitely.<sup>5</sup>

The proposed U.S.-India deal is an integral part of the Bush administration’s approach to nonproliferation.<sup>6</sup> In a 2001 speech at the National Defense University, President Bush unveiled his new policy, labeling it “a clear and clean break from the past.”<sup>7</sup> The President called for a new concept of deterrence<sup>8</sup> and made clear his intention to move beyond old

1. See Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, tit. I, 120 Stat. 2726 (to be codified at 22 U.S.C. §§ 8001-8008 and 42 U.S.C. § 2153(d)).

2. This term refers to section 123 of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2297g-4), which governs U.S. nuclear trade agreements with foreign nations. To date, the United States has concluded approximately two dozen such agreements. National Nuclear Security Administration, Agreements for Cooperation in the Peaceful Uses of Nuclear Energy, <http://www.nnsa.doe.gov/na-20/cooperation.shtml> (last visited Feb. 14, 2008).

3. R. Nicholas Burns, *America’s Strategic Opportunity with India*, FOREIGN AFF., Nov.-Dec. 2007, at 131, 136.

4. R. Nicholas Burns, Under Secretary for Political Affairs, U.S. Dep’t of State, Remarks to the Heritage Foundation, U.S.-India Relations: The Road Ahead (May 23, 2007), available at <http://www.state.gov/p/us/rm/2007/85424.htm>.

5. See Foster Klug, *U.S.-India Nuclear Deal’s Future Uncertain*, ASSOCIATED PRESS, Apr. 4, 2008, available at <http://ap.google.com/article/ALeqM5hjHnPz7XX0WpdjPiswhHLvaXj0pAD8VR0NLO0>; Matthew Rosenberg, *Nuclear Deal Threatens India Government*, ASSOCIATED PRESS, Oct. 9, 2007, available at <http://abcnews.go.com/International/wireStory?id=3708805>.

6. See NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 4, 6 (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> (emphasizing the importance of “work[ing] closely with like-minded countries” to confront new proliferation threats, “build coalitions,” and “hold countries responsible for complying with their commitments” as well as the United States’s intention to “pursue country-specific strategies that best enable us and our friends and allies to prevent, deter, and defend against WMD and missile threats from [dedicated proliferators]”); cf. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 27 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (acknowledging that “[d]ifferences remain” between the United States and India “including over the development of India’s nuclear and missile programs” but stating that “[t]hrough a strong partnership with India, we can best address any differences and shape a dynamic future”).

7. George W. Bush, President of the U.S., Remarks by the President to Students and Faculty at National Defense University (May 1, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010501-10.html>. The President’s reference to a “clear and clean break” pertained most directly to the United States’s decision to withdraw from the Anti-Ballistic Missile (ABM) Treaty, a decision it would announce several months later. Press Release, White House Press Sec’y, ABM Treaty Fact Sheet: Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), available at <http://www.state.gov/t/ac/rls/fs/2001/6848.htm>.

8. Bush, *supra* note 7 (“We must work together with other like-minded nations to deny weapons of terror from those seeking to acquire them. . . . We need new concepts of deterrence that rely on both offensive and defensive forces. Deterrence can no longer be based solely on the threat of nuclear retaliation.”).

nonproliferation frameworks and treaties that “prevent[] us from addressing today’s threats.”<sup>9</sup>

The administration’s approach raises two questions. First, to the extent that the United States continues to pursue similar policies with respect to countries other than India,<sup>10</sup> what problems will it encounter? Can a model of deterrence that is not based on the threat of reciprocal destruction survive?<sup>11</sup> Second, it raises fundamental questions about the dynamism of international law. While the administration proudly hails its policy as a “break from the past,”<sup>12</sup> critics have been quick to condemn it for the same reason. They see the President’s policies, and particularly the proposed U.S.-India deal, as a threat to a universalist nonproliferation regime that has worked well in the past.

This Note assesses critics’ arguments that the deal serves a possibly fatal blow to the NPT’s nonproliferation norm. Part II briefly describes the deal and its historical context. While those who have criticized the deal as a threat to international law are undoubtedly correct that it represents an exception to the NPT’s basic bargain, I argue in Part III that the deal may not be as detrimental to the international nonproliferation regime as some critics suggest.<sup>13</sup> The particularity of this international agreement does not necessitate the conclusion that it threatens the nonproliferation system. Moreover, the argument that the deal will significantly impact other countries’ nuclear decisions is open to question. India has long occupied an exceptional place in U.S. nuclear policy. Its status as a non-signatory to the NPT and its consistent objections to that Treaty distinguish it from other countries. While the deal is not perfectly crafted, the special treatment it accords to India is both appropriate and, some might argue, necessary in light of the unique proliferation and security problems at issue. India is a major power with nuclear weapons, yet it remains outside of the nonproliferation system. The deal attempts to bring India under the nonproliferation umbrella by establishing legal obligations that prevent it from supplying nuclear materials to other countries, as well as creating greater incentives for India to help restrain proliferation worldwide. In conclusion, Part IV provides three

---

9. *Id.* (addressing the Anti-Ballistic Missile Treaty specifically).

10. Although Israel and Pakistan are the only other nuclear states that did not join the NPT, the United States is considering a somewhat similarly particularistic approach to North Korea, recently brokering a deal with Pyongyang—along with South Korea, Japan, China, and Russia—to disable three nuclear facilities at Yongbyon. *North Korea’s Nuclear Programmes. Getting Technical*, ECONOMIST, Nov. 10, 2007, at 55. Senator Biden, Chairman of the Senate Foreign Relations Committee, has suggested that the United States attempt “[t]o rein these guys inside a deal that has some transparency,” a proposal that some Republicans criticized—much as critics have attacked the U.S.-India deal—as rewarding a nuclear profligate by working outside of international nonproliferation frameworks. Mark Mazzetti & William J. Broad, *The Right Confronts Rice Over North Korea Policy*, N.Y. TIMES, Oct. 25, 2007, at A10.

11. The literature on deterrence is voluminous and beyond the scope of this Note. I mean merely to highlight that the U.S.-India agreement is premised on the notion that, in some instances, states can best contain and deter proliferation by relying on transparency, inspection regimes, and international agreements rather than the threat of retaliation.

12. See *infra* note 62 and accompanying text.

13. This Note does not take a position on the advisability of the deal from a U.S. or Indian perspective, nor does it comprehensively assess the potential advantages and costs (environmental, economic, political, etc.) for either country. This Note merely examines the critics’ arguments regarding the deal’s effect on the international nonproliferation regime.

suggested modifications to remedy the problems the deal presents regarding incentives, termination, and future assurances. These changes may make the deal more effective and strengthen the international nonproliferation system.

## II. A NEW SET OF THREATS: U.S. NONPROLIFERATION POLICY AND INDIA AS A STRATEGIC PARTNER

The United States's new nonproliferation policy, of which the U.S.-India deal is an integral part, seeks to recognize an environment in which the primary threats to U.S. national security stem from non-state actors and the states from which they may acquire weapons of mass destruction (WMD). The United States has begun to look beyond international legal regimes for solutions to these new problems.<sup>14</sup> This Part will describe the deal, provide an overview of the NPT, and discuss why the United States has turned to India as a partner in promoting its nonproliferation policies.

### A. *The Terms of the Deal*

In 2006, Congress carved out an exception to the U.S. Atomic Energy Act of 1954, authorizing the President to conclude a 123 Agreement with India despite its nuclear status.<sup>15</sup> The August 2007 123 Agreement outlined the terms of the deal, subject to approval from the IAEA, the Nuclear Suppliers Group (NSG), and the U.S. Congress. The United States and India pledged to facilitate civil nuclear trade<sup>16</sup> between themselves and third-party countries "where appropriate."<sup>17</sup> The United States also assured India of its "commitment to the reliable supply of fuel" (including by "work[ing] with friends and allies to adjust the practices of the [NSG]" and negotiating with the IAEA).<sup>18</sup> In return, India promised to place all transferred materials under safeguards.<sup>19</sup> Ultimately, at least sixty-five percent of India's thermal reactors (and perhaps as many as ninety percent) will be placed under IAEA safeguards.<sup>20</sup> Nothing transferred under the Agreement may be used for

---

14. According to at least one unnamed U.S. official, "traditional nonproliferation has failed." Mike Allen & Barton Gellman, *Preemptive Strikes Part of U.S. Strategic Doctrine. "All Options" Open for Countering Unconventional Arms*, WASH. POST, Dec. 11, 2002, at A26.

15. Specifically, Congress waived the application of Section 128 and portions of Section 129 of the Atomic Energy Act of 1954 (imposing exports controls) with regard to India. 22 U.S.C.S. § 8003(a) (LexisNexis 2006).

16. Civil nuclear trade refers to trade in nuclear and non-nuclear material, equipment, and components to enable nuclear power generation. Nuclear power may offer a cleaner solution to India's enormous need for power. Indeed, "[a]lmost half of India's population has no access to the electricity grid." Somini Sengupta, *Thirsting for Energy in India's Boomtowns and Beyond*, N.Y. TIMES, Mar. 2, 2008, at A4. Moreover, India estimates that its energy consumption will "quadruple over the next 25 years, inevitably expanding India's emissions of greenhouse gases." *Id.* "India's total emissions are [currently] the fourth largest in the world." *Id.*

17. Agreement Concerning Peaceful Uses of Nuclear Energy (123 Agreement), U.S.-India, art. 4(1), Aug. 3, 2007 [hereinafter 123 Agreement], available at <http://www.state.gov/documents/organization/90157.pdf>.

18. *Id.* art. 5(6)(a)-(b).

19. *Id.* art. 10.

20. *U.S.-India Atomic Energy Cooperation: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. 3 (2006) (statement of Condoleezza Rice, Sec'y of State) [hereinafter Rice].

military purposes<sup>21</sup> or transferred to unauthorized persons.<sup>22</sup> While the terms of the Agreement itself are reminiscent of those found in other 123 Agreements, India's status as a non-member of the NPT makes the deal groundbreaking.

### B. *The NPT and the International Nonproliferation Regime*

Since nuclear weapons were first developed, proposals for an international nonproliferation system have vacillated between emphasizing arms control and arms oversight. The Baruch Plan of 1946 proposed that an international agency exercise control over atomic energy activities worldwide.<sup>23</sup> When that proposal failed to receive Soviet support, President Eisenhower floated the Atoms for Peace Plan, which, in contrast to the Baruch Plan, proposed separate controls for civilian and military nuclear applications.<sup>24</sup> When the NPT came into effect fifteen years later, the idea that civil and military nuclear materials could remain separate lay at the center of its promise.<sup>25</sup> The NPT is, at its core, "a bargain between have and have not states that exchanges free trade in conventional weaponry and nuclear power for no weapons."<sup>26</sup> This bargain has, for the most part, been extremely effective. "The number of nuclear weapons in the world has declined from a peak of 65,000 in 1986 to roughly 27,000 today."<sup>27</sup> Scholars estimate that only ten states either have or are seeking nuclear weapons.<sup>28</sup> In 1995, considering the Treaty's success to date, NPT member states voted to extend the Treaty indefinitely.

Since the passage of the NPT, the nuclear threats the United States faces have changed considerably. Terrorist organizations, A.Q. Khan,<sup>29</sup> and the so-called "axis of evil"<sup>30</sup> have raised the specter of weapons falling into the wrong hands, perhaps even with state complicity. India and, to a greater

21. 123 Agreement, *supra* note 17, art. 9.

22. *Id.* art. 7(2).

23. ORG. FOR ECON. COOPERATION AND DEV. NUCLEAR ENERGY AGENCY, THE REGULATION OF NUCLEAR TRADE 12 (1988). The Plan was named after its chief proponent, Bernard Baruch, President Truman's representative to the United Nations Atomic Energy Commission. *Id.*

24. *Id.* at 13-14.

25. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] (supporting the "development of the applications of atomic energy for peaceful purposes" while urging "cessation of the nuclear arms race" and the achievement of "nuclear disarmament"). See generally STROBE TALBOTT, ENGAGING INDIA: DIPLOMACY, DEMOCRACY, AND THE BOMB 12-13 (2004) (describing the NPT's "grand bargain").

26. See Roger K. Smith, *Explaining the Non-Proliferation Regime: Anomalies for Contemporary International Relations Theory*, 41 INT'L ORG. 253, 257-58 (1987).

27. JOSEPH CIRINCIONE, BOMB SCARE: THE HISTORY AND FUTURE OF NUCLEAR WEAPONS 43 (2007); see George Perkovich, *Bush's Nuclear Revolution: A Regime Change in Nonproliferation*, FOREIGN AFF., Mar.-Apr. 2003, at 2.

28. See, e.g., CIRINCIONE, *supra* note 27, at 43.

29. During the 1980s and 1990s, A.Q. Khan, the father of Pakistan's nuclear program, illicitly sold nuclear equipment and practical information to Libya, Iran, and North Korea. See David Albright & Corey Hinderstein, *Unraveling the A.Q. Khan and Future Proliferation Networks*, WASH. Q., Spring 2005, at 111

30. In his 2002 State of the Union address, President Bush labeled North Korea, Iran, and Iraq an "axis of evil . . . seeking weapons of mass destruction." George W. Bush, President of the U.S., State of the Union Address ¶ 21 (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

extent, Pakistan, are regarded as locations where terrorists might acquire nuclear weapons.<sup>31</sup> In light of these new threats, the United Nations and the United States have turned to what some scholars term an “enforcement” model,<sup>32</sup> by focusing on criminalizing irresponsible proliferation, facilitating interdiction, and establishing international policing mechanisms.<sup>33</sup> This enforcement model relies in large part on the cooperation of other states. The U.S.-India deal is part of this new approach insofar as it seeks to address the threat posed by nuclear renegade countries and non-state actors by enlisting India as a major world power in a more inclusive international nonproliferation coalition. The deal is also part of a new deterrence model; it seeks to restrain proliferation and increase nuclear stability by making India’s unilateral testing moratorium part of a bilateral arrangement with the United States,<sup>34</sup> requiring that India observe the export controls applicable to nuclear weapons countries,<sup>35</sup> and enlisting India’s support in a Fissile Material Cut Off Treaty (FMCT).<sup>36</sup>

### C. *India: From Nuclear Weapons Pariah to Strategic Partner*

While India has long occupied a controversial place in the international nonproliferation system—or rather, outside of it—the United States and India have partnered in these efforts because of what the two countries view as a convergence of their strategic interests.

Since Indian independence, nuclear power has been central to India’s national identity—both internally, as a symbol of *swadeshi* (self-reliance), and externally, as a marker of India’s geopolitical independence.<sup>37</sup> Yet India has historically deemphasized the use of nuclear weapons as a tool of offensive military force, focusing instead on the use of nuclear power in scientific and

---

31. See RAJESH M. BASRUR, MINIMUM DETERRENCE AND INDIA’S NUCLEAR SECURITY 129-30 (2006). Although Pakistan is generally regarded as a greater threat, considering the history of A.Q. Khan and the insecurity of its nuclear stockpiles, see *infra* note 170, India has not escaped allegations that it may have exported centrifuge enrichment technology in the past. See SHARON SQUASSONI, CONG. RESEARCH SERV., U.S. NUCLEAR COOPERATION WITH INDIA 9 (2006).

32. See, e.g., Perkovich, *supra* note 27.

33. Examples of the enforcement model at play are the Proliferation Security Initiative, the Nuclear Suppliers Group, the Container Security Initiative, and Security Council Resolution 1540. See generally Peter van Ham & Olivia Bosch, *Global Non-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications*, GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM: THE IMPACT OF UNSCR 1540 at 3, 5, 10-11 (Olivia Bosch & Peter van Ham eds., 2007) (describing these initiatives and explaining that Resolution 1540, in particular, “aims not only to address the enforcement weaknesses in the treaty and export control regimes but also to emphasize the role states are expected to play in developing capacity and working together to pre-empt proliferation”).

34. See Press Release, Government of India, Fact Sheet on the India US Civil Nuclear Energy Cooperation (July 27, 2007), available at <http://meaindia.nic.in/pressrelease/2007/07/27pr01.htm>.

35. Press Release, The White House, Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh (July 18, 2005) [hereinafter Joint Statement], available at <http://www.whitehouse.gov/news/releases/2005/07/20050718-6.html>.

36. *Id.*

37. See V.C. Trivedi, *India’s Approach Towards Nuclear Energy and Non-Proliferation of Nuclear Weapons*, in NPT: PARADOXES AND PROBLEMS 42, 44 (Anne W. Marks ed., 1975). For a comprehensive history of India’s nuclear program, see GEORGE PERKOVICH, INDIA’S NUCLEAR BOMB (1999).

technological developments.<sup>38</sup> Indeed, “Nehru made moral aversion to nuclear weapons a dominant theme in the Indian national narrative.”<sup>39</sup> In 1948, just one year after independence, Prime Minister Nehru established the Indian Atomic Energy Commission to begin developing India’s civil nuclear program.<sup>40</sup> Since then, India’s civil nuclear program has occupied a prominent place in national politics.<sup>41</sup>

The passage of the NPT twenty years after Indian independence marked a pivotal moment in Indian nuclear policy. India refused (and continues to refuse) to sign the NPT on the grounds that it is discriminatory. India opposed the Treaty for prohibiting horizontal proliferation (from states with nuclear weapons to those without them) but not vertical proliferation (within nuclear-weapons states).<sup>42</sup> Furthermore, India criticized the NPT for imposing one-sided obligations on states without nuclear weapons.<sup>43</sup> India’s claim has always been that the NPT does not go far enough. Indeed India has, in many ways, been a leader in nonproliferation. An Indian diplomat active at the time of the NPT debates noted that India was the first country to place nonproliferation on the General Assembly agenda in 1964.<sup>44</sup> According to him, India’s “persistent plea [is] that the international community should concern itself with proliferation in all its manifestations rather than with mere dissemination.”<sup>45</sup> India’s early objections to the NPT were linked to its concerns about being left behind in global development. “Since nuclear technology is the technology of the future and is likely to become the most crucial and potent instrument of economic development and social progress, it would obviously be invidious for a greater part of the world to become wholly dependent on a few nuclear-weapon States . . . .”<sup>46</sup>

India displayed its nuclear recalcitrance once more during the Comprehensive Test Ban Treaty (CTBT) negotiations. Although “the genesis of the CTBT traces to the 1954 appeal of Prime Minister Nehru . . . [that appeal was] invoked by the . . . government of India in justification of its refusal to participate in the treaty, which . . . India believes does not go far

38. See ASHLEY J. TELLIS, *INDIA’S EMERGING NUCLEAR POSTURE: BETWEEN RECESSED DETERRENT AND READY ARSENAL* 261 (2001). Following the 1998 nuclear tests, however, Prime Minister Vajpayee sought to portray India’s nuclear weapons as an integral part of the country’s national security strategy. See *infra* note 60 and accompanying text.

39. PERKOVICH, *supra* note 37, at 444. Subsequent Prime Ministers repeated this message. See STOCKHOLM INT’L PEACE RESEARCH INST., *THE NEAR-NUCLEAR COUNTRIES AND THE NPT* 22-23 (1972).

40. HILARY SYNNOTT, *THE CAUSES AND CONSEQUENCES OF SOUTH ASIA’S NUCLEAR TESTS* 19 (1999). See also Atomic Energy Commission, <http://www.aec.gov.in> (last visited Apr. 4, 2008), for more information on the Commission and its successor, the Department of Atomic Energy.

41. See ASHOK KAPUR, *POKHRAN AND BEYOND: INDIA’S NUCLEAR BEHAVIOUR* 193 (2001); *cf id.* at 158 (describing how, during the Shastri and Gandhi years, Indian nuclear scientists often played important roles as political strategists).

42. SYNNOTT, *supra* note 40, at 22.

43. Statement by the Indian Representative (Husain) to the Eighteen Nation Disarmament Committee: Nonproliferation of Nuclear Weapons (Feb. 27, 1968), in U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *DOCUMENTS ON DISARMAMENT* 110, 114 (1968).

44. *Id.* at 110-11.

45. *Id.* at 111.

46. *Id.* at 113.

enough toward the intended goal of nuclear disarmament.”<sup>47</sup> Thus, at the 1996 Geneva Conference on Disarmament, “India, acting alone, blocked the necessary consensus on submitting the draft text to the United Nations General Assembly.”<sup>48</sup>

Despite these actions, U.S. cooperation with India on nuclear matters began quite early. The United States promoted India’s use of atomic energy beginning in the mid-1950s.<sup>49</sup> However, India’s 1974 “peaceful” nuclear test<sup>50</sup> put a significant damper on this policy and led to the formation of the NSG and the dawn of an era of technology export control-based policy.<sup>51</sup> The test—which some perceived as a direct affront to the recently adopted NPT—led commentators to bemoan the early failure of the Treaty.<sup>52</sup> Yet the United States and other major powers had a muted reaction to the Indian test.<sup>53</sup> Indeed, the United States remained engaged with India on nuclear issues,<sup>54</sup> though subject to greater legal constraints as a result of the passage of the Nuclear Nonproliferation Act of 1978.<sup>55</sup>

Then in 1998, in what came as a surprise to U.S. intelligence agencies, India conducted more tests.<sup>56</sup> Shortly thereafter, Pakistan followed with tests of its own. In response, fourteen countries imposed sanctions.<sup>57</sup> The United Nations passed a Security Council Resolution condemning the tests and ruling out recognition of either India or Pakistan as a nuclear weapons power.<sup>58</sup>

47. Lawrence Scheinman, *Remarks on the Comprehensive Test Ban Treaty and Nuclear Non-Proliferation*, in *THE COMPREHENSIVE TEST BAN TREATY: ISSUES AND ANSWERS* 5, 5 (Matthew McKinzie ed., 1997).

48. Annette Schaper, *The Comprehensive Test Ban Treaty from a Global Perspective*, in *THE COMPREHENSIVE TEST BAN TREATY: ISSUES AND ANSWERS*, *supra* note 47, at 11, 13.

49. In the 1960s, the United States constructed the Tarapur nuclear power reactor outside of Mumbai, India and agreed to provide enriched uranium fuel so long as India would relinquish the right to acquire fuel from other sources. Victor Gilinsky, Comm’r, U.S. Nuclear Regulatory Comm., *Remarks Before the India Council of Washington, D.C.* (Feb. 5, 1980) (on file with author). Even after India’s 1974 test, U.S. executive branch officials lobbied to continue supplying fuel to India’s Tarapur reactors on the grounds that, should American assistance cease, broader regional stability might be threatened by “pan-Islamicism” and the Soviets might take the place of the United States in providing nuclear assistance. *See* Letter from Robert F. Goheen, U.S. Ambassador to India, to Paul S. Sarbanes, U.S. Senator, at 2 (Dec. 11, 1979) (on file with author).

50. India described these tests as “peaceful” in the sense that they could be used for civil purposes, for example, to tunnel through mountains or clear large areas. PERKOVICH, *supra* note 37, at 82; Raju G.C. Thomas, *Whither Nuclear India?*, in *NUCLEAR INDIA IN THE TWENTY-FIRST CENTURY* 3, 6 (D.R. SarDesai & Raju G.C. Thomas eds., 2002). *See generally* Nuclear Threat Initiative, *Nuclear Chronology*, [http://www.nti.org/e\\_research/profiles/India/Nuclear/2296\\_6267.html](http://www.nti.org/e_research/profiles/India/Nuclear/2296_6267.html) (last visited Apr. 3, 2008) (providing a timeline of the 1974 test).

51. *See* William C. Potter, *India and the New Look of U.S. Nonproliferation Policy*, 12 *NONPROLIFERATION REV.* 343, 433 (2005).

52. Ian Smart, *Non-Proliferation Treaty: Status and Prospects*, in *NPT: PARADOXES AND PROBLEMS*, *supra* note 37, at 19.

53. *See* CIRINCIONE, *supra* note 27, at 37; Potter, *supra* note 51, at 433. This pattern was repeated in 1992 after India tested the short-range Prithvi missile. *See* PERKOVICH, *supra* note 37, at 329.

54. *See* TALBOTT, *supra* note 25, at 17 (describing Kissinger’s visit to India shortly after the 1974 test).

55. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified as amended in scattered sections of 22 & 42 U.S.C.).

56. *See, e.g.*, TALBOTT, *supra* note 25, at 3; Jeffrey R. Smith, *CIA Missed Signs of India’s Tests*, *U.S. Officials Say*, WASH. POST, May 13, 1998, at A1.

57. SYNNOTT, *supra* note 40, at 28-32. However, most of these sanctions were scaled back soon thereafter. *Id.*

58. S.C. Res. 1172, ¶ 11, U.N. Doc. S/RES/1172 (June 6, 1998).

Following the nuclear tests “the Indian government called on ‘all nuclear weapons states . . . to join with it in opening early negotiations for a Nuclear Weapons Convention,’”<sup>59</sup> attempting to use the test as an opportunity to assert that it remained on the right side of history. Commentators have debated the motivations behind India’s decision to resume testing, though there is considerable agreement that nationalist aims lay at its core.<sup>60</sup> There is no question that the nuclear tests were a setback to U.S.-India relations.<sup>61</sup>

Nevertheless, by 2005, the world had changed. When Secretary of State Condoleezza Rice visited India in March of that year, she told Prime Minister Singh that the United States was willing to “break with long-standing nonproliferation orthodoxy.”<sup>62</sup> The U.S.-India civilian nuclear deal, which President Bush and Prime Minister Singh would announce four months later, was not, however, a stand-alone measure.

#### D. U.S.-India Relations: Beyond Nuclear

U.S. nuclear policy vis-à-vis India is part of a much broader program of alignment between the two nations based on what the Bush and Singh administrations view as shared strategic objectives in the areas of democracy, economic growth, foreign policy towards China, military cooperation, and terrorism.<sup>63</sup>

First, the United States views India as a lodestar of democracy. As R. Nicholas Burns, the former Under Secretary for Political Affairs at the State Department, has said: “[w]e share an attachment to democracy and individual rights founded on an instinctive mistrust of authoritarianism.”<sup>64</sup> In fact, when President Bush and Prime Minister Singh publicly launched the deal, they hardly mentioned their shared nonproliferation objectives, instead emphasizing their desire “[t]o create an international environment conducive to promotion of democratic values.”<sup>65</sup> Despite the United States’s recent lack

---

59. TELLIS, *supra* note 38, at 24 (quoting John F. Burns, *India Calls for Talks on a Treaty to Limit All Atomic Arsenals*, N.Y. TIMES, June 1, 1998, at A1).

60. See, e.g., BHARAT KARNAD, NUCLEAR WEAPONS & INDIAN SECURITY: THE REALIST FOUNDATIONS OF STRATEGY 399-400 (2002); SYNNOTT, *supra* note 40, at 13 (explaining that it would be “futile, and probably misleading, to single out one cause as dominant”); Amitabh Matoo, *India’s Nuclear Policy in an Anarchic World*, in INDIA’S NUCLEAR DETERRENT: PAKHRAN II AND BEYOND 9, 12-13 (Amitabh Mattoo ed., 1999). Shortly after the May 13, 1998 tests, Prime Minister Vajpayee noted. “Our intentions were, are, and will always be peaceful. But we do not want to cover our action with a veil of needless ambiguity. India is now a nuclear weapons state.” Prabhu Chawla, *Interview with Prime Minister Atal Bihari Vajpayee*, INDIA TODAY, May 25, 1998, available at <http://www.india-today.com/itoday/25051998/vajint.html>. In addition to nationalist aims, enhancing India’s power vis-à-vis China and Pakistan undoubtedly figured prominently in India’s calculus. See PERKOVICH, *supra* note 37, at 438-40.

61. See Strobe Talbott, *Dealing with the Bomb in South Asia*, FOREIGN AFF., Mar.-Apr. 1999, at 110, 110.

62. Burns, *supra* note 3, at 135.

63. See generally *id.* (discussing the convergence of Indian and U.S. strategic interests).

64. *Id.* at 131; see also Rice, *supra* note 20, at 2 (listing democracy as a “common interest[ ] and shared ideal[ ]”).

65. Joint Statement, *supra* note 35.

of popularity abroad, seventy-one percent of Indians had a favorable view of Americans in 2005,<sup>66</sup> among the highest of all of the countries surveyed.<sup>67</sup>

Second, there are economic incentives behind the deal—both considerable potential gains to U.S. and Indian industry,<sup>68</sup> as well as broader economic ties between the two countries. The United States is currently “India’s largest investment partner, [holding] a 13% share” of India’s total foreign investments.<sup>69</sup> Meanwhile, India has become an important source of human capital for the United States<sup>70</sup> and a ready market for U.S. goods.<sup>71</sup>

Third, the United States views India as a strategic counterbalance to China, and India in return, views the United States as a likeminded country with an important stake in countering China’s influence.<sup>72</sup> Robert Blackwill, former U.S. Ambassador to India, has gone so far as to say that there are “no two [other] countries which share equally the challenge of trying to shape the rise of Chinese power.”<sup>73</sup> China has indicated that it will not veto the U.S.-India deal in the NSG, perhaps because “any adverse strategic consequences of U.S.-Indian nuclear cooperation could be counteracted through similar support of Pakistan’s civil nuclear program.”<sup>74</sup> China has allegedly been quite involved over the years in supporting Pakistan’s nuclear program.<sup>75</sup> The picture with regard to China is, however, quite complex. While India and China have often found themselves at loggerheads, and while they share a

66. Note that this number dropped fifteen percentage points in 2006. PEW RESEARCH CTR., AMERICA’S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS 1 (2006), available at <http://pewglobal.org/reports/pdf/252.pdf>.

67. *Id.*

68. See Leonard Weiss, *U.S.-India Nuclear Cooperation: Better Later than Sooner*, 14 NONPROLIFERATION REV 429, 438 (2007) (“The deal will provide more market share for U.S. high-tech defense sales, nuclear sales, and space-technology related sales.”); Carlos M. Gutierrez, U.S. Sec’y of Commerce, Remarks to the U.S.-India High Technology Cooperation Group (Feb. 22, 2007), available at [http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01\\_002819](http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_002819) (“U.S. businesses are ready and well-qualified to participate in India’s civil nuclear program . . . [T]he economic benefits will flow both ways between the United States and India.”). But see Fred McGoldrick, Harold Bengelsdorf & Lawrence Scheinman, *The U.S.-India Nuclear Deal: Taking Stock*, ARMS CONTROL TODAY, Oct. 2005, at 6, 9 (“India may continue to deal with Russia or even buy from France. This could leave the United States in the ironic position of leading a move to ease nuclear trade restrictions with India without deriving major commercial benefits.”)

69. U.S. Dep’t of State, Background Note: India (Oct. 2007), <http://www.state.gov/r/pa/ei/bgn/3454.htm>.

70. See Dan Frost, *Personal Assistants on Call, Just Not in the Next Office*, N.Y. TIMES, Nov. 14, 2007, at H5.

71. See, e.g., Ashutosh Varshney, *India’s Democratic Challenge*, FOREIGN AFF., Mar.-Apr. 2007, at 93.

72. See, e.g., Swaran Singh, *The China Factor in South Asia’s Nuclear Deterrence*, in THE INDIA-PAKISTAN NUCLEAR RELATIONSHIP: THEORIES OF DETERRENCE AND INTERNATIONAL RELATIONS 287, 287 (E. Sridharan ed., 2007) (describing India as a common enemy of China and Pakistan).

73. Potter, *supra* note 51, at 346 (citing Zlatica Hoke, *U.S. and India Getting Closer Than Ever*, VOICE OF AMERICA, July 22, 2005, available at <http://www.payvand.com/news/05/jul/1194.html>); see *U.S.-India Atomic Energy Cooperation. Hearing on Strategic and Nonproliferation Implications Before the S. Comm. on Foreign Relations*, 109th Cong. (2006) (testimony of Robert L. Gallucci, Dean, Edmund A. Walsh School of Foreign Service, Georgetown University) [hereinafter Gallucci], available at <http://foreign.senate.gov/testimony/2006/GallucciTestimony060426.pdf>.

74. CHRISTOPHER GRIFFIN, AM. ENTER. INST., CONTAINMENT WITH CHINESE CHARACTERISTICS: BEIJING HEDGES AGAINST THE RISE OF INDIA 3 (2006), available at [http://www.aei.org/publications/pubID.24873/pub\\_detail.asp](http://www.aei.org/publications/pubID.24873/pub_detail.asp).

75. See Singh, *supra* note 72, at 296-97.

long history of animosity, they have recently taken several steps towards reconciliation, including conducting joint military exercises.<sup>76</sup>

Fourth, the United States and India view each other—at least to a limited extent—as military partners, conducting joint air and naval exercises, undertaking training exchanges, and working “to expand the surveillance of suspect cargo vessels.”<sup>77</sup> Although the United States and India developed some military relations in the 1990s, Congressional sanctions following India’s 1998 nuclear test interrupted these efforts.<sup>78</sup> In 2005, as part of the thaw in U.S.-India relations, the two countries signed a framework agreement for the “U.S.-India Defense Relationship.”<sup>79</sup>

Finally, although the United States and India face different terrorist threats (terrorist attacks within India are more frequent and are often viewed as a regional, rather than an international, threat),<sup>80</sup> the two countries nevertheless share a common understanding of the exigencies of their security challenges<sup>81</sup> and have engaged in joint counterterrorism activities.<sup>82</sup> This commonality has also figured into Indian public consciousness. Pew has reported that “[o]utside of the U.S. only two countries—India and Russia—register majority support for the War on Terror.”<sup>83</sup>

Against this backdrop, the shared interests at the heart of the U.S.-India deal emerge not as predominately *nuclear* interests but rather strategic ones.

### III. THE U.S.-INDIA DEAL FROM THE STANDPOINT OF INTERNATIONAL LAW

Critics of the U.S.-India deal have been most vocal in emphasizing that the deal threatens to undermine the NPT and its nonproliferation norms. Robert Gallucci, Dean of Georgetown’s School of Foreign Service, observes:

Most analysts believe that fifty years of non-proliferation policy has something to do with explaining why the spread of nuclear technology has not led to the proliferation of nuclear weapons . . . . A key part of that policy has been our support for an international

76. GRIFFIN, *supra* note 74, at 4. Additionally, “in December 2004 . . . Chinese and Indian oil firms made a successful joint bid for a set of fields in Canada, setting the stage for a January 2006 ‘Memorandum for Enhancing Cooperation in the Field of Oil and Natural Gas’ that permits joint bids on energy assets in third countries.” *Id.* at 6.

77. Burns, *supra* note 3, at 141.

78. See Michael R. Chambers, *U.S. Military Perspectives on Regional Security in South Asia*, in *SOUTH ASIA IN 2020: FUTURE STRATEGIC BALANCES AND ALLIANCES* 231, 235 (Michael R. Chambers ed., 2002).

79. Press Release, U.S. Dep’t of State, New Framework for the U.S.-India Defense Relationship (June 28, 2005), available at <http://newdelhi.usembassy.gov/ipr062805.html>.

80. A 2006 State Department report notes that “[a]s in previous years, terrorists staged hundreds of attacks on people and property in India. The most prominent terrorist groups were violent extremists operating in Jammu and Kashmir; Maoists operating in the ‘Naxalite belt’ in eastern, southern and central India; and ethno-linguistic nationalists in India’s northeastern states.” OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM ch. 2 (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82734.htm>.

81. See, e.g., Press Release, Embassy of India, Joint Statement of the India-US Joint Working Group on Counterterrorism (July 12, 2002), available at [http://www.indianembassy.org/press\\_release/2002/jul/12.htm](http://www.indianembassy.org/press_release/2002/jul/12.htm).

82. See, e.g., Press Release, Richard Boucher, U.S. Dep’t of State Spokesman, U.S.-India Counterterrorism Joint Working Group (July 18, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/11922.htm>.

83. PEW RESEARCH CTR., *supra* note 66.

norm captured in the very nearly universally adhered to Nuclear Non-Proliferation Treaty

....<sup>84</sup>

There can be little doubt that the proposed U.S.-India deal sets up a system of rights and duties that parallels that of the NPT while remaining outside of it. Yet, as I will argue in this Part, the “addition” to the NPT that the U.S.-India deal represents is indicative of the dynamism of international law. It adapts an old norm (nonproliferation) to an existing reality (India’s de facto nuclear status) and creates a framework to accommodate a country that remains an outlier to a nearly universal nonproliferation regime.<sup>85</sup>

#### A. *Different Contracts: From the NPT to the U.S.-India Deal*

Before examining the critics’ arguments in greater detail, one must understand how the terms of the U.S.-India deal are different from those of the NPT. Under the NPT, in return for relinquishing the right to develop nuclear weapons and submitting to full-scope safeguards, non-nuclear-weapons states (NNWSs) receive the right to import nuclear technologies for peaceful purposes.<sup>86</sup> In exchange for sharing peaceful nuclear technology and submitting to limited-scope safeguards, nuclear-weapons states (NWSs) receive a guarantee that non-nuclear states will not develop weapons.<sup>87</sup> This binary bargain sets up a trade in symmetrical goods.

The U.S.-India deal, on the other hand, is asymmetrical. Unlike the NPT, it is not premised primarily on the two countries’ nuclear interests, but on a more varied set of factors. In effect, the deal permits India to have the best of both worlds—to continue to develop its military nuclear program without being an NPT NWS and receive nuclear materials from the United States under limited-scope safeguards. In exchange for submitting to “India-specific” limited-scope safeguards and an Additional Protocol,<sup>88</sup> India may import nuclear and non-nuclear material and equipment for use in its civil nuclear program.<sup>89</sup> In return for guaranteeing a continuous supply of fuel to India,<sup>90</sup> the United States receives the right to sell such materials and equipment to India and to have India’s civil nuclear facilities placed under safeguards.<sup>91</sup> The U.S.-India nuclear deal undercuts the promise of the NPT insofar as it gives a country that has refused to join the NPT greater rights than it would have were

84. Gallucci, *supra* note 73, at 3.

85. van Ham & Bosch, *supra* note 33, at 16. One hundred and ninety countries have joined the NPT. U.N. Office of Disarmament Affairs, NPT (in Chronological Order by Deposit), <http://disarmament.un.org/TreatyStatus.nsf> (follow “NPT” in the left frame, then follow “chronological order by deposit”) (last visited Apr. 15, 2008). Indeed, universality has been a goal of the NPT from the beginning. Carlton Stoiber, *The Evolution of the NPT Review Conference Final Documents, 1975-2000*, 10 *NONPROLIFERATION REV.* 126, 130 (2003) The NPT’s goal of universal adherence was specifically reaffirmed at the 2000 NPT Review Conference. *Id.* at 144.

86. NPT, *supra* note 25, arts. II-V. The terms NNWS and NWS, as used in this Note, refer specifically to nuclear-weapons states and non-nuclear-weapons states party to the NPT.

87. *Id.*

88. 123 Agreement, *supra* note 17, arts. 5(6)(c), 10(2).

89. *Id.* art. 5.

90. *Id.* art. 5(6)(b)(iv).

91. *Id.* arts. 3, 5(6)(c).

it to accede to the Treaty, under which it could only be treated as a NNWS under full-scope safeguards.<sup>92</sup>

### B. *The Critics' Arguments in Greater Detail*

While the terms of the U.S.-India deal thereby contrast those of the NPT, critics can only speculate as to how the deal will impact the international nonproliferation regime. For the most part, critics' arguments break down into three categories.

First, there are critics who believe that the deal will affect third-party countries' decisionmaking about whether to develop nuclear weapons. They cite Brazil, South Korea, and Argentina as countries that might respond to a U.S. deal with India by wanting special treatment of their own<sup>93</sup>—or worse—by abandoning their NPT pledges and developing nuclear programs in the expectation that they will be rewarded, despite their profligacy, further down the road.

Second, there are critics who believe the deal will erode the moral divide between NPT members and non-members, making it more difficult for responsible international actors to criticize and sanction the irresponsible.<sup>94</sup> They argue that the deal threatens to chip away at both the high moral ground and the persuasive pull of joining the NPT's club.<sup>95</sup> Some of these critics believe that universalist regimes like the NPT simply cannot be squared with more particularistic ones.<sup>96</sup> These critics see in the nuclear deal a slippery slope, wherein granting one country concessions for responsible nuclear behavior may erode the bright-line, frozen-in-time policy the NPT erected.<sup>97</sup> In essence, these critics fear that such deals will lead countries to take the international community's word more lightly.

Third, there are critics who focus on the danger of allowing a NWS to broker independent bilateral deals with countries who are either outside of the NPT or in violation of its terms, on the grounds that other countries might follow suit.<sup>98</sup> Underlying this fear is a broader concern that a unilateralist or

92. This is because the NPT defines a NWS as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967." NPT, *supra* note 25, art. IX(3).

93. See, e.g., CRINCIONE, *supra* note 27, at 120 (2007); Gallucci, *supra* note 73, at 4.

94. See, e.g., *U.S.-India Atomic Energy Cooperation: Hearing on Strategic and Nonproliferation Implications Before the S. Comm. on Foreign Relations*, 109th Cong. 35 (2006) (statement of Robert J. Einhorn, Senior Advisor, Ctr. for Strategic and Int'l Studies) [hereinafter Einhorn] ("[T]he US.-India agreement has strengthened the case Iran can make—and is already making—internationally and at home . . .").

95. Scholars such as Sagan have written about the NPT's norm-creation influence. Scott D. Sagan, *Why Do States Build Nuclear Weapons. Three Models in Search of a Bomb*, 21 INT'L SECURITY 54, 73 (1996). The Ukraine is a good example of a country that appears to have joined the NPT at least in part because of the advantages (be they real or symbolic) of joining the nonproliferation regime, rather than remaining "in the company of dissenters like India and Pakistan." *Id.* at 81-82.

96. Cf. Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 N.Y.U. J. INT'L L. & POL. 937 (2007) (contrasting the NPT's universalist approach with more particularistic approaches).

97. See, e.g., Potter, *supra* note 51, at 346.

98. See, e.g., *U.S.-India Atomic Energy Cooperation: Hearing on Strategic and Nonproliferation Implications Before the S. Comm. on Foreign Relations*, 109th Cong. 3 (2006) (statement of Gary Milholin, Director, Wisconsin Project on Nuclear Arms Control) ("If the United

exceptionalist approach to nonproliferation will lead to a piecemeal, rather than an overarching and comprehensive, framework for dealing with proliferation.<sup>99</sup> Indeed, it may be difficult for the international community to condemn the actions of irresponsible unilateralists while permitting those of the responsible. China, for instance, might insist on supplying countries that are outside of the NPT with nuclear equipment under comparably minimal or site-specific safeguards.<sup>100</sup>

### C. *Why the Deal May Not Be as Bad as It Seems*

Despite the appeal of these critics' arguments, it is clear that the international community is faced with what may amount to a legal anachronism: while India is a de facto nuclear weapon state, it cannot be recognized as a de jure nuclear state because the NPT defines a NWS as a state that has "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967."<sup>101</sup> Further, India does not assert today that it would have joined the NPT as a NNWS in 1968. Quite to the contrary, India is adamant about its right to possess and, if necessary, use nuclear weapons.<sup>102</sup> The international community thus faces a conundrum: how to bring India under the assurances and safeguards of the international nonproliferation system without undercutting the very terms of that regime. According to Secretary of State Condoleezza Rice, a halfway solution is the best option: "We are clearly better off having India most of the way in rather than all the way out."<sup>103</sup>

While Rice's pragmatic argument may not appeal to many international legal scholars, it is worth noting that even critics of the deal, like Robert Gallucci, argue that there is a range of possibilities for achieving nonproliferation goals with respect to India, from total adherence to the NPT, which he acknowledges is impossible, to an Indian ban on fissile material production.<sup>104</sup> In allowing this possibility, Gallucci and others like him may accept that there can be some modification of the NPT's approach with regard to India without a complete erosion of its norms. Doggedly adhering to the status quo for its own sake may be misguided. The dynamism of international

---

States decides to drop controls to help one of its friends . . . other supplier countries will do the same . . .").

99. See CIRINCIONE, *supra* note 27, at 150 ("[P]roliferation problems cannot be solved one country at a time . . . [A] comprehensive, multidimensional approach is needed for all of the threats we face from new nations acquiring weapons.").

100. See SQUASSONI, *supra* note 31, at 10, *see also infra* Subsection III.C.4.

101. NPT, *supra* note 25, art. IX(3).

102. See, e.g., Press Release, Ministry of External Affairs, Statement by External Affairs Minister in Parliament Relating to the Indo-US Bilateral Civil Nuclear Cooperation Agreement (Aug. 16, 2007), available at <http://meaindia.nic.in/pressrelease/2001/08/16pr01.htm>.

103. Rice, *supra* note 20.

104. Gallucci, *supra* note 73, at 5; *see also* Marvin Miller & Lawrence Scheinman, *Israel, India, and Pakistan. Engaging the Non-NPT States in the Nonproliferation Regime*, ARMS CONTROL TODAY, Dec. 2003, at 15, 18-20, available at [http://www.armscontrol.org/act/2003\\_12/MillerandScheinman.asp](http://www.armscontrol.org/act/2003_12/MillerandScheinman.asp).

law, and its focus on process rather than inflexible rules,<sup>105</sup> does not, in and of itself, make its force any weaker.

Underlying all three of the critics' primary arguments is a fear about creating exceptions to a system that is nearly universal and which, in its universality, appeals to the legalistic instinct that the rule of law derives much, if not all, of its legitimacy from its equal application.<sup>106</sup> Yet while states should be treated as equal juridical partners when they enter into legal arrangements (such as when they submit to the International Court of Justice's jurisdiction or enter trade agreements),<sup>107</sup> universally applicable, one-size-fits-all rules need not necessarily govern all of their relations outside of these consensual legal arrangements.

Our system of international relations has, time and again, recognized that major powers play different roles in the maintenance of public world order.<sup>108</sup> Just as major powers benefit from a system in which they often write the rules, they also disproportionately bear the costs, both because they are frequently targets for attacks<sup>109</sup> and by virtue of their investments (economic and otherwise) in the maintenance of geopolitical stability.<sup>110</sup> Even the United Nations, whose charter states that the "[o]rganization is based on the principle of the sovereign equality of all its Members,"<sup>111</sup> is home to a Security Council with five permanent members.<sup>112</sup> Likewise, the World Bank, although representing 185 countries, has five out of twenty-four executive directors appointed by the five largest shareholders and a president nominated by the United States.<sup>113</sup>

---

105. See Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2642 (1997).

106. See, e.g., U.S. CONST. amend. XIV, § 1.

107. Indeed, sovereign equality is a foundational principle of international law, as recognized by the United Nations Charter. U.N. Charter art. 2, para. 1. Chief Justice Marshall recognized, in *The Antelope*, that "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations." 23 U.S. (10 Wheat.) 66, 122 (1825); see also GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 25-62 (2004). See generally EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW (1920) (discussing the theory of sovereign equality); P.H. KOOIJMANS, THE DOCTRINE OF THE LEGAL EQUALITY OF STATES (1964) (same).

108. See W. Michael Reisman, *The United States and International Institutions*, SURVIVAL, Winter 1999, at 62, for a discussion of the United States's distinctive role in maintaining public world order.

109. Although U.S. persons and facilities do not constitute even a high share of terrorist victims worldwide, see U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM, Annex of Statistical Information (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82739.htm>, terrorist attacks in Iraq (where forty-five percent of the terrorist attacks that occurred in 2006 took place, *id.*) are, in many ways, attacks against U.S. interests, broadly defined.

110. See, e.g., JAMES K. JACKSON, CONG. RESEARCH SERV., DIRECT INVESTMENT ABROAD: TRENDS AND CURRENT ISSUES 1 (2005) ("New spending by U.S. firms on businesses and real estate abroad, or U.S. direct investment abroad, reached \$248 billion in 2004 . . . more than twice the amount foreign firms invested in the United States . . .").

111. U.N. Charter art. 2, para. 1.

112. *Id.* art. 23, para. 1.

113. World Bank, About Us, <http://www.worldbank.org/> (follow "About" hyperlink; then follow "Organization" hyperlink) (last visited Apr. 3, 2008). Of course, one can criticize this distinction given to major powers on normative grounds. Yet having five members on the Security Council rather than 192 makes collective action (and subsequent monitoring of compliance) easier, particularly because

Somewhat paradoxically, by virtue of the role they play in shaping international legal norms, major powers' actions in supplementing, amending, and refashioning international legal rules may have a stabilizing influence on public world order.<sup>114</sup> This is not simply because of the constitutive veneer with which they endow their actions, but because this constitutive effect is, in fact, real.<sup>115</sup> Rather than upsetting a universal system for arms control, the U.S.-India deal may ultimately strengthen the nonproliferation system by bringing a country with significant political and nuclear clout at least part way under its tent. Where India is a leader in the nonproliferation game, it can remain a leader, for instance, by stepping ahead of other NPT members and signing an Additional Protocol with the IAEA. Thus, while there are strong reasons to side with the critics who believe that any particularistic, bilateral agreement inherently undermines the universalist NPT, the damage it may cause may not be as bad as some suggest.

### 1. *Marginal Gains and Real Incentives*

In evaluating the U.S.-India deal's impact on international legal norms, and responding to the critics' first argument, one must first ask whether the NPT *continues* to be effective, or whether its marginal gains have diminished over the years. Despite the accession of France, China, Belarus, Ukraine, Kazakhstan, and Brazil to the NPT in the 1990s,<sup>116</sup> many, if not most countries joined the NPT relatively early.<sup>117</sup> As a member of the U.S. NPT negotiating team explains, "[t]he basic purpose of the NPT was to provide another choice . . . to establish a common nonproliferation norm that would assure cooperating nuclear weapon 'have-not' countries that if they did not acquire nuclear weapons, their neighbors and rivals would not do so either."<sup>118</sup> While the NPT served a critical purpose in creating an alternative for non-nuclear countries, and in persuading those who wished to give up their nuclear

---

those countries' interests are more likely to be aligned. As Andrew Hurrell points out, in the international security context in particular, a

vast gulf . . . continues to exist between the normative ambitions of international society and the power-political structures on which effective responses will continue to depend . . . The old foundations for the management of security, in which inequality and hierarchy played such a central role, have been weakened but not replaced by anything more secure or reliable.

Andrew Hurrell, *Security and Inequality*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* 248, 271 (Andrew Hurrell & Ngaire Woods eds., 1999).

114. See SIMPSON, *supra* note 107, at 67-68 (describing how great powers "make and remake . . . international law").

115. Consider multiple historical examples in which the United States has created international legal rules by virtue of its actions. See, e.g., Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation no. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

116. Because China tested its first nuclear weapon in 1964, when it joined the NPT in 1992 it did so as a NWS.

117. See U.N. Office of Disarmament Affairs, *supra* note 85, for a chronological list of countries that have joined the NPT. In addition to the three depositary governments (the United States, Soviet Union, and United Kingdom), forty other states had signed the NPT by 1970. NPT, *supra* note 25, 729 U.N.T.S. at 169 n.1.

118. George Bunn, *The NPT and Options for Its Extension in 1995*, 1 *NONPROLIFERATION REV.* 52 (1994), available at <http://cns.mis.edu/pubs/npr/vol01/12/bunn12.pdf>.

programs to make such renunciations publicly,<sup>119</sup> today the categories of countries with and without nuclear weapons appears relatively stable. What progress there is to be made may, therefore, occur only around the margins—with remaining outliers like India, Pakistan, Israel, North Korea, Iran, and Syria. Solving the proliferation problems posed by these countries may require a more individualized response than the NPT can provide.

The NPT's major gains may have come and gone. While the NPT continues to play an important role in representing the international community's core set of commitments to preventing the spread of dangerous nuclear technology, the proposition that the U.S.-India deal would play a major role—or even act as a tipping point—in a country's decision to initiate (or restart) its nuclear program is simply difficult to believe.<sup>120</sup> A government looking to mimic India's example would have to suffer international approbation and the cost of foregoing civil nuclear imports in exchange for uncertain benefits some fifty years down the road—precisely the kind of long-term investment governments find difficult to make.<sup>121</sup> Indeed, the consensus view among scholars is that “states will seek to develop nuclear weapons when they face a significant military threat to their security that cannot be met through alternative means; if they do not face such threats, they will willingly remain non-nuclear states.”<sup>122</sup> Even if one rejects this view in light of the Indian example or others, which suggest that factors like domestic politics may weigh heavily in a country's decision whether to develop nuclear weapons,<sup>123</sup> the United States's decision to conclude a civil nuclear deal with India is unlikely to provide enough of a catalyst to jumpstart a third-party country's nuclear program, particularly if that country is not directly affected by India's nuclear posture.

One country that is directly affected by India's nuclear posture is, of course, Pakistan. Analysts disagree on the relative stability of South Asia's nuclear dynamics. Ganguly and Hagerty, for example, tend towards the view that “India and Pakistan have, over the last two decades, settled into a more stable nuclear-deterrent balance” rather than a “delicate form of deterrence that remains vulnerable to breakdown.”<sup>124</sup> Certainly, India and Pakistan

---

119. See GEORGE PERKOVICH ET AL., *UNIVERSAL COMPLIANCE. A STRATEGY FOR NUCLEAR SECURITY* 17-20 (2005).

120. *But see* Kurt M. Campbell & Robert J. Einhorn, *Avoiding the Tipping Point: Concluding Observations, in THE NUCLEAR TIPPING POINT: WHY STATES RECONSIDER THEIR NUCLEAR CHOICES* 317, 324-25 (Kurt M. Campbell, Robert J. Einhorn & Mitchell B. Reiss eds., 2004) (arguing that this kind of exceptionalism, combined with other factors, will indeed be a tipping point for near nuclear or non-nuclear countries).

121. See Ashton B. Carter, *America's New Strategic Partner?*, *FOREIGN AFF.*, July-Aug. 2006, at 33, 40 (highlighting the years India spent “in the penalty box, which long exacted a heavy price from New Delhi in terms of both prestige and technology” and arguing, more generally, that although the deal “has caused some grumbling within the NPT regime, a revolt of its members or the regime's collapse is not likely”).

122. Sagan, *supra* note 95, at 54, *see* Campbell & Einhorn, *supra* note 120, at 320. This is not to suggest that scholars have not also challenged this view. Sagan, for one, argues that this approach is “dangerously inadequate.” Sagan, *supra* note 95, at 55; *see also* George Perkovich, *Think Again*, *FOREIGN POLICY*, Autumn 1998, at 12, 12, 16.

123. *See, e.g.*, Sagan, *supra* note 95, at 63.

124. SUMIT GANGULY & DEVIN T. HAGERTY, *FEARFUL SYMMETRY* 197 (2005).

frequently make military decisions that provoke threats of an arms race.<sup>125</sup> Those who fear that the nuclear deal will catalyze a South Asian arms race contend that supplying India uranium may allow it to divert domestic uranium for use in its military program.<sup>126</sup> Ashley Tellis argues, however, that the U.S.-India deal will not contribute to India's nuclear weapons capabilities or the freeing of domestic uranium for use in India's strategic program.<sup>127</sup> The Hyde Act further requires that the President monitor India's uranium production and the amount of uranium that India allocates to its military program, so that major changes will be noted.<sup>128</sup> Some have suggested, as a general matter, that "Indian accumulation of fissile material is unlikely to fundamentally alter the nuclear decisions or capabilities of other states, while nuclear testing and the potential spread of nuclear technologies will have far more direct effects."<sup>129</sup> If one accepts this argument, then the deal may be a step forward insofar as it gives India further incentives to abstain from testing. There can be no doubt, however, that this is an area of potential risk.

Aside from Pakistan, Japan is one NPT member whose decisionmaking might be affected by the U.S.-India deal. According to some, Japan has recently become concerned by indications—such as the U.S. Congress's refusal to ratify the CTBT and slow progress towards nuclear disarmament—"that the nonproliferation regime is eroding."<sup>130</sup> Despite joining the NPT, Japan kept its nuclear materials and continued its research in case the NPT were to dissolve.<sup>131</sup> In fact, "[u]ncertainty about the treaty was so strong at first that Japan and other nonnuclear states insisted that they be allowed to review and renew their membership every five years."<sup>132</sup> It would be overly simplistic, however, to suggest that a U.S.-India deal would cause Japan to restart its nuclear program. Other U.S. actions, as well as domestic and historical factors, would play a strong role in influencing Japan's decision.<sup>133</sup> In fact, some speculated that Japan might even endorse the deal.<sup>134</sup> Certainly, the concern that countries other than Japan are still hedging their bets in case

125. For a recent example, see *India Missile Test to Start Arms Race: Pakistan*, REUTERS INDIA, Feb. 27, 2008, <http://www.reuters.com/article/newsMaps/idUSISL2952620080227>.

126. See, e.g., Weiss, *supra* note 68, at 438.

127. ASHLEY J. TELLIS, *ATOMS FOR WAR: U.S.-INDIAN CIVILIAN NUCLEAR COOPERATION AND INDIA'S NUCLEAR ARSENAL* 7 (2006), available at <http://www.carnegieendowment.org/files/atomsforwarfinal4.pdf> (arguing that India's domestic uranium supplies are sufficient to "sustain the largest nuclear weapons program that can be envisaged relative to its current capabilities").

128. 22 U.S.C.S. § 8003(g)(2)(H) (LexisNexis 2006).

129. MICHAEL A. LEVI & CHARLES D. FERGUSON, *U.S.-INDIA NUCLEAR COOPERATION: A STRATEGY FOR MOVING FORWARD* 20 (2006).

130. Kurt M. Campbell & Tsuyoshi Sunohara, *Japan: Thinking the Unthinkable*, in *THE NUCLEAR TIPPING POINT*, *supra* note 120, at 218, 240.

131. Scott D. Sagan, *How to Keep the Bomb from Iran*, *FOREIGN AFF.*, Sept.-Oct. 2006, at 45, 50.

132. *Id.*

133. See Campbell & Sunohara, *supra* note 130, at 241-43. Campbell argues that "[t]he international circumstances would have to be extraordinarily worrisome to override the strong domestic opposition that would no doubt follow any Japanese decision to consider formal nuclear status." Kurt M. Campbell, *Reconsidering a Nuclear Future: Why Countries Might Cross over to the Other Side*, in *THE NUCLEAR TIPPING POINT*, *supra* note 120, at 18, 28; see Mike M. Mochizuki, *Japan Tests the Nuclear Taboo*, 14 *NONPROLIFERATION REV.* 303 (2007).

134. Masako Toki, *Commentary, Will Japan Support India's Nukes?*, *FOREIGN POL'Y IN FOCUS*, Sept. 26, 2007, <http://www.fpif.org/fpifxtu/4579> (noting that "former Prime Minister Abe's recent visit to India suggests that Tokyo is ready to support the agreement").

the NPT collapses has become less relevant since the 1995 vote to extend the NPT indefinitely.

## 2. *History of Nuclear Exceptions*

The U.S.-India deal is not the first time the United States accorded India special treatment, nor is it the first time that the United States and India have entered a civil nuclear trade agreement.<sup>135</sup> Moreover, U.S. nuclear diplomacy has always operated in a particularized fashion. The U.S. response to Iraq and Libya punished those two countries severely for their WMD programs. In the wake of Operation Iraqi Freedom, nuclear renegade countries might fear that the United States is just as likely to attack them as it is to reward them for having WMD programs.<sup>136</sup> Nor is adopting a one-size-fits-all international nonproliferation law a guarantee of responsible nuclear behavior, as evidenced by North Korea and Iran.<sup>137</sup> Indeed, despite remaining an NPT member, China engages in a “selective policy . . . to deflect criticism of its nonproliferation behavior through partial acceptance of certain commitments while keeping others at arms length.”<sup>138</sup>

The U.S.-India deal is also not the first time the United States created exceptions to the NPT’s rule on the grounds that unique security concerns exist. U.S. sanctions legislation even incorporates a presidential waiver in recognition of the unique foreign policy concerns at play and the importance of giving the executive flexibility to decide when punitive responses are appropriate.<sup>139</sup> Presidents have long exercised considerable discretion in this area. The Reagan administration, for example, declared that the “policy of selective denial of sensitive nuclear exports will be applied less rigorously to Euratom [European Atomic Energy Community] countries and Japan.”<sup>140</sup> President Carter conversely adopted a policy that was criticized for being “too inflexible” with regard to trade restrictions on nuclear materials.<sup>141</sup>

---

135. The United States has engaged in civilian nuclear cooperation with India before, notably with the Tarapur reactor. *See Agreement Concerning the Civil Uses of Atomic Energy, U.S.-India, Oct. 25, 1963, 14 U.S.T. 1484; supra note 49 and accompanying text.* Even after the U.S. Nonproliferation Act of 1978 ended the program of civilian cooperation, see McGoldrick, Bengelsdorf & Scheinman, *supra* note 68, at 6, the United States and other countries continued to treat instances of irresponsible Indian nuclear behavior with a light hand. For instance, several countries believed that the “international community’s relatively mild and short-lived reactions to the 1998 Indian and Pakistani nuclear tests may have reduced the perceived penalties for going nuclear.” Campbell & Einhorn, *supra* note 120, at 324; *see id.* at 318. *See TELLIS, supra note 127, at 9-10, for information on India’s fuel supply agreements with the United States, Canada, China, France, and Russia under site-specific safeguards agreements.*

136. *Cf. Campbell & Einhorn, supra note 120, at 322 (suggesting that the Bush Administration’s “muscular counterproliferation strategy” may have an indirect impact on some countries).*

137. *See, e.g., David E. Sanger, Nuclear Agency Says Iran Has Used New Technology, N.Y. TIMES, Feb. 23, 2008, at A3 (announcing the IAEA’s decision to confront Iran with evidence suggesting it had experimented with nuclear weapon technology).*

138. Zachary S. Davis, *China’s Nonproliferation and Export Control Policies*, 35 *ASIAN SURV.* 587, 588 (1995).

139. *See Arms Export Control Act, 22 U.S.C. § 2799aa-1(b)(5) (2000) (permitting the President to exercise waiver authority following a joint resolution of Congress).*

140. *COMM. ON INT’L SECURITY AND ARMS CONTROL, NAT’L ACADEMY OF SCIENCES, NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 239 (1985).*

141. *Id.* at 240.

The development of France's nuclear weapons program is a good example of the United States's willingness to work around the NPT to achieve its nuclear security goals. Although France's initial refusal to join the NPT hampered U.S.-French cooperation because of Atomic Energy Act restrictions,<sup>142</sup> Richard Ullman reported in a 1989 article that the United States had been providing France secret nuclear assistance since the 1970s.<sup>143</sup> In 1985, the United States made its cooperation more overt, lifting legal sanctions and concluding a formal Agreement for Cooperation on the Safety and Security of Nuclear Activities and Installations for Mutual Defense Purposes.<sup>144</sup> Since these policies ultimately led to France joining the NPT, this special treatment may have been a success. Indeed, although France did not join the NPT until 1992, it acted like an NPT member,<sup>145</sup> even joining the NSG in 1978 as one of its founding members. France originally resisted joining the NPT "both to protect the commercial freedom of its substantial nuclear energy industry and for symbolic reasons."<sup>146</sup> For a nationalist like de Gaulle, possessing nuclear weapons was part and parcel of reestablishing France's "grandeur."<sup>147</sup> The U.S. response therefore had to be tailored to France's unique geopolitical position and its sensitivities. To the author's knowledge, scholars have not criticized the United States's special treatment of France as having eroded the NPT's goals or other countries' adherence to it. Quite to the contrary, these were years during which the NPT is commonly viewed as having been most successful at securing widespread compliance.

The French example and others confirm that "[t]he lesson to be drawn from the history of nonproliferation is not that all states eyeing the bomb eventually get it but that nonproliferation efforts succeed when the United States and other global actors help satisfy whatever concerns drove a state to want nuclear weapons in the first place."<sup>148</sup> For instance, negotiations between Iran and the EU-3 (France, Germany, and Great Britain) beginning in 2003 point to a potential role for countries to play in counterbalancing the more rigid international nonproliferation regime by sweetening the pot, so to speak, thereby making compliance with international rules more attractive.<sup>149</sup> The recent National Intelligence Estimate on Iran likewise emphasizes the important role that international pressure played in halting Iran's program in

---

142. Even when the Act was revised (first in 1954 and again in 1958), cooperation was still limited primarily to U.S.-U.K. sharing because Congress required that recipients have already "made substantial progress in the development of atomic weapons." AVERY GOLDSTEIN, *DETERRENCE AND SECURITY IN THE 21ST CENTURY* 192 (2000) (quoting Memorandum of Conversation, U.S. Delegation to the Berm. Meeting, Atomic Energy Items: (1) French Request (2) Test Limitations 6 (March 21-22, 1957) (on file with The National Security Archive)).

143. *Id.* at 199; Richard H. Ullman, *The Covert French Connection*, *FOREIGN POL'Y*, Summer 1989, at 3, 3.

144. GOLDSTEIN, *supra* note 142, at 199 & n.54.

145. SVERRE LODGAARD, *MAKING THE NON-PROLIFERATION REGIME UNIVERSAL 5*, available at <http://www.wmdcommission.org/files/No7-Lodgaard%20Final.pdf>.

146. Christopher Way & Karthika Sasikumar, *Leaders and Laggards: When and Why Do Countries Sign the NPT?* 31 (Research Group in Int'l Sec., Université de Montréal/McGill Univ., Working Paper No. 16, 2004), available at <http://www.ciaonet.org/wps/ger003/ger003.pdf>.

147. GOLDSTEIN, *supra* note 142, at 194.

148. Sagan, *supra* note 131, at 47.

149. See Stephen Hadley, Nat'l Sec. Advisor, Press Briefing at the White House (Dec. 3, 2007), available at <http://www.whitehouse.gov/news/releases/2007/12/20071203-10.html>.

2003.<sup>150</sup> It now seems clear that it will take more than official sanctions and reprimands to make Iran forswear its nuclear option indefinitely.<sup>151</sup> Another example is Egypt's decision to join the NPT, which it did only after ratifying a peace deal with Israel that changed its national security posture.<sup>152</sup> Similarly, a decisive factor leading to Argentina and Brazil's accession to the NPT, according to some accounts, was the change in their regional bilateral relations.<sup>153</sup>

Despite the breakdown in 2002 of the 1994 Agreed Framework with North Korea,<sup>154</sup> that agreement remains an example of how bilateral agreements may become necessary to taking action with regard to countries that pose nuclear threats. At least the immediate effects of bilateral action with regard to North Korea after it was caught violating the NPT—namely, that Pyongyang halted plutonium production and allowed IAEA inspectors on site in exchange for light-water reactors<sup>155</sup>—point to the potential importance of such actions.

Israel is yet another case study in the difficulty, if not impossibility, of treating all states alike. Israel has not declared its nuclear capabilities and is not a part of the NPT. After the United States discovered that Israel had likely developed nuclear weapons, but that it would stick by its refusal to sign the NPT, Israel “moved from the era of nuclear ambiguity to the era of nuclear opacity.”<sup>156</sup> A bilateral agreement like the U.S.-India deal that recognizes Israel as a nuclear power is therefore not likely to appeal to Israel. Addressing Israel's nuclear weapons concerns and securing its compliance with international nonproliferation norms may require an individualized approach.

### 3. *The Moral Dividing Line*

To address the critics' second argument, one must consider how the U.S.-India deal may affect the moral line dividing NPT members from non-members. In the case of India, the derogation of this moral line may not be as bad as it first appears. George Perkovich points out that India, Pakistan, and Israel's possession of nuclear weapons “is morally, politically, and strategically (although not juridically) akin to that of the original five nuclear

150. NATIONAL INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 6 (2007), available at [http://www.dni.gov/press\\_releases/20071203\\_release.pdf](http://www.dni.gov/press_releases/20071203_release.pdf).

151. Indeed, “Iran is committed to the nuclear program as an assertion of national interest and technical prowess. . . . But Tehran has in recent years shown itself open to negotiations over the program, and ready for compromises, so long as they entail respect for the country's dignity and rights.” GARETH SMYTH, FUNDAMENTALISTS, PRAGMATISTS, AND THE RIGHTS OF THE NATION: IRANIAN POLITICS AND NUCLEAR CONFRONTATION 22 (2006), available at [http://www.tcf.org/publications/internationalaffairs/smyth\\_iran.pdf](http://www.tcf.org/publications/internationalaffairs/smyth_iran.pdf).

152. Sagan, *supra* note 131, at 51.

153. John R. Redick, *Factors in the Decisions by Argentina and Brazil to Accept the Nonproliferation Regime*, in PULLING BACK FROM THE NUCLEAR BRINK 67, 74-75 (Barry R. Schneider & William L. Dowdy eds., 1998).

154. Mitchell B. Reiss, *The Nuclear Tipping Point: Prospects for a World of Many Nuclear Weapons States*, in THE NUCLEAR TIPPING POINT, *supra* note 120, at 10.

155. Sagan, *supra* note 131, at 57.

156. AVNER COHEN, ISRAEL AND THE BOMB 337 (1998). By “opacity,” Cohen refers to “a situation in which the existence of a state's nuclear weapons has not been acknowledged by the state's leaders, but in which the evidence for the weapons' existence is strong enough to influence other nations' perceptions and actions.” *Id.* at ix.

powers,” since they never signed the NPT.<sup>157</sup> Unlike North Korea and Iran, which have arguably failed to honor their nuclear pledges, India has stayed true to its original word—declining to make international commitments it does not intend to uphold. While one might argue that India’s decision not to join the NPT undermines the sacrifice of those states that did, several factors mitigate this point. First, as noted in Section II.C, India objected to the NPT from the beginning on the grounds that it did not go far enough in sanctioning proliferation. Second, India’s security situation (as a nonaligned state bordering an antagonistic China, which was a nuclear weapons country but not a member of the NPT) made it particularly difficult for India to forego its nuclear option at that time.<sup>158</sup> Third, among the non-nuclear states, India was arguably one of (if not the) closest to developing a nuclear explosive device at the time the NPT froze the number of global nuclear powers.<sup>159</sup> The NPT certainly represented less of a sacrifice for countries that had no intention of developing nuclear programs at the time of the NPT. Perkovich’s observation points to the dissonance between the juridical and moral norms in this regard—something India has highlighted for decades.<sup>160</sup> Because the nuclear nations had the power to pass international legislation in 1968, they enshrined their nuclear weapons status as morally superior, while condemning identical behavior by less powerful nations. Recognition of this moral equivalence may argue for treating India differently both from those that chose to join the NPT and certainly from those who have violated its terms.<sup>161</sup>

#### 4. *Unilateralism & Exceptionalism*

Finally, the best response to critics’ arguments about unilateralism is simply that requiring the NSG and IAEA to approve the deal sets a precedent for ensuring that there is some international agreement regarding the advisability of such bilateral deals in the future.

China may well seek a similar deal with Pakistan.<sup>162</sup> In fact, this may explain why China has not publicly opposed the U.S.-India deal.<sup>163</sup> What

157. George Perkovich, *Bush’s Nuclear Revolution. A Regime Change in Nonproliferation*, FOREIGN AFF., Mar.-Apr. 2003, at 3.

158. See STOCKHOLM INT’L PEACE RESEARCH INST., *supra* note 39, at 17.

159. See STEPHEN PHILIP COHEN, INDIA: EMERGING POWER 158-59 (2001), STOCKHOLM INT’L PEACE RESEARCH INST., *supra* note 39, at 16.

160. Strobe Talbott recounts what an acquaintance told him following the 1974 Indian nuclear test: “‘You Americans may have expropriated our deity when your scientists broke open this great secret . . . but that did not give you a permanent monopoly on morality or on technology.’” TALBOTT, *supra* note 25, at 14.

161. Cf. Ted Galen Carpenter & Charles V. Pena, *Rethinking Non-Proliferation*, NAT’L INTEREST ONLINE, June 1, 2005, <http://nationalinterest.org/General.aspx?id=92&id2=12164> (criticizing the United States’s “one-size-fits-all” nonproliferation policy that permits countries like Iran and North Korea to become nuclear powers “while their more peaceful neighbors are hamstrung by the NPT from countering those moves”); Avner Cohen & Thomas Graham, Jr., *An NPT for Non-Members*, BULL. ATOM. SCIENTISTS, May-June 2004, at 40, 44 (proposing a “form of associate membership under a separate, free-standing agreement or protocol” for countries like Israel, India, and Pakistan that have not violated the NPT, but instead simply refused to join it).

162. See, e.g., Michael Krepon, *The US-India Nuclear Deal: Another Wrong Turn in the War on Terror*, HENRY L. STIMSON CENTER, Mar. 29, 2006, <http://www.stimson.org/pub.cfm?id=283>; GEORGE PERKOVICH, FAULTY PROMISES: THE U.S.-INDIA NUCLEAR DEAL (2005), <http://www.carnegieendowment.org/files/PO21.Perkovich.pdf>.

assurances are there that the U.S.-India deal will *not* lead to proliferation by third-party states (in particular, China) to Pakistan and other countries? The answer lies in the NSG, which is required to approve the U.S.-India deal by consensus.<sup>164</sup> The NSG, therefore, could not approve a similarly structured deal without U.S. support. Although China could draft an agreement that bypasses NSG approval, such a move would surely meet with international condemnation. Because China has aided Pakistan's nuclear program in the past (allegedly providing the weapons design that A.Q. Khan later passed to Libya),<sup>165</sup> the real question is: will the deal drive Pakistan and China closer than they would have been in its absence? Possibly. But the United States and India's growing strategic alliance across sectors would drive China and Pakistan closer in any event. To be sure, this is a valid concern about the deal.

The salient question is whether the NSG can adopt standards in its review of the India deal that would prevent subsequent deals that would be inadvisable from a proliferation standpoint. Commentators have focused on whether the United States should adopt a universal set of criteria by which it would consider civil nuclear deals with similarly situated countries,<sup>166</sup> a suggestion the United States has resisted unequivocally—asserting that India is a one-time exception.<sup>167</sup> Of course the question is of limited applicability, since Israel and Pakistan are the only other nuclear countries that did not join the NPT. Moreover, Israel does not have a civil nuclear program, though some reports indicate that it may consider one in the future.<sup>168</sup>

There can be no question that the time is not ripe for a U.S.-Pakistan deal. The A.Q. Khan revelations are but a few years old and a mark on Pakistan's proliferation record that will be difficult to erase.<sup>169</sup> Pakistan's current political instability is another significant consideration.<sup>170</sup> President Bush has made clear to President Pervez Musharraf that Pakistan should not expect a nuclear deal of its own.<sup>171</sup> Nor does the United States want to bind itself to offering Pakistan a similar deal contingent upon Pakistan's achievement of specified benchmarks in the future. Moreover, explicitly promulgating universal criteria might signal to non-nuclear countries that this exception is about to become a rule, thereby threatening instability. Yet the NSG or its member countries might well articulate the criteria they considered

163. See *supra* note 74 and accompanying text.

164. George Bunn, *U.S.-India Nuclear Cooperation Agreement: Final Congressional Approval Is Conditional on Future Steps by India and Two International Organizations*, LAW ALLIANCE FOR WORLD SECURITY, Dec. 20, 2006, <http://www.cdi.org/laws/india-us-122006.cfm>.

165. PERKOVICH, *supra* note 162, at 3-4; see *supra* note 129 and accompanying text.

166. See Einhorn, *supra* note 94, at 42 (advocating "country-neutral" implementation).

167. See R. Nicholas Burns, Under Secretary for Political Affairs, U.S. Dep't of State, *On-The-Record Briefing on the Status of the U.S.-India Civil Nuclear Cooperation Initiative and the Text of the Bilateral Agreement for Peaceful Nuclear Cooperation (123 Agreement)* (July 27, 2007), available at <http://www.state.gov/p/us/rm/2007/89559.htm>.

168. Miles A. Pomper, *Israel, Neighbors Mull Nuclear Power Programs*, ARMS CONTROL TODAY, Sept. 2007, at 38, 38-39.

169. See, e.g., Albright & Hinderstein, *supra* note 29, at 111-19.

170. Indeed, for the time being the United States has focused on helping Pakistan secure its nuclear weapons. David E. Sanger & William J. Broad, *U.S. Secretly Aids Pakistan in Guarding Nuclear Arms*, N.Y. TIMES, Nov. 18, 2007, at A1.

171. Elisabeth Bumiller & Carlotta Gall, *Bush Rules out a Nuclear Deal with the Pakistanis*, N.Y. TIMES, Mar. 5, 2006, at A1.

in reaching their decision regarding whether to approve the India exception.<sup>172</sup> If a country like China were to propose a Pakistan deal by arguing that Pakistan meets the same criteria as India, the United States (in vetoing the deal in the NSG) could articulate why Pakistan does not meet the bar.

### 5. *Inroads and Accountability*

Beyond these responses to critics' concerns, there are several independent reasons why the deal may be beneficial to the international community. First, it puts feet on the ground and establishes a channel for ongoing communication between India, the IAEA, and the United States.<sup>173</sup> "[I]magine the alternative: Without this initiative, 81 percent of India's current power reactors—and its future power and breeder reactors—would continue to remain outside of IAEA safeguards. The Indian nuclear power program would remain opaque, a nuclear black box."<sup>174</sup> Addressing emerging nuclear threats (particularly nuclear terrorism) requires effective mechanisms for securing existing stockpiles and dual-use materials as well as strengthening cooperation with governments that possess them. While there are legitimate concerns that the U.S.-India deal as drafted does not accomplish this goal, since the safeguards cover only those facilities India chooses,<sup>175</sup> having India comply with some IAEA safeguards is certainly an improvement from having it comply with none.<sup>176</sup> Because the U.S.-India deal is not an arms control agreement (like the Nunn-Lugar program aimed at securing nuclear stockpiles in Russia<sup>177</sup>), there are limits to what it can accomplish. Yet if it is true, as some experts argue, that nuclear weapons will spread no matter what we do,<sup>178</sup> then it is particularly important that we strengthen strategic relationships with states that possess nuclear materials. Indeed, this is a mainstay of the United States's new approach to nonproliferation.<sup>179</sup>

The U.S.-India deal also takes several steps towards ensuring that India remains a responsible nuclear power. For instance, it requires that India sign an Additional Protocol (further strengthening the IAEA's ability to collect data on countries' nuclear activities), which only eighty-six states have adopted to date.<sup>180</sup> India has also pledged to "refrai[n] from transfer of enrichment and reprocessing technologies to states that do not have them" and to "adhere[] to Missile Technology Control Regime (MTCR) and Nuclear

172. This does not mean that these reasons must be framed in universal terms. Certainly, the NSG could approve the deal because it finds India's export regulations sufficiently strong and its separation plan to be adequate insurance against the diversion of materials and supplies to India's military program.

173. There are presently some IAEA safeguards in place in India, though they are quite limited. See Weiss, *supra* note 68, at 439-41.

174. Rice, *supra* note 20, at 3.

175. "There is no reason why we should attach any positive value to India's willingness to submit a few additional nuclear facilities of its choosing to international safeguards, so long as other fissile material producing facilities are free from safeguards." Gallucci, *supra* note 73, at 2.

176. See Rice, *supra* note 20.

177. 22 U.S.C. §§ 5901-02 (2000).

178. See, e.g., CIRINCIONE, *supra* note 27, at 102.

179. See *supra* note 6 and accompanying text.

180. Int'l Atomic Energy Agency, Strengthened Safeguards System: Status of Additional Protocols, [http://www.iaea.org/OurWork/SV/Safeguards/sg\\_protocol.html](http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html) (last visited Apr. 3, 2008).

Suppliers Group . . . guidelines.”<sup>181</sup> If the underlying purpose and philosophy of the NPT is to permit the development of “peaceful applications of nuclear technology” while preventing the further spread of nuclear weapons and enhancing “the cooperation of all States in the attainment of this objective,”<sup>182</sup> then the U.S.-India deal is a step forward in accomplishing these goals.

As counterintuitive as it seems, the likelihood of future Indian nuclear tests provides another argument in favor of the deal. Whatever agreement the international community reaches with India, it must anticipate that India may test again.<sup>183</sup> While a nuclear test automatically triggers sanctions under U.S. law, if the past is any guide, Congress and the executive branch will find ways to lessen the sanctions’ impact.<sup>184</sup> A bilateral nuclear agreement can, however, institute automatic triggers, as recommended in Section IV.B. The deal also places the United States in a position of greater responsibility for monitoring Indian proliferation.<sup>185</sup> For instance, the deal makes India’s unilateral moratorium on nuclear testing bilaterally enforceable.<sup>186</sup> Increased U.S. accountability for India’s nuclear behavior thus permits (if not obliges) the United States to be more vigilant in monitoring and responding to irresponsible nuclear behavior.<sup>187</sup>

The international nonproliferation system has evolved over time and must continue to do so. Less formal international coalitions, like the NSG and the Proliferation Security Initiative (PSI),<sup>188</sup> have developed to complement the NPT. With NPT members like Iran demonstrating that they are not afraid to violate the Treaty, groups like the NSG have emerged as critical to weapons

181. Joint Statement, *supra* note 35.

182. NPT, *supra* note 25

183. Shortly after the 123 Agreement was signed, Prime Minister Singh announced to Parliament that it should not oppose the deal since it did not restrict “‘India’s right to undertake future nuclear tests, if it is necessary.’” Somini Sengupta, *Defending Nuclear Pact, India Premier Faces Jeers*, N.Y. TIMES, Aug. 17, 2007, at A10.

184. While the Arms Export Controls Act, 22 U.S.C. § 2799aa-1 (2000), and the Export-Import Bank Act, 12 U.S.C. § 635(b)(4) (2000), require that the United States impose economic sanctions on a non-nuclear country that receives or detonates a nuclear device, the United States has sought exceptions for India. For instance, although the United States imposed sanctions after India’s 1998 tests, most of the U.S. sanctions were eased within a few months and Congress gave the President authority to remove all of the sanctions the following year. DIANNE E. RENNACK, CONG. RESEARCH SERV., INDIA AND PAKISTAN: U.S. ECONOMIC SANCTIONS (2003); see JEANNE J. GRIMMETT, CONG. RESEARCH SERV., NUCLEAR SANCTIONS: SECTION 102(b) OF THE ARMS EXPORT CONTROL ACT AND ITS APPLICATION TO INDIA AND PAKISTAN (1999).

185. See, for example, the list of Congressional reporting requirements included in the Hyde Act, 22 U.S.C.S. § 8003(c) (LexisNexis 2006).

186. See SQUASSONI, *supra* note 31, at 13. Of course, the United States would not be the only country with responsibility for monitoring India. Other countries are now considering civil nuclear deals of their own with India in anticipation of NSG approval. See, e.g., *infra* note 196.

187. It is debatable whether past U.S.-India cooperation has had this effect. One might argue that the U.S.-India agreement regarding Tarapur spurred the United States to take more punitive actions in response to India’s 1974 test (imposing sanctions, passing the Nuclear Non-Proliferation Act in 1978, and initiating the Nuclear Suppliers Group). However, the short-lived nature of the U.S. sanctions points in the opposite direction.

188. For more information on the PSI generally, see Richard T. Cupitt & Chris Jones, *The Proliferation Security Initiative: An Anti-Institution?*, in NON-PROLIFERATION EXPORT CONTROLS 197 (Daniel Joyner ed., 2006).

control.<sup>189</sup> A reverse-engineered process, whereby India would join the PSI and comply with NSG regulations as well as IAEA safeguards before (or instead of) joining the NPT, may therefore not be a bad solution.<sup>190</sup> As India's place in the world changes, gaining India's support for and participation in these informal arrangements may even gradually move it closer to disarmament or stockpile reduction.<sup>191</sup>

#### IV. INFIRMITIES IN THE DEAL: TIMING, INCENTIVES, AND PERPETUITY

While the recent unraveling of the U.S.-India nuclear deal suggests that domestic political pressures inherent in large democracies and coalition politics led to the deal's threatened demise,<sup>192</sup> political forces do not operate in a vacuum.<sup>193</sup> There are good reasons to believe that the deal's threatened collapse is closely tied to the terms of the deal itself and the international process through which it occurred.<sup>194</sup> Although neither India nor the United States is likely to renegotiate the agreement, Congress will have another opportunity to review the agreement before it becomes final.<sup>195</sup> Considering how the deal might have been different—and how it might be supplemented in

189. See Warren Hoge, *Iran Was Blocked From Buying Nuclear Materials At Least 74 Times, Group Says*, N.Y. TIMES, Nov. 16, 2007, at A8 (describing how the NSG had prevented Iran from making "purchases of nuclear-related materials at least 75 times over nine years").

190. Because amendments to the NPT must be approved by all existing parties to the Treaty, there is little hope for change through this route. See M.J. Wilmshurst, *Reforming the Non-Proliferation System in the 1980s*, in THE INTERNATIONAL NUCLEAR NON-PROLIFERATION SYSTEM: CHALLENGES AND CHOICES 149 (John Simpson & Anthony G. McGrew eds., 1984). Other scholars have proposed solutions that would make India, Israel, and Pakistan "accede to an additional protocol to the NPT, obliging them to behave 'as if' they were members of the treaty." LODGAARD, *supra* note 145, at 5.

191. According to a 1994 survey, ninety-two percent of Indians surveyed "expressed total or partial support for an international agreement to ban nuclear weapons," and thirty-nine percent of those surveyed would support the NPT if Pakistan also agreed to sign it. David Cortright & Amitabh Mattoo, *Indian Public Opinion and Nuclear Weapons Policy*, in INDIA AND THE BOMB 3, 16 (David Cortright & Amitabh Mattoo eds., 1996). This study suggests that conditional assent to the NPT (or other nonproliferation agreements) is not, at least politically speaking, out of the question for India over the long run.

192. Challenges to the deal emerged from opposition and coalition parties—particularly India's Communist Party—which threatened early elections in response to the deal in a bid for increased power. Somini Sengupta, *In India's Coalition Math, Marxists' Power Is Magnified*, N.Y. TIMES, Oct. 9, 2007, at A3 (describing Communist Party "saber rattling" and the fact that "India's electoral math makes it impossible for Prime Minister Manmohan Singh's coalition government, which is led by the Congress Party, to govern without the backing of its Communist allies"); see also Priya Sahgal, *Cold Fusion*, INDIA TODAY, Dec. 10, 2007, at 25 (describing opposition to the deal in the Indian legislature, coming from both the right and the left of the political spectrum). In particular, Indian political groups objected to the Hyde Act's provisions regarding Indian cooperation on U.S. foreign policy vis-à-vis Iran and the termination of U.S. cooperation in response to further Indian nuclear tests. For more on Indian objections to the deal, see Weiss, *supra* note 68, at 444-45.

193. See Koh, *supra* note 105, at 2640-41 (explaining that international law is "a two-level game, in which a member's relations with its treaty partners occur on an international chessboard, and its bargaining about compliance with its internal domestic constituencies transpires on a domestic chessboard").

194. See, e.g., *infra* Section III.A (describing the effects of the time lapse between the Hyde Act and the 123 Agreement).

195. The U.S. Congress will have an opportunity to review the agreement before it enters into force, assuming the deal receives NSG and IAEA approval. 22 U.S.C.S. § 8003(b)(2), (b)(7), (e) (LexisNexis 2006). The U.S. Government has now set the clock running, stating that Congress must have the deal back by May 2008 in order to approve it. Somini Sengupta, *State Department Gives India a Deadline for a Nuclear Pact*, N.Y. TIMES, Mar. 6, 2008, at A6.

the future—can guide our efforts as we consider future agreements and as other countries conclude agreements of their own with India following NSG approval.<sup>196</sup> This Part considers three weaknesses in the deal and how they might be remedied.

#### A. Incentives

Since its inception, the United States and India have hailed the deal as the “symbolic centerpiece” of the U.S.-India relationship.<sup>197</sup> Critics have assailed it for the same reasons—alleging that it is *merely* symbolic and full of empty promises.<sup>198</sup> There can be no doubt that while India faces an energy crisis that the deal attempts to alleviate,<sup>199</sup> a significant benefit of the deal for India is that it recognizes India’s status as a global player and as an exception to an international regime that it has long viewed as discriminatory.<sup>200</sup>

Several provisions of the 123 Agreement therefore recognize India’s status as a *de facto* nuclear weapons state. The 123 Agreement states: “this Agreement is between two States possessing advanced nuclear technology, both Parties having the same benefits and advantages.”<sup>201</sup> Rather than simply stating that the IAEA safeguards will be “limited-scope safeguards,” the Agreement calls them “India-specific.”<sup>202</sup> The deal also implicitly recognizes India’s status as a *de facto* nuclear power in providing that the Agreement “shall be implemented in a manner so as not to hinder . . . any other activities involving the use of . . . military nuclear facilities.”<sup>203</sup> As the government of India publicly asserted following the release of the Agreement, “[n]owhere in the bilateral agreement . . . is testing mentioned.” India therefore retains “the sovereign right to test and would do so if it is necessary in national interest.”<sup>204</sup>

196 France, for instance, has already begun to discuss its civil nuclear cooperation agreement with India. Emmanuel Jarry, *Sarkozy Seeks Civil Nuclear Deal with India*, REUTERS, Jan. 25, 2008, <http://www.reuters.com/article/newsone/idUSISL16292120080125>.

197. Burns, *supra* note 4.

198. See, e.g., McGoldrick, Bengelsdorf & Scheinman, *supra* note 68, at 8 (arguing that “a voluntary safeguards agreement would be largely symbolic and is unlikely to yield meaningful nonproliferation benefits”); Einhorn, *supra* note 94, at 2 (stating that the deal gave “the Indians virtually all that they wanted” while “what the U.S. got from the deal was, for the most part, speculative—the hope that a stronger partnership with India will pay strategic dividends down the road”).

199. See generally GOV’T OF INDIA PLANNING COMM’N, INTEGRATED ENERGY POLICY: REPORT OF THE EXPERT COMMITTEE (2006) (discussing India’s energy needs and policy). However, critics allege that expanding India’s civil nuclear program will have, at best, a minimal impact on India’s energy supply. *India PM Says US Nuclear Deal Not Dead*, SYDNEY MORNING HERALD, Oct. 31, 2007 (on file with author).

200 See, e.g., TALBOTT, *supra* note 25, at 26 (“For many Indian politicians, government officials, defense experts, and commentators, the NPT embodied ‘the three D’s’ of U.S. nuclear policy—dominance, discrimination, and double standards.”).

201. 123 Agreement, *supra* note 17, pmbl.

202. *Id.* art. 5.

203. *Id.* art. 2.

204. Press Release, Ministry of External Affairs, *supra* note 102. Note that India borrows the language of “rights” from the NPT. However, the NPT states: “Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination . . . .” NPT, *supra* note 25, art. IV, ¶ 1.

The United States and India's asymmetrical interests in the deal create problems of timing and incentives. As explained in Section II.D, the U.S.-India deal is not premised on aligning incentives with nuclear interests. Once India secured U.S. recognition of its nuclear status, it may have lost some of its incentive to comply with the Agreement, since it had already realized its symbolic benefits; indeed from the moment the deal was announced, India displayed to the world that the United States was willing to recognize Indian nuclear exceptionalism.<sup>205</sup> Perhaps it should not be surprising, then, that despite having spent a great deal of political capital on reaching the agreement, Prime Minister Singh retreated from the deal once it had been promulgated.<sup>206</sup> The government of India reported that, during a conversation to discuss the impending failure of the deal, Prime Minister Singh also spoke to President Bush about India's position on agriculture in the Doha trade talks.<sup>207</sup> The fact that the deal provided the Prime Minister a direct channel to the White House—which he could then use to discuss agricultural trade protections (a high political priority for India)—may have been nearly as politically beneficial to the Prime Minister as the conclusion of the deal itself.<sup>208</sup> Another explanation of the timing problem relates to the domestic and international fora in which the deal unfolded. The finalization of the 123 Agreement following the passage of the Hyde Act created an opportunity for cleavage between the two agreements. Having secured a U.S. commitment to completing the deal—not to mention legislation authorizing it—Indian politicians and commentators could seize on provisions of the Hyde Act that they found unpalatable<sup>209</sup> and leverage these to bargain for more concessions with the executive branch in the 123 Agreement.<sup>210</sup>

To partially remedy this problem of timing, incentives for future compliance should have been incorporated into the deal. For instance, rather than stating that “[s]ensitive nuclear technology, heavy water production technology, [and] sensitive nuclear facilities . . . may be transferred under this Agreement pursuant to an amendment,”<sup>211</sup> the Agreement could have provided that such transfers would *only* be considered upon the completion of, for example, fifteen years of successful trade between the two nations and adoption of the IAEA Additional Protocol.<sup>212</sup>

205. Cf. Carter, *supra* note 121, at 34 (noting that “India obtained nuclear recognition up front” but that “the gains for the United States are contingent and lie far ahead in the uncertain future”).

206. See Andy Mukherjee, *The Cost of India's Nuclear U-Turn*, INT'L HERALD TRIB. (Paris), Oct. 16, 2007, at 15. Indeed, Prime Minister Singh went from proclaiming, “I will let posterity judge the value of what we have done,” to announcing that “[f]rankly, the deal is not important.” *Id.*

207. See, e.g., Ruth David, *Singh Reckons U.S.-India Nuclear Deal on Ice*, FORBES.COM, Oct. 16, 2007, [http://www.forbes.com/markets/2007/10/16/india-nuclear-pact-markets-econ-cx\\_rd\\_1016markets03.html](http://www.forbes.com/markets/2007/10/16/india-nuclear-pact-markets-econ-cx_rd_1016markets03.html).

208. Indeed, “[t]his [deal] is not an issue that is a vote winner in India; it is not a common person's concern.” Ruth David, *India Prime Minister Casts Doubt on Nuclear Agreement*, FORBES.COM, Oct. 12, 2007, [http://www.forbes.com/2007/10/12/india-singh-nuclear-face-cx\\_rd\\_1015autofacscan02.html](http://www.forbes.com/2007/10/12/india-singh-nuclear-face-cx_rd_1015autofacscan02.html) (quoting political analyst Mahesh Rangarajan).

209. See Weiss, *supra* note 68, at 444-45 (describing these provisions).

210. For an example of the problems this cleavage may have created, see *infra* note 227 and accompanying text.

211. 123 Agreement, *supra* note 17, art 5(2).

212. Trade in sensitive technology for uranium enrichment is one area in which Congress and the executive branch are in direct tension. The Hyde Act states that the United States will “work with

To the extent that it is now too late to make such revisions to the deal itself, the United States can take steps to explicitly tie the deal's successful implementation to concrete benefits outside of the nuclear deal, such as agricultural subsidies, visas for Indian workers, and opportunities for Indian students to study in the United States. While these diversified incentives will likely be part of the follow-on efforts the United States contemplates, continuing to reference their connection to the deal as the lynchpin of U.S.-India cooperation might make the deal more attractive to Indian voters (who care more about educational and agricultural programs, in some cases, than nuclear policy),<sup>213</sup> accomplish both countries' goals of making the deal part of a larger strategic relationship, and increase the costs of irresponsible nuclear behavior.

### B. Termination

The Agreement's provisions for termination are another potential weak point. The Agreement specifies considerations that either party shall make before terminating, but these provisions are so nebulous and broad that they may provide an effective means of forestalling termination.<sup>214</sup> While the Agreement incorporates a standard right of return of nuclear material transferred pursuant to the Agreement in the event of termination,<sup>215</sup> Siddharth Varadarajan explains that the right of return has been "so effectively boxed in [by other provisions of the Agreement] as to render it harmless."<sup>216</sup> Even assuming good will on India's part, one can imagine that it might be extremely difficult, if not impossible, to retrieve all of the nuclear materials sold to India.<sup>217</sup> Notably, some other civil nuclear cooperation agreements,

---

members of the NSG, individually and collectively, to further restrict the transfers of such equipment and technologies, including to India." 22 U.S.C. § 8002(a)(5) (LexisNexis 2006). Other agreements for civil nuclear cooperation, such as the U.S.-Japan agreement of 1987, are not as lenient with regard to the provision of sensitive nuclear technology. See Agreement for Cooperation Between the Government of the United States of America and the Government of Japan Concerning Peaceful Uses of Nuclear Energy, U.S.-Japan, art. 2(1)(b), Nov. 4, 1987, 1574 U.N.T.S. 339 [hereinafter U.S.-Japan Agreement].

213. See PERKOVICH, *supra* note 162, at 6 (noting that more than sixty percent of Indians depend on agriculture to make a living). *But see* M R Srinivasan, Op-Ed., *The Urgency of Concluding the Nuclear Deal*, HINDU (Chennai), Feb. 9, 2008, available at <http://www.hindu.com/2008/02/09/stories/2008020953531000.htm> (arguing that "[i]t was a mistake for India to have parked the nuclear agreement in an Indo-U.S strategic relationship").

214. See Siddharth Varadarajan, Op-Ed., *Insulating India's Reactors from Fuel Disruption*, HINDU (Chennai), Aug. 8, 2007, available at <http://www.hindu.com/2007/08/08/stories/2007080855361200.htm>. For example, the Agreement states that "the Parties shall consider the relevant circumstances" and that "[i]f a Party seeking termination cites a violation of this Agreement as the reason . . . the Parties shall consider whether the action was caused inadvertently or otherwise." 123 Agreement, *supra* note 17, art. 14(2)-(3). In contrast, the NPT states that a Party may withdraw from the treaty if it decides that "extraordinary events . . . have jeopardized the supreme interests of its country" and that a withdrawing party "shall give notice of such withdrawal . . . [which] shall include a statement of the extraordinary events." NPT, *supra* note 25, art. X, ¶ 1.

215. 123 Agreement, *supra* note 17, art. 14(4). This is a standard provision. See, e.g., 42 U.S.C. § 2153 (a)(4) (2000).

216. Varadarajan, *supra* note 214.

217. This is particularly true because the state calling for return must pay the "fair market value thereof and for the costs incurred as a consequence of such removal." 123 Agreement, *supra* note 17, art. 14(6). While other 123 agreements require payment of "fair market value," they do not require payment for costs incurred. See, e.g., U.S.-Japan Agreement, *supra* note 212, art. 12(5); Agreement Concerning Peaceful Uses of Nuclear Energy, U.S.-Bangl., art. 11(3), Sept. 17, 1981, 34 U.S.T. 63.

like the U.S.-Japan Agreement, provide for an arbitrator to settle disputes,<sup>218</sup> a provision the U.S.-India deal lacks.<sup>219</sup>

While the NPT also permits countries to withdraw unilaterally,<sup>220</sup> NPT members are not likely to do so. By acceding to the Treaty, they have foregone their ability to develop nuclear weapons. These countries are therefore more dependent upon the international supply of civilian nuclear materials to maintain their nuclear energy programs. India's termination of the 123 Agreement, on the other hand, would simply return it to the status quo, since the deal does not require that India forgo any of its military nuclear capabilities. Furthermore, the symbolic benefits of the deal for India would not be negated by its withdrawal. Therefore, India has more incentives to terminate or fail to comply with the deal than NPT member states.

Although the Hyde Act stipulates that several events may terminate the Agreement, these are limited to serious breaches. For instance, the Act states that exports will be terminated:

If there is any materially significant transfer by an Indian person of . . . (i) nuclear or nuclear-related material, equipment, or technology that is not consistent with NSG guidelines or decisions, or (ii) ballistic missiles . . . that [are] not consistent with MTCR [Missile Technology Control Regime] guidelines, unless the President determines that cessation of such exports would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security.<sup>221</sup>

The Act further provides that the President may waive automatic termination if such transfer was made without the government of India's knowledge or control over the transferring person, and if the President assures Congress that India is taking appropriate actions in response.<sup>222</sup> The only circumstance in which the President cannot waive automatic termination is when the "President determines that India has detonated a nuclear explosive device."<sup>223</sup> While the Hyde Act's termination triggers are a necessary aspect of the Agreement (since the 123 Agreement itself does not incorporate these provisions), other triggers could also be built into the Agreement wherein less significant breaches, would trigger temporary cessation or imposition of more extensive safeguards. Although such conditional measures would undoubtedly make the deal less attractive to Indian constituents, the NSG might include some of these conditions as part of its approval of the Indian exemption.

---

Further, the Agreement cautions that exercising the right of return "would have profound implications for . . . relations," 123 Agreement, *supra* note 17, art. 14(5), a provision that is unique to the U.S.-India Agreement. Wade Boese, *U.S. Indian Nuclear Deal Advances*, ARMS CONTROL TODAY, Sept. 2007, at 22, 23.

218. U.S.-Japan Agreement, *supra* note 212, art. 14 (making detailed provisions for appointing an arbitral tribunal and remedial provisions that allow either party to request the President of the International Court of Justice to appoint an arbitrator if the other party fails to do so). This is not to imply, however, that this is a common feature of 123 Agreements.

219. 123 Agreement, *supra* note 17, art. 15 (providing that disputes "shall be promptly negotiated by the Parties").

220. NPT, *supra* note 25, art. X.

221. 22 U.S.C.S. § 8003(d)(3)(A)(ii) (LexisNexis 2006).

222. § 8003(d)(3)(B).

223. § 8005.

### C. *Perpetuity*

The deal's promise of perpetuity<sup>224</sup> highlights a third potentially problematic aspect of the deal, namely, how provisions of the Agreement will fare should either country terminate the deal. The 123 Agreement provides that several articles (pertaining to the imposition of India-specific IAEA safeguards, nuclear fuel cycle activities, storage and retransfers, physical protection of nuclear materials, and peaceful use) will remain in effect notwithstanding termination.<sup>225</sup> India would ostensibly continue to submit to IAEA safeguards even if the United States terminated the Agreement in order to continue trading with third-party countries. Yet one article in particular poses difficult questions for the United States. Article 5 of the 123 Agreement states that the India-specific safeguards will "provid[e] for corrective measures that India may take to ensure uninterrupted operation of its civilian nuclear reactors in the event of disruption of foreign fuel supplies" without defining what these "corrective measures" include.<sup>226</sup> Moreover, the Agreement represents that, even should it terminate, the United States will "convene a group of friendly supplier countries . . . to pursue such measures as would restore fuel supply to India" in the event of a supply disruption.<sup>227</sup> This provision, possible aimed at assuring India that U.S. legislative action will not interfere with the fuel supply assurances in the 123 Agreement forged by the administration, may lead to conflict down the road between the U.S. Congress and the executive branch.

Presumably, the India-specific IAEA protocols and the NSG's approval will contain mechanisms for future enforcement that would apply even if the U.S.-India Agreement were to terminate. Although India has stated that it does not want (and may not accept) anything other than a "clean exemption" from the NSG,<sup>228</sup> some additional conditions imposed by the NSG might be palatable to India. These conditions might strengthen the deal by requiring, for instance, that India take certain disarmament measures. Such assurances would also make the U.S.-India deal more reflective of the spirit of the international nonproliferation regime.

Another way of securing the deal's promises in perpetuity, and linking the deal to the broader NPT framework, is to use the deal as a catalyst for action aimed at reducing global fissile material production. As part of the Agreement, the United States and India pledged to work towards the "conclusion of a multilateral Fissile Material Cut Off Treaty."<sup>229</sup> In light of the slow progress on this Treaty to date, the United States should seek assurances that India will begin to reduce—with an eye towards ultimately

---

224. Rice, *supra* note 20 ("Once a reactor is under IAEA oversight, safeguards will be in place permanently. . . ."); see 123 Agreement, *supra* note 17, art. 16(3).

225. 123 Agreement, *supra* note 17, art. 16(3).

226. *Id.* art. 5(6)(c).

227. *Id.* art. 5(6)(b)(iv).

228. *We Want Clean NSG Exemption: Kakodkar*, HINDU (Chennai), Feb. 21, 2008, available at <http://www.thehindu.com/2008/02/21/stories/2008022159851300.htm>.

229. Joint Statement, *supra* note 35. Such a treaty, proposed by President Clinton in 1993 but not yet concluded, would end the production of fissile material for nuclear weapons.

terminating—its production of fissile material, as the United States, United Kingdom, Russia, France, and China have informally done.<sup>230</sup>

## V. CONCLUSION

Examining the U.S.-India deal's impact on the NPT regime reveals the precise ways in which the deal may—or may not—pose risks to that system. Critics bristle at the deal as an example of the United States picking favorites and separating the “good guys” from the bad—condemning North Korea while cajoling India and creating exceptions, in effect, for its anointed.<sup>231</sup> This is not, they argue, the comprehensive solution to nonproliferation that we need. Yet one can see in this agreement an approach to nonproliferation that is comprehensive in another regard. Many of today's transnational problems, particularly nuclear terrorism, require cooperation that spans topical areas—from nuclear security, to military policy, to internal policing and legal reforms. Yet the international institutions and treaty regimes that grew up following World War II were designed to operate topically.<sup>232</sup> Broader bilateral arrangements that trade strategic benefits (in this instance) for nuclear ones may be an important part of addressing a new and complex environment in which transnational problems are increasingly cross-disciplinary and, therefore, not easily addressed by existing international regimes.

The U.S.-India civil nuclear deal has arisen to confront a reality and address a particular need: India will not accede to the NPT though it is a nuclear weapons state; India needs nuclear power and will develop it with or without the United States. Contrary to some critics' arguments, devising a more flexible mechanism for addressing these twin realities may strengthen international nonproliferation efforts and, ultimately, the regime itself. While the deal is imperfect as drafted, this Note suggests that there may be remedies for several of its problematic aspects. At its core, the deal is—and can be made more—consistent with our commitment to nonproliferation.

---

230. While Prime Minister Singh has indicated that India will not accept a moratorium on fissile material production, Weiss, *supra* note 68, at 445, assurances that India will begin to reduce its production would be a major step forward. The United States can also use its congressional reporting requirements, *see supra* text accompanying note 128, to give India incentives not to use the agreement to step up its fissile material production for weapons. *See* LEVI & FERGUSON, *supra* note 129, at 20-22.

231. *See* Krepon, *supra* note 162.

232. “Political conflict, for example, was to be regulated by the United Nations. . . . Destructive economic conflicts . . . were to be mitigated through the Bretton Woods system . . . .” Koh, *supra* note 105, at 2614.