

Appendix 13B. Legal aspects of the Indian–US Civil Nuclear Cooperation Initiative

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I. Introduction

On 18 July 2005 US President George W. Bush and Indian Prime Minister Manmohan Singh launched the Civil Nuclear Cooperation Initiative (CNCI).¹ For the United States, the CNCI was designed to allow US exports of civilian nuclear technology to India, while India, in essence, pledged to prevent the proliferation of nuclear weapons to non-nuclear weapon states. The CNCI was preceded by an agreement on 28 June 2005 between the two countries' defence ministers, which stipulated *inter alia* that India and the USA would 'expand [their] collaboration relating to missile defense'.² The two agreements are steps in the development of a strategic partnership between India and the USA that was formally initiated in 2004 in a process called the Next Steps in Strategic Partnership (NSSP).³ The NSSP is founded on a growing realization in the USA of the geopolitical advantages that would follow from closer ties with India. For India, the main advantage—apart from recognition of what it sees as its status as a 'responsible nuclear weapon power'—is the prospect of technical assistance for its endeavour to increase its production of nuclear energy for the rapidly growing Indian economy.⁴

The declared willingness of the USA to engage with India in the field of civil nuclear technology and missile defence has raised concerns about the impact of this move on the integrity of the nuclear non-proliferation regime. Commentators have also expressed concerns, describing the CNCI as a non-proliferation 'reality check' or a 'sea change' of policy.⁵ If India and the USA carry out their declared policy, and if

¹ The White House, 'Joint statement between President George W. Bush and Prime Minister Manmohan Singh', News release, Washington, DC, 18 July 2005, URL <<http://www.whitehouse.gov/news/releases/2005/07/20050718-6.html>>.

² Embassy of India, 'New framework for the US–India defense relationship', Press release, Washington, DC, 28 June 2005, para. 4H, URL <http://www.indianembassy.org/press_release/2005/June/31.htm>. On transfers of ballistic missile technologies and the commitments made under the Missile Technology Control Regime see Ahlström, C., 'Arrows for India?—technology transfers for ballistic missile defence and the Missile Technology Control Regime', *Journal of Conflict and Security Law*, vol. 9, no. 1 (spring 2004), pp. 103–25.

³ See generally Kronstadt, K. A., *US–India Bilateral Agreements in 2005* (US Library of Congress, Congressional Research Service: Washington, DC, 8 Sep. 2005), URL <<http://fpc.state.gov/documents/organization/53616.pdf>>.

⁴ On the recent development of the bilateral relationship see Tellis, A. J., *India as a New Global Power: An Action Agenda for the United States* (Carnegie Endowment for International Peace: Washington, DC, 2005), URL <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=17079&prog=zgp&proj=zsa>>.

⁵ See, e.g., Kimball, D. G., 'US–India nuclear cooperation: a reality check', *Arms Control Today*, vol. 35, no. 7 (Sep. 2005), p. 3; and Gormley, D. M. and Scheinman, L., 'Implications of proposed

this prompts other states to enter into such deals, this would signify a major change in the way in which members of the non-proliferation regime engage with non-members. International non-proliferation policy has thus far been directed at denying or restricting transfers of nuclear goods and technologies to those few states that remain outside the nuclear non-proliferation agreements, primarily the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT).⁶ Furthermore, it has been a salient feature of policy on India to avoid taking any measure that could be interpreted as acknowledging that India has de jure status as a nuclear weapon state.

This appendix analyses some of the legal aspects of implementation of the CNCI, if it is approved by the US Congress and in India. Section II describes the main elements of the 18 July Indian–US joint statement as it pertains to cooperation in the nuclear field, followed by a discussion in section III of the implications of their proposed cooperation regarding the obligations assumed by the USA under the NPT. Most commentators have analysed the CNCI from the perspective of policy according to the Guidelines for Nuclear Transfers of the Nuclear Suppliers Group (NSG) rather than the NPT. Section IV discusses how the CNCI would affect the USA's commitments as a participant in the NSG. Implementation of the CNCI would, however, have an impact not only on international obligations and commitments but also on national legislation and policies. Section V discusses the CNCI in the light of Indian and US national legislation on exports of nuclear technology, and section VI presents the conclusions.

II. The 2005 Civil Nuclear Cooperation Initiative

In the 1950s the USA cooperated actively with India in the field of nuclear technology under the Atoms for Peace programme. The USA exported heavy water for the Canadian-supplied Canadian–Indian–US (CIRUS) research reactor and assisted in the construction of the Indian Tarapur Atomic Power Station (TAPS).⁷ The detonation by India of a 'peaceful nuclear explosive device' in 1974 resulted in a shift in US policy towards discouraging other states from engaging with India in the nuclear field. In 1998, when India—and Pakistan—conducted a number of nuclear tests, the USA implemented sanctions against India. In 1998 the UN Security Council adopted Resolution 1172, stipulating *inter alia* that all UN member states should be encouraged to 'prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles capable of delivering such weapons'.⁸

India–US civil nuclear cooperation', Nuclear Threat Initiative (NTI) Issue Brief, July 2005, URL <http://www.nti.org/e_research/e3_67b.html>. See also Potter, W. C., 'India and the new look of US nonproliferation policy', CNS Research Story, Monterey Institute of International Studies, Center for Nonproliferation Studies (CNS), 25 Aug. 2005, URL <<http://cns.miiis.edu/pubs/week/050825.htm>>.

⁶ The Treaty on the Non-Proliferation of Nuclear Weapons was opened for signature on 1 July 1968 and entered into force on 5 Mar. 1970; the text is available in *United Nations Treaty Series*, vol. 729 (1970), p. 161 and at URL <<http://www.un.org/Depts/dda/WMD/treaty/>>.

⁷ For a detailed treatment of US assistance for the development of the Indian nuclear infrastructure see Perkovich, G., *India's Nuclear Bomb: The Impact on Global Proliferation* (University of California Press: Berkeley, Calif., 1999); and Abraham, I., *The Making of the Indian Atomic Bomb: Science, Secrecy and the Postcolonial State* (Zed Books Ltd: London, 1998).

⁸ UN Security Council Resolution 1172, 6 June 1998, URL <<http://www.un.org/documents/scres.htm>>, para. 8.

There has recently been a rapprochement between India and the USA. Even before the September 2001 attacks on the United States, there was a new shift in US policy as the USA began to view India as an important ally in South Asia. In 2001 the USA lifted the sanctions it had imposed on India after the 1998 nuclear tests as a consequence of India's support in the fight against terrorism. A more important reason for the current rapprochement may be the growing realization in the USA that India is 'a rising global power' that could act as a counterbalance to an increasingly powerful China.⁹ It would seem as if India's significance as a de facto nuclear weapon state is secondary to this strategic consideration.

In 2001 India and the USA also stepped up their bilateral negotiations in several policy areas. This culminated in the announcement in January 2004 of the NSSP initiative,¹⁰ under which the two countries committed themselves to closer cooperation in four areas: civilian nuclear energy, civilian space programmes, high-technology trade and missile defence. The Next Steps in Strategic Partnership programme was 'completed' in July 2005, when President Bush and Prime Minister Singh issued a joint statement that the NSSP had provided the basis for expanding their bilateral activities and commerce in space, civil nuclear energy and dual-use technology.¹¹ Their cooperation on civil nuclear energy is now to be developed in line with their commitments in the CNCI.

The CNCI joint statement lists the commitments made by both sides. In the document President Bush declared his view that 'as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other such states'. He committed the US Administration to 'work to achieve full civil nuclear energy cooperation with India': it will accordingly 'seek agreement from Congress to adjust US laws and policies, and the United States will work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India, including but not limited to expeditious consideration of fuel supplies for safeguarded nuclear reactors at Tarapur'. The Bush Administration also promised to consult with US partners on India's participation in the International Thermonuclear Experimental Reactor (ITER) consortium and support India's part in the work to develop advanced nuclear reactors.¹²

India, for its part, pledged to 'reciprocally' agree to assume the same 'responsibilities and practices', and thereby acquire the same 'benefits and advantages', as other countries with advanced nuclear technology. These 'responsibilities and practices' are defined in the joint statement as:

identifying and separating civilian and military nuclear facilities and programs in a phased manner and filing a declaration regarding its civilian nuclear facilities with the International Atomic Energy Agency (IAEA); taking a decision to place voluntarily its civilian nuclear facilities under IAEA safeguards; signing and adhering to an Additional Protocol with respect

⁹ Burns, R. N. (US Under Secretary for Political Affairs) and Joseph, R. G. (US Under Secretary for Arms Control and International Security), 'The US and India: an emerging entente?', Remarks as prepared for the House International Relations Committee, Washington, DC, 8 Sep. 2005, URL <<http://www.state.gov/p/us/rm/2005/52753.htm>>.

¹⁰ US Department of State, 'Next Steps in Strategic Partnership with India', Statement by the President, Washington, DC, 12 Jan. 2004, URL <<http://www.state.gov/p/sa/rls/pr/28109.htm>>.

¹¹ US Department of State, 'United States and India successfully complete Next Steps in Strategic Partnership', Washington, DC, 18 July 2005, URL <<http://www.state.gov/p/sa/rls/fs/2005/49721.htm>>.

¹² US Department of State, 'US-India civilian nuclear cooperation', Fact sheet, Office of the Spokesman, Washington, DC, 22 July 2005, URL <<http://www.state.gov/r/pa/prs/ps/2005/49969.htm>>. On the ITER see URL <<http://www.iter.org>> and appendix 13C.

to civilian nuclear facilities; continuing India's unilateral moratorium on nuclear testing; working with the United States for the conclusion of a multilateral Fissile Material Cut Off Treaty; refraining from transfer of enrichment and reprocessing technologies to states that do not have them and supporting international efforts to limit their spread; and ensuring that the necessary steps have been taken to secure nuclear materials and technology through comprehensive export control legislation and through harmonization and adherence to Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG) guidelines.¹³

In the joint statement President Bush 'welcomed' Prime Minister Singh's 'assurance'. They decided to establish a working group 'to undertake on a phased basis in the months ahead the necessary actions mentioned above to fulfill these commitments', and they agreed to review progress towards fulfilment of their commitments during the US President's visit to India in early 2006.

The CNCI thus provides for 'full civil nuclear energy cooperation' between India and the USA in return for a number of commitments related to certain aspects of the nuclear non-proliferation regime. The main thrust of the commitments made by India relates to the identification and separation of civilian and military nuclear facilities and programmes—which would seem to be a sine qua non for civilian nuclear energy cooperation in the first place. India maintains a significant nuclear infrastructure that comprises 15 operating nuclear power reactors, with an additional 8 reactors under construction and another 24 proposed.¹⁴ Furthermore, the country has a large number of facilities that operate on the front-end as well as the back-end of the nuclear fuel cycle.¹⁵ India's nuclear infrastructure has not been developed with a clear separation between military and civilian programmes. Commentators have noted the problems involved in separating the two.

[A]ttempts to separate military and civil nuclear programs in the five internationally acknowledged nuclear weapon states, as defined by the NPT, have been fraught with difficulty. In practice, the effective separation of military and civil nuclear programs has required additional steps that are largely absent from the US/India agreement. . . . India's extensive military and civil nuclear programs are often connected, sharing personnel and infrastructure. In addition, some facilities currently have both a military and civilian purpose.¹⁶

Concerns have been expressed that the Indian authorities may try to limit the number of facilities and programmes that they will declare as civilian because India's military nuclear programme would rely at least partly on the former for fissile material: 'The prospect that the nuclear bureaucracy in India will seek to minimize the undertakings with respect to international safeguards, and to avoid having to fully separate civil and military activities (*inter alia* for cost considerations of having to build dedicated facilities for the latter alone) suggests that reaching closure on a mutually acceptable arrangement will not be easy'.¹⁷ India's plan to separate civilian and military nuclear facilities has been the subject of bilateral discussions with the

¹³ The White House (note 1), p. 2.

¹⁴ See appendix 13C, table 13C.1.

¹⁵ See, e.g., Cirincione, J. with Wolfsthal, J. B. and Rajkumar, M., *Deadly Arsenals: Tracking Weapons of Mass Destruction* (Carnegie Endowment for International Peace: Washington, DC, 2002), pp. 191–205. On the nuclear fuel cycle see appendix 13C.

¹⁶ Albright, D., 'Testimony before the House Committee on International Relations Hearing on the US–India "Global Partnership" and its impact on non-proliferation', Institute for Science and International Security, Washington, DC, 26 Oct. 2005, URL <<http://www.isis-online.org/publications/southasia/albrighttestimonyoctober262005usindiadeal.pdf>>.

¹⁷ Gormley and Scheinman (note 5).

USA: the intention was to finalize the plan before President Bush's March 2006 visit to India. These discussions have been carried out with the understanding that a credible separation between civilian and military nuclear installations will play a vital role in helping to secure the endorsement of both the participants in the NSG and members of the US Congress of this shift in US policy. Information revealed in early 2006 indicated that there are differences between the USA and India as to the scope of the separation—regarding the number of reactors placed under safeguards and the duration of the safeguards.¹⁸

After identifying its civilian nuclear facilities India should take a decision to voluntarily place these facilities under IAEA safeguards. India has already concluded five safeguards agreements of the INFCIRC/66 type—safeguards that are item-specific rather than comprehensive.¹⁹ These safeguards agreements typically specify the material, facilities and equipment to be safeguarded, and under them the IAEA is required to ensure that the specified items are not used in a way that would further any military purpose. Under the CNCI India has committed itself to 'sign and adhere to' an Additional Safeguards Protocol with respect to its civilian facilities.²⁰ Briefly, the safeguards system under the 1997 Additional Protocol includes measures to strengthen the IAEA's access to information, *inter alia* by extending the access of IAEA inspectors under the safeguards mandate to include the detection of clandestine sites. The Protocol is additional to the NPT-type comprehensive ('full-scope') safeguards laid down in INFCIRC/153²¹ (see section III below), and for many of its provisions it is presupposed that there is also such a safeguards agreement in place. As a non-party to the NPT, India does not have any safeguards agreements that meet that standard. Furthermore, the safeguards laid down in INFCIRC/153 and INFCIRC/540 could not serve their intended purpose—that is, to verify that a party to the NPT is not acting in contravention of its obligation under the treaty not to develop or acquire nuclear weapons—in this case since India would be permitted under the CNCI to retain a nuclear weapon programme. The task would rather be to retain the rationale of INFCIRC/66-type safeguards—to ensure that certain specified nuclear components and technologies are not used for military purposes.

It should be noted in this context that the IAEA Board of Governors has asked the Director General to negotiate Additional Protocols with those non-parties to the NPT that are prepared to accept measures stipulated in the Model Additional Protocol in

¹⁸ 'U.S. says obstacles remain to U.S.–Indian agreement', Nuclear Threat Initiative, Global Security Newswire, 23 Jan. 2006, URL <http://www.nti.org/d_newswire/issues/2006_1_23.html>.

¹⁹ IAEA, The Agency's Safeguards System (1965, as Provisionally Extended in 1966 and 1968), INFCIRC/66/Rev.2, 16 Sep. 1968; this and other IAEA Information Circulars discussed in this appendix are available at URL <<http://www.iaea.org/Publications/Documents/Infciircs/index.html>>.

²⁰ In 1997 the IAEA put forward a Model Additional Protocol, in INFCIRC/540, intended to strengthen existing NPT safeguards agreements. IAEA, Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corrected), Sep. 1997.

²¹ IAEA, The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/153 (Corrected), June 1972. The term full-scope safeguards refers to safeguards that cover 'all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere'. The objective of such safeguards is the timely detection of the diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or of other nuclear explosive devices or for purposes unknown, and the deterrence of such diversion by the risk of early detection.

pursuance of safeguards effectiveness and efficiency objectives.²² However, in conformity with the IAEA Statute, each individual Additional Protocol or other legally binding agreement requires the approval of the Board. Bearing in mind India's interest in acquiring the same benefits and advantages as the USA and other countries with advanced nuclear technology, India would probably not be prepared to accept full-scope safeguards of the type applicable to non-nuclear weapon states under the NPT. Rather, India may aim for the 'voluntary-offer' type of safeguards arrangement, similar to those in place for the states recognized as nuclear weapon states under the NPT. In voluntary-offer safeguards, the nuclear weapon state voluntarily offers to submit some or all of its civilian nuclear material and facilities to those safeguards measures that it has identified. These voluntary-offer safeguards agreements generally follow the INFCIRC/153 type of agreement, but they vary in scope. The negotiation of an Additional Protocol between the IAEA and India could become a problem for India since it is difficult to see how the Agency could negotiate such an agreement without considering India's status as a non-nuclear weapon state under the NPT (see section III below). Furthermore, since the conclusion of a voluntary-offer type of agreement with India could be viewed as *de jure* recognition of its current status as a *de facto* nuclear weapon state, it cannot be taken for granted that such an agreement would obtain the necessary support in the IAEA Board of Governors. Furthermore, the USA has declared that a voluntary-offer safeguards arrangement would not be acceptable under the terms of the CNCI.²³ Finding a generally acceptable safeguards arrangement with India will be a key issue for the realization of the CNCI but, given the diversity of interests of the actors involved, it is difficult to see how an acceptable arrangement can be devised.

Under the CNCI India pledges to continue its unilateral moratorium on nuclear testing. However, in the light of the Bush Administration's strong reluctance to ratify the 1996 Comprehensive Nuclear Test-Ban Treaty (CTBT), it is no surprise that the CNCI does not commit India to ratify the CTBT.²⁴ This would seem to mean that India could in the future revoke its unilateral test moratorium. In addition, under the CNCI India is committed to merely work with the USA to conclude a multilateral fissile material cut-off treaty—not to stop its production of fissile material for military purposes. Some observers have noted that the CNCI would not require India to unilaterally respect a moratorium on the production of fissile material in a manner similar to that of the five NPT-defined nuclear weapon states, none of which is believed currently to be involved in the production of fissile material for military purposes.²⁵ Hence, under the CNCI India is in a position to increase its stocks of fissile material and, consequently, to enlarge its arsenal of nuclear weapons, which some experts believe it is aiming to do.²⁶

²² See the foreword to INFCIRC/540 (Corrected) (note 20).

²³ Prepared remarks by Robert G. Joseph (US Under Secretary of State for Arms Control and International Security), Senate Foreign Relations Committee, Hearing on US–India Civil Nuclear Cooperation Initiative, 2 Nov. 2005, URL <<http://www.state.gov/t/us/rm/55968.htm>>, p. 9.

²⁴ Under Article XIV of the CTBT, the treaty will enter into force 180 days after the date of the deposit of the instruments of ratification by all the 44 states listed in its annex 2. India is among those 44 states, and its ratification is consequently necessary for the treaty to enter into force. The 44 states are also listed in annex A in this volume.

²⁵ Fiorill, J., 'Experts call for conditions on US–India agreement', Global Security Newswire, Nuclear Threat Initiative, 13 Oct. 2005, URL <http://www.nti.org/d_newswire/issues/2005_10_13.html>.

²⁶ See, e.g., Kile, S. N. and Kristensen, H. M., 'World nuclear forces, 2005', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), p. 594.

India has also committed itself to support a proposal made by the USA in February 2004 to the NSG—an export control regime in which India is not a participant. This proposal called on the NSG states to limit the transfer of enrichment and reprocessing technology, but it has faced problems in obtaining the necessary support there.²⁷ In any case, India's record on the non-proliferation of goods and technologies that may be used for the production of nuclear weapons is considered by many to be good, even though two Indian scientists have faced sanctions (they are barred from visiting the USA or dealing with US companies) as a result of US allegations that they provided nuclear information to Iran.²⁸

Finally, it is interesting to note that under the CNCI India is not committed to subscribe to the 2002 Hague Code of Conduct against Ballistic Missile Proliferation (HCOC), the only multilateral instrument to ensure responsible policies in the field of ballistic missile non-proliferation.²⁹ Furthermore, the CNCI is silent on India's position vis-à-vis the most recent US initiative on non-proliferation of weapons of mass destruction, the 2003 Proliferation Security Initiative (PSI).³⁰

III. The Non-Proliferation Treaty

The NPT entered into force on 5 March 1970. As of 1 March 2006 there were 189 parties—making it almost universal.³¹ The USA was a driving force behind the negotiation of the NPT, and the US Government is one of its three depositaries. While the USA joined the treaty at an early stage, India remains a non-party. Hence, none of the rights or obligations of the NPT apply to India, but some of the USA's obligations under the treaty are relevant to the CNCI.

India's main argument for not joining the NPT is that it is 'discriminatory' because it distinguishes between two types of party: 'nuclear-weapon states' (NWS) and 'non-nuclear-weapon states' (NNWS). The original 'grand bargain' of the treaty can be summarized as follows: the NNWS relinquished their option to develop nuclear weapons in return for the promise of access to civilian nuclear technology as well as a general obligation on the part of the NWS to halt the cold war nuclear arms race and a more general pledge to work for disarmament. According to NPT Article IX, paragraph 3, 'a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967'. This temporal delimitation signifies that only five states may have formal NWS status

²⁷ Boese, W., 'No consensus on nuclear supply rules', *Arms Control Today*, vol. 35, no. 7 (Sep. 2005), p. 41, URL <http://www.armscontrol.org/act/2005_09/NoConsensusNukeSupply.asp>.

²⁸ Lugar, R. G. (Senator), 'Opening statement for hearing on the India nuclear agreement', US Senate Foreign Relations Committee, 2 Nov. 2005, URL <<http://lugar.senate.gov/pressapp/record.cfm?id=248133>>. See also 'Delhi issues plea on US sanctions', BBC News Online, 1 Oct. 2004, URL <<http://news.bbc.co.uk/2/3708250.stm>>.

²⁹ On India's position during the negotiation of the HCOC see, e.g., Ahlström, C., 'Non-proliferation of ballistic missiles: the 2002 Code of Conduct', *SIPRI Yearbook 2003: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2003), p. 749. For the list of participants of the HCOC see the glossary in this volume. See also Mallik, A., *Technology and Security in the 21st Century: A Demand-side Perspective* SIPRI Research Report no. 20 (Oxford University Press: Oxford, 2004).

³⁰ See, e.g., Ahlström, C., 'The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles', *SIPRI Yearbook 2005* (note 26), p. 741. For the list of states participating in the PSI see the glossary in this volume.

³¹ For lists of the parties to the NPT and the states with safeguards agreements and Additional Safeguards Protocols see annex A in this volume.

under the NPT—China, France, Russia (as main successor to the USSR), the United Kingdom and the United States. Because India did not detonate a nuclear explosive device before 1 January 1967 it would automatically be considered a NNWS upon joining the NPT unless this paragraph of Article IX is amended.

Under Article I of the NPT a NWS assumes a specific obligation not to assist, encourage or induce ‘any non-nuclear weapon State’ to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. The key question here is the meaning of the words ‘assist’ and ‘any’—would ‘any’ encompass only NNWS *parties* to the NPT, or would it have a broader material field of application so as to encompass *any* NNWS (i.e., any state not meeting the requirements of Article IX, irrespective of that country’s participation in the NPT)? If so, could the CNCI be seen as allowing ‘assistance’ to a NNWS within the context of Article I?

The negotiation history of the NPT demonstrates that the scope of the term ‘any NNWS’ was not intended to apply *inter partes* only, but also to cover non-parties to the treaty. One of the major preoccupations of the drafters of the NPT was to establish a legal regime that did not contain any loopholes in its main provisions.³² Earlier drafts of the treaty not only defined what was to be seen as a ‘nuclear-weapon state’, but also provided a definition of ‘non-nuclear-weapon state’. In the US proposal of 21 March 1966, a NNWS was defined as ‘any State which is not a “nuclear-weapon State”’.³³ The definition did not include any requirement of participation in the treaty itself. Furthermore, this interpretation is also consistent with the way in which the terms are used in Article III (see below). It should also be noted that legal doctrine is uniform in holding that the term does not only cover parties to the treaty: ‘The obligation of nuclear-weapon States not to assist non-nuclear-weapon States applies to all the latter states whether they are Parties to the NPT, or not. . . . [A]ny other result would constitute an inducement to non-nuclear-weapon States not to become parties’.³⁴ Hence there is a legal argument to be made in support of a wide material field of application of Article I and that the provision is not limited *inter partes*.

The next question is whether the nuclear cooperation promised under the CNCI could be seen as having the effect ‘in any way to assist’ a NNWS and would hence fall under the prohibition in NPT Article I. The drafting record of the NPT indicates that this provision was intended to have a wide scope.³⁵ Mason Willrich notes that ‘any nuclear assistance received by a non-nuclear-weapon state could be subjectively

³² Shaker, M. I., *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959–1979*, vol. 1 (Oceana Publications, Inc.: New York, N.Y., 1980), pp. 191 ff. Furthermore, it should be noted that UN General Assembly Resolution 2028 (XX), 19 Nov. 1965—laying down the main elements of a draft NPT—established that ‘the treaty should be void of any loop-holes which might permit nuclear or non-nuclear Powers to proliferate, directly or indirectly, nuclear weapons in any form’.

³³ American Amendments to the Draft Treaty of 17 August 1965 submitted on 21 March 1966, Article IV, para. b, reprinted in United States Arms Control and Disarmament Agency, *International Negotiations on the Treaty on the Nonproliferation of Nuclear Weapons* (US Government Printing Office: Washington, DC, 1969), p. 140.

³⁴ Shaker (note 32), p. 257. Mason Willrich, a counsel of the US Arms Control and Disarmament Agency who was involved in the negotiation of the NPT, notes that ‘[t]he undertaking by nuclear-weapon states not to assist non-nuclear-weapon states under Article I is universal and applies with equal force to all such states, whether or not they are parties to the Treaty. Indeed, any other result would constitute an inducement to non-nuclear-weapon states not to become parties’. Willrich, M., *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (Michie Co.: Charlottesville, Va., 1969), p. 95.

³⁵ Shaker (note 32), p. 259.

appraised as falling within the range of prohibited activity'.³⁶ The feature intended to allow such appraisal under the NPT was the application of safeguards under Article III, which would provide a means to 'establish and clarify the peaceful purpose of most international assistance'.³⁷ Little detailed information is available on the type of cooperation with India envisaged by the USA under the CNCI, other than the 'expeditious consideration of fuel supplies for safeguarded nuclear reactors at Tarapur'.³⁸ Could this be seen as the provision of assistance under NPT Article I? Some commentators argue that this is the case since the export of nuclear fuel for the Tarapur Atomic Power Station could free up domestic enrichment capacity in India that could be used for the production of fissile material for military purposes.³⁹ This would be an argument that is familiar to the USA, as it was made a few years ago against the Russian attempts to provide the same power plant with nuclear fuel. It may therefore be concluded that implementation of the CNCI—depending on the nature of the cooperation—may come into conflict with US obligations under NPT Article I. It would also involve Article III: paragraph 2 stipulates that 'Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article'. This provision is not particularly specific—what is meant by the terms 'source or special fissionable material' and 'equipment or material especially designed or prepared for the processing, use or production of special fissionable material'? Furthermore, the phrase 'safeguards required by this article' could be read as demanding the type of safeguards that Article III deals with—safeguards to be applied in NNWS under the NPT. The Zangger Committee—another export control regime, formed in 1971—has taken on the task of interpreting the requirements of Article III in relation to exports to non-parties of the NPT. According to the Zangger Committee Guidelines, the exporting state should require that safeguards should be applied 'to the source or special fissionable material in question'.⁴⁰ In other words, the safeguards required under this provision have been interpreted to mean safeguards of the INFCIRC/66 type—safeguards covering the *specific* source or special fissionable material exported.

There has, however, been a significant development in this interpretation over the years. During the 1970s and the 1980s it was common for nuclear supplier states party to the NPT, in their domestic legislation on nuclear exports, to demand that the recipient country should have a full-scope safeguards agreement in place as a condition for supply. Such safeguards conform with the safeguards requirements incumbent on NNWS parties to the NPT (cf. Article III, paragraph 1, and INFCIRC/153).⁴¹ The objective of these safeguards is the timely detection of the diversion of signifi-

³⁶ Willrich (note 34), p. 94.

³⁷ Willrich (note 34), p. 94.

³⁸ The White House (note 1), p. 2.

³⁹ Ruppe, D., 'US deal would aid Indian nuclear weapons, expert says', Global Security Newswire, Nuclear Threat Initiative, 13 Oct. 2005, URL <http://www.nti.org/d_newswire/issues/2005/10/13/5b4a539b-1a2a-44f4-b53e-a193fde69f6f.html>.

⁴⁰ IAEA, Communications of 15 November 1999 received from member States regarding the export of nuclear material and of certain equipment and other material, INFCIRC/209/Rev.2, 9 Mar. 2000.

⁴¹ For a legal analysis of the system of safeguards agreements under the NPT see, e.g., Edwards, D. M., 'International legal aspects of safeguards and the non-proliferation of nuclear weapons', *International and Comparative Law Quarterly*, vol. 33 (1984), pp. 1–21.

cant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or of other nuclear explosive devices or for purposes unknown, and deterrence of such diversion by the risk of early detection.

In 1992 the NSG states adopted a requirement for full-scope safeguards as a condition for supply (see below). More importantly, at the 1995 NPT Review and Extension Conference the parties to the NPT adopted a consensus document on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament. Paragraph 12, under the heading 'Safeguards', states: 'New supply arrangements for the transfer of source and or special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material to non-nuclear-weapon States should require, as a necessary precondition, acceptance of IAEA full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices'.⁴² The formulation is clear in that, for new supply arrangements, it demands the acceptance of full-scope safeguards as well as internationally legally binding commitments not to acquire nuclear weapons. The 1995 Principles and Objectives document was 'recalled and reaffirmed' by the parties at the 2000 NPT Review Conference.⁴³

Since the previous supply arrangements between India and the USA have lapsed, the CNCI should formally be viewed as a new supply arrangement.⁴⁴ However, India has not, and will not under the CNCI, accept full-scope safeguards or a legally binding obligation not to acquire nuclear weapons. Does this mean that the USA would be acting against its obligations under the NPT if it were to decide to provide nuclear materials without the required conditions? The answer to this question boils down to the legal nature of the 1995 Principles and Objectives document. Should this be viewed as a political declaration, devoid of normative impact, or as a document expressing an authoritative interpretation of the requirements of NPT Article III, paragraph 2 by the parties to the treaty? In contrast with the guidelines of the Zangger Committee and the NSG—which have been accepted by only some of the states parties to the NPT—the 1995 Principles and Objectives document as well as the Final Declaration of 2000 have been accepted by all parties to the NPT.

It is a recognized principle of international law that a treaty provision may be modified by subsequent agreement or practice, not necessarily by means of a formal amendment.⁴⁵ Anthony Aust notes that parties to a treaty may 'subsequently agree on an authoritative interpretation of its terms, and this can amount, in effect, to an amendment'.⁴⁶ Article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties states—on the interpretation of treaties—that the following factors shall be taken into account: '(a) any subsequent agreement between the parties regarding the

⁴² For the Principles and Objectives document, adopted on 11 May 1995, see 'Documents on nuclear arms control and non-proliferation', *SIPRI Yearbook 1996: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1996), pp. 591–93.

⁴³ Final Document, 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, vol. I, NPT/CONF.2000/28 (Parts I and II), p. 3.

⁴⁴ See McGoldrick, F., Bengelsdorf, H. and Scheinman, L., 'The US–India nuclear deal: taking stock', *Arms Control Today*, vol. 35, no. 8 (Oct. 2005), pp. 6–12.

⁴⁵ Sinclair, I. M., *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester University Press: Manchester, 1984), pp. 106 ff.

⁴⁶ Aust, A., *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 2000), p. 191. See also Jennings, R. and Watts, A. (eds), *Oppenheim's International Law*, vol. 1, *Peace*, 9th edn (Longman: London, 1996), p. 1254, note 5; and Brownlie, I., *Principles of Public International Law*, 4th edn (Clarendon Press: Oxford, 1990), p. 625.

interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties'.⁴⁷ The 1995 Principles and Objectives document could certainly qualify as a 'subsequent agreement'. It is also evident that this document has affected the practice of the parties: states have for the past 10 years shown a consistent pattern of support for the requirement of full-scope safeguards as a condition for supply.⁴⁸ Hence, an argument may be made that the provision in NPT Article III should today be interpreted to require full-scope, rather than item-specific, safeguards. This would also imply that implementation of the CNCI would conflict with US obligations under that article.

IV. The Nuclear Suppliers Group and full-scope safeguards as a condition for supply

The Nuclear Suppliers Group was formed in 1974 with the purpose of strengthening the nuclear non-proliferation regime with broader—as regards both substance and participation—multilateral export controls.⁴⁹ It is pertinent to note that the event that triggered the formation of the NSG was India's 1974 nuclear test explosion, which demonstrated the risks that could follow from purportedly 'peaceful' uses of nuclear technology. As of 1 January 2006, 45 states (and the European Commission as a permanent observer) participate in the NSG, which operates on the basis of consensus. It is important to note that cooperation in the NSG is not based on a legally binding international agreement:⁵⁰ rather, it is through the incorporation of NSG policy recommendations in national legislation that its provisions gain normative force.

In 1978 the NSG Guidelines for Nuclear Transfers were communicated to the IAEA, which subsequently published them in INFCIRC/254.⁵¹ The guidelines state

⁴⁷ The Vienna Convention on the Law of Treaties (VCLT) was opened for signature on 23 May 1969 and entered into force on 27 Jan. 1980; it is available in *United Nations Treaty Series*, vol. 1155 (1980), p. 331 and at URL <<http://www.un.org/law/ilc/texts/treaties.htm>>. The VCLT has no retroactive effect and does not apply to treaties concluded prior to its entry into force (cf. Article 4). However, the International Court of Justice (ICJ) has generally viewed the VCLT as an authoritative point of departure for the assessment of customary international law on the interpretation of treaties. See, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *ICJ Reports 1994*, pp. 21–22, §41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgment, *ICJ Reports 1995*, p. 18, §33; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, *ICJ Reports 1996 (II)*, p. 812, §23.

⁴⁸ Another example is the repeated reference to the document in the NSG itself to the effect that its outreach activities are taking place 'in accordance' with the 1995 document. On Russia's supply of fuel to India in 2001 see section IV below.

⁴⁹ On the history of the NSG see IAEA, Communication of 10 May 2005 received from the Government of Sweden on behalf of the participating governments of the Nuclear Suppliers Group, INFCIRC/539/Rev.3, 30 May 2005. For the participants of the NSG and the other export control regimes discussed in this appendix see the glossary and chapter 16 in this volume.

⁵⁰ See further Ahlström, C., *The Status of Multilateral Export Control Regimes: An Examination of Legal and Non-legal Agreements in International Cooperation* (Iustus Förlag: Uppsala, 1999); and Gualtieri, D. S., 'The system of non-proliferation export controls', ed. D. Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press: Oxford, 2003), p. 467.

⁵¹ IAEA, Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, INFCIRC/254, Feb. 1978, reprinted in

that suppliers 'should transfer trigger list items only when covered by IAEA safeguards'. There is no requirement for full-scope safeguards—only for safeguards on the items transferred. The revelation of a clandestine nuclear weapon programme in Iraq in 1991 served as a wake-up call for the nuclear non-proliferation regime. It led to a renaissance for the NSG, and at the 1992 plenary meeting the participants decided to implement a policy by which full-scope safeguards would be a condition for supply.⁵² The requirement for full-scope safeguards is outlined in Paragraph 4(a) of the guidelines: 'Suppliers should transfer trigger list items or related technology to a non-nuclear-weapon State only when the receiving State has brought into force an agreement with the IAEA requiring the application of safeguards on all source and special fissionable material in its current and future peaceful activities'. In the absence of full-scope safeguards in the recipient state, transfers of controlled items may take place in only two situations: (a) as an exceptional case when the trigger list item is deemed essential for the safe operation of a safeguarded facility, and (b) if the transfer takes place in accordance with agreements and contracts drawn up on or prior to 3 April 1992 (the 'grandfathering clause').

The conclusion of the Model Additional Protocol in 1997 has generated proposals to expand the requirement for full-scope safeguards so as to also require the application of that instrument. As noted above, in February 2004 President Bush made a proposal according to which only states that have signed an Additional Protocol should be allowed to import nuclear equipment. This proposal has been under consideration within the NSG but has not yet been agreed by all members.⁵³

It is clear that the civil nuclear cooperation between India and the USA proposed under the CNCI would not be possible to reconcile with the commitment of the USA, as an NSG participant, to insist on full-scope safeguards as a condition for supply. It should also be noted that the exemptions so far recognized would not be applicable to the present situation: there are no bilateral agreements in place between India and the USA that would 'grandfather' the requirement for full-scope safeguards. Invoking the safety exemption clause would also pose serious difficulties, given the reactions of NSG participants (including in particular the USA itself) to the recent experience of Russian transfers to India. In the autumn of 2000 Russia declared its intention to supply nuclear fuel to the TAPS. It is important to note that Russia did not challenge the validity of full-scope safeguards as a condition for supply, but rather argued that the transfer should fall under the safety exemption clause because the delivery of fuel was necessary for the safe operation of the plant. However, the other NSG participants were unconvinced by Russia's position and maintained that the proposed transfer would not be in conformity with Russia's commitments as an NSG participant. In February 2001 Russia nevertheless exported 50 tonnes of low-enriched uranium to India and was heavily criticized by other NSG participants.⁵⁴ Because of this criticism, Russia later abstained from further exports of nuclear fuel and power plants to India; instead, it initiated a discussion in the NSG on the possibility of making an

International Legal Materials, vol. 17 (1978), p. 220. The most recent version of the NSG Guidelines is reproduced in INFCIRC/254/Rev.7/Part 1, 23 Feb. 2005.

⁵² IAEA, Statement on full-scope safeguards, INFCIRC/405, May 1992, reprinted in *International Legal Materials*, vol. 31 (1992), p. 1253.

⁵³ Boese (note 27).

⁵⁴ E.g., the USA declared that it 'deeply regrets that the Russian Federation has shipped nuclear fuel to the Tarapur power reactors in India in violation of Russia's nonproliferation commitments'. 'US deeply regrets Russian shipment of uranium fuel to India', 16 Feb. 2001, URL <http://www.usembassy.it/file2001_02/alia/a1021910.htm>.

exemption for India from the requirement of full-scope safeguards as a condition for supply.

Paragraph 10 of the NSG Guidelines for Nuclear Transfers contains a ‘non-proliferation principle’ which states that, ‘notwithstanding other provisions of these Guidelines, suppliers should authorize transfer of items or related technology identified in the trigger list only when they are satisfied that the transfers would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices or be diverted to acts of nuclear terrorism’. Given the criticism that the US nuclear cooperation with India—even with a separation between military and civilian facilities—could be seen as providing assistance to the Indian nuclear weapon programme, it is difficult to see how the USA could act in accordance with this commitment under the terms of the CNCI.

Hence, implementation of the CNCI would conflict with the USA’s commitments under paragraph 4 of the NSG Guidelines and possibly also with the ‘non-proliferation’ principle in paragraph 10. In the 2005 Indian–US joint statement, the USA states that it will work to ‘adjust international regimes’ in order to allow for full civil nuclear cooperation with India. This would seem to indicate that the USA will work to amend provisions of the NSG Guidelines, but it is by no means certain that it would receive consensus support. However, recent information suggests that the USA is not seeking to bring about amendments: in November 2005, in a statement before the Senate Foreign Relations Committee, Robert G. Joseph, Under Secretary of State for Arms Control and International Security, clarified how the USA proposes to accommodate the CNCI with US commitments under the NSG.

We [have] stressed our desire that the NSG maintain its effectiveness, and emphasized that we do not intend to undercut this important nonproliferation policy tool. For this reason, *the U.S. proposal neither seeks to alter the decisionmaking procedures of the NSG nor amend the current full-scope safeguards requirement in the NSG Guidelines*. Rather, the United States proposes that *the NSG take a policy decision to treat India as an exceptional case*, given its energy needs, its nuclear nonproliferation record, and the nonproliferation commitments it has now undertaken. *We do not advocate similar treatment for others outside the NPT regime.*⁵⁵

The USA aims to have a consensus decision in the NSG to this effect by the 2006 Plenary Meeting.

The US proposal was discussed at the October 2005 NSG Consultative Group meeting, and apparently acquired some support from France, the UK and Russia. Other participating governments, notably Austria, Sweden and Switzerland, expressed strong reservations.⁵⁶ Many other participants adopted a wait-and-see approach.⁵⁷

The approach not to amend the NSG Guidelines and to take a policy decision to treat India as a special case has the advantage of being a quick solution. It would still, however, require consensus among the NSG states and, as noted above, at least a few participants remain unconvinced by the US proposal.⁵⁸ Moreover, the proposal

⁵⁵ Prepared remarks by Robert G. Joseph (note 23), p. 9 (emphasis added).

⁵⁶ Boese, W., ‘Suppliers weigh Indian nuclear cooperation’, *Arms Control Today*, vol. 35, no. 9 (Nov. 2005).

⁵⁷ Prepared remarks by Robert G. Joseph (note 23), p. 6.

⁵⁸ E.g., in the late autumn of 2005 critical reports in the official Chinese media claimed that the CNCI would have a ‘negative impact’ on the global nuclear order and non-proliferation efforts. See Mohan, C. R., ‘Delhi’s comrades slam India, Beijing’s slam US for n-deal’, *Indian Express*, 4 Nov. 2005, URL <http://www.indianexpress.com/print.php?content_id=81265>.

arguably does not take sufficient account of the nature of the NSG regime: while the NSG Guidelines are not binding under international law, they have been incorporated into national legislation by the participants and have therefore acquired a formal legal force at the national level. This implies that national licensing authorities (in the USA or elsewhere) would still have to consider the guidelines when deciding upon a proposed transfer of nuclear technology to India. As the requirement for full-scope safeguards would remain, it is difficult to see how participants could agree to a transfer without having amended the guidelines.

The NSG participants have declared that they view their cooperation as consistent with, and complementary to, the NPT. A delicate situation would arise if the members of the NPT regime were to make an exception for full-scope safeguards as a condition for supply to India, while the treaty regime at the same time has moved to elevate this principle as part of the requirements of NPT Article III. Here it should be noted that all the states participating in the NSG are also parties to the NPT and can obviously not act contrary to their international obligations under the treaty. If they nevertheless were to do so, this would most likely be viewed as undermining the integrity of the treaty—and at a time when the NPT is regarded as under severe stress.⁵⁹

V. National legislation on nuclear exports

In the July 2005 Joint Statement, the US President declared his intention that the United States would ‘seek agreement from Congress to adjust U.S. laws and policies’ and India’s Prime Minister committed India to implement comprehensive domestic export control legislation.⁶⁰

US legislation

The 1954 Atomic Energy Act (AEA), as amended, is the principal US legislation governing US nuclear cooperation and exports.⁶¹ The AEA was amended in 1978 with the adoption of the Nuclear Non-Proliferation Act (NNPA), which added non-proliferation to the criteria for US exports of nuclear equipment.⁶²

Section 123(a)(2) of the AEA establishes that an ‘agreement for cooperation’ meeting certain criteria must be in place before the commencement of international cooperation. In the case of non-nuclear-weapon states there is a requirement ‘as a condition of continued United States nuclear supply under the agreement for cooperation, that IAEA safeguards be maintained with respect to all nuclear materials in all peaceful nuclear activities within the territory of such state, under its jurisdiction, or carried out under its control anywhere’. Hence, under US domestic law there is also a requirement for full-scope safeguards as a condition for cooperation. However, the US president may exempt a proposed agreement for cooperation from any of the

⁵⁹ On the outcome of the 2005 NPT Review Conference see chapter 13, section II.

⁶⁰ The White House (note 1), p. 2.

⁶¹ The Atomic Energy Act of 1954, 30 Aug. 1954, Public Law 83-703 (68 Stat. 919), reprinted in *Nuclear Regulatory Legislation*, NUREG-0980, vol. 1, no. 6 (US Nuclear Regulatory Commission, Office of the General Counsel: Washington, DC, June 2002), pp. 1–9.

⁶² Nuclear Non-Proliferation Act of 1978, 10 Mar. 1978, Public Law 95-242 (92 Stat. 120), reprinted in *Nuclear Regulatory Legislation*, NUREG-0980 (note 61), pp. 15.1–3.

requirements of section 123 if it is determined that the inclusion of any such requirement would be 'seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security'. According to the 1985 Export Administration Amendment Act, an exempted agreement would not become effective unless both houses of Congress approve it.⁶³

Section 128 of the AEA outlines the criteria governing US exports for peaceful nuclear uses of source material, special nuclear material, production facilities and any sensitive nuclear technology to a non-nuclear weapon state. Subparagraph (a)(1) lays down the condition that IAEA safeguards should be maintained with respect to 'all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export'. This provision also allows the US president to waive the requirement for full-scope safeguards as a condition of supply if he determines that a failure to approve an export would be seriously prejudicial to the achievement of US non-proliferation objectives or otherwise jeopardize the common defence or security. Finally, section 129 of the AEA also has a bearing on the CNCI. Under this provision no nuclear materials and equipment or sensitive nuclear technology may be exported to 'any non-nuclear-weapon state that is found by the president to have, at any time after the effective date of this section [to have] detonated a nuclear explosive device'. Also under this provision the president may waive the cessation of exports if he determines 'that cessation of such exports would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security'.

The Bush Administration has already introduced several amendments as a result of the CNCI. Amendments to the Export Administration Regulations (EAR) became effective on 30 August 2005: they removed some licence requirements for exports and re-exports to India of items controlled unilaterally for nuclear non-proliferation reasons. Furthermore, six Indian entities were removed from the Entity List of the EAR.⁶⁴ Yet, as shown above, full implementation of the CNCI would require the involvement and consent of Congress.

The initial reaction of the US Congress to the CNCI was not enthusiastic. Members of Congress have complained that they were not consulted before this major policy shift was announced.⁶⁵ A hearing of the House of Representatives International Relations Committee on 8 September 2005 revealed that many congressmen were concerned about the possible negative impact of the CNCI on the nuclear non-proliferation regime.⁶⁶ As of the late autumn of 2005 the administration had not begun formal consultations with Congress. The administration aims to forward a proposal for amendments to domestic legislation in early 2006 so as to enable civil nuclear cooperation with India. While no detailed information is available, it has been

⁶³ See Squassoni, S., *US Nuclear Cooperation With India: Issues for Congress* (US Library of Congress, Congressional Research Service: Washington, DC, 29 July 2005), p. 5.

⁶⁴ *Federal Register*, vol. 70, no. 167 (30 Aug. 2005), p. 51251.

⁶⁵ Robinson, D., 'US: India nuclear accord will not harm non-proliferation effort', *Voice of America*, 8 Sep. 2005, URL <<http://www.globalsecurity.org/wmd/library/news/india/2005/india-050908-voa01.htm>>.

⁶⁶ Ruppe, D., 'Obstacles surface to proposed US-Indian nuclear deal', *Global Security Newswire*, Nuclear Threat Initiative, 9 Sep. 2005, URL <http://www.nti.org/d_newswire/issues/2005_9_9.html>.

suggested that amendments will be proposed to Section 129 of the AEA and to the NNPA.⁶⁷

It remains to be seen whether the US Administration will succeed in conveying the notion to Congress that the CNCI involves a net gain for the non-proliferation of nuclear weapons and whether congressmen will accept the CNCI as it is currently formulated. It cannot be excluded that Congress may decide to add further conditions for its approval, such as Indian participation in a fissile material cut-off. Both Indian and US representatives have made it clear that any such additional conditions are likely to be seen as 'deal-breakers'.⁶⁸

Indian legislation

India is committed under the CNCI to ensure that the necessary steps have been taken to secure its nuclear materials and technology through comprehensive domestic export control legislation and through harmonization and adherence to the guidelines of both the Missile Technology Control Regime and the NSG. India previously implemented national export controls on dual-use items, but the legislation has been described as 'a complicated patchwork'.⁶⁹ In May 2005 the Indian Government enacted the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, which *inter alia* criminalizes the possession and transfer of weapons of mass destruction (WMD) by unauthorized individuals and entities. The enactment of this law was motivated primarily by the obligations on all states under UN Security Council Resolution 1540,⁷⁰ which requires penal legislation as well as 'effective measures to establish domestic controls' to prevent WMD proliferation.⁷¹ The Indian export control system still involves seven different primary laws, but it appears to be fairly comprehensive. Some commentators have argued that India needs to adopt unified, comprehensive export control legislation,⁷² but that would seem to go beyond the commitments made within the context of the CNCI. For India's part, it includes among its responsibilities under the CNCI 'adherence' to the guidelines of both the NSG and the MTCR.⁷³ India has previously been an ardent opponent of the multilateral export control regimes but seems recently to have changed its attitude.

It should be noted that the CNCI is not uncontroversial in India. Some commentators have criticized it as a deal by which India would give up its independent policies in the nuclear field. The CNCI has also been seen as an important explanation for why India voted in favour of finding Iran in non-compliance with its safeguards obligations at the September 2005 IAEA Board of Governors meeting—a decision that

⁶⁷ 'Work begins on legislative changes needed to implement US–India nuclear agreement', Global Security Newswire, Nuclear Threat Initiative, 17 Aug. 2005, URL <http://www.nti.org/d_newswire/issues/2005_8_17.html>.

⁶⁸ See, e.g., 'India envoy warns on changes to US nuclear deal', *New York Times*, 22 Nov. 2005.

⁶⁹ Anthony, I. and Bauer, S., 'Transfer controls', *SIPRI Yearbook 2005* (note 26), p. 708.

⁷⁰ United Nations, Letter dated 8 August 2005 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, UN document S/2005/521, 11 Aug. 2005 (the 2005 Act is reproduced in the annex to this letter).

⁷¹ UN Security Council Resolution 1540, 28 Apr. 2004.

⁷² Gahlaut, S. and Srivastava, A., *Nonproliferation Export Controls in India—Update 2005* (Center for International Trade and Security: Athens, Ga., 2005), p. 11.

⁷³ The term 'adherence' in this context is typically used to describe the behaviour of a state that is not a formal participant in the export control regimes but whose export control practices conform to the guidelines of the regimes.

has generated a certain measure of domestic criticism.⁷⁴ In January 2006 US representatives hinted at a link between the successful realization of the CNCI and the position of India on the referral of Iran to the UN Security Council, although India denied that there was such a link and maintained that they were two separate issues.⁷⁵

VI. Conclusions

The announcement of the Civil Nuclear Cooperation Initiative by India and the United States in the summer of 2005 has raised considerable interest—as well as anxiety—among states and in academic circles. It represents a paradigmatic departure from what has been seen as the conventional wisdom in the field of the non-proliferation of nuclear weapons—not to engage with an NPT ‘hold-out’ state. US policy on nuclear non-proliferation has so far been dominated by a desire to hinder other states from acquiring a nuclear weapon capability. The policy of technology denial and cold-shouldering has been in operation ever since India acquired its nuclear capability. However, the current US Administration seems no longer to be interested in sacrificing what it sees as its wider geopolitical, or economic, interests for the sake of consistency in its non-proliferation policies.

The present situation throws into relief a dichotomy between two perspectives on nuclear non-proliferation—a ‘pragmatic’ one and a ‘normative’ one. The former would focus on the fact that India has already managed to defeat the purpose of the multilateral nuclear non-proliferation regime: it has acquired the position of a ‘technology holder’ and should be treated as such. The main interest today would then be not to punish India, but to limit the potential negative effects by ensuring that India does not proliferate its nuclear technologies. To continue to insist that India should accede to the NPT as a non-nuclear weapon state would serve no useful purpose since India has repeatedly stated that it will not do so. The second perspective would remain faithful to the formal nuclear non-proliferation regime and regard India as a ‘hold-out’ that has managed to acquire a nuclear weapon capability and should therefore pay a political, and an economic, price. The principal objective should be to maintain the integrity of the nuclear non-proliferation regime. To engage with India in the nuclear field would only demonstrate to potential proliferators that it is possible to defeat the purpose of the Non-Proliferation Treaty, running the risk of stimulating other states to acquire a nuclear capability.

In the final analysis it may be concluded that the CNCI would be a very good bargain for India. India could reap the benefits of full civil nuclear cooperation in return for rather modest pledges that would not affect its ability to retain and expand its nuclear weapon arsenal. As this appendix shows, the CNCI raises a number of international and domestic legal issues. Accommodation of the CNCI is a question not only for the participants in the NSG and members of the US Congress, but possibly also for the parties to the NPT.

⁷⁴ ‘India’s foreign policy compromised: experts’, *The Hindu*, 29 Oct. 2005, URL <<http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2005102918391200.htm>>.

⁷⁵ ‘Nuclear deal could die if India fails to back U.S. position on Iran, ambassador says’, Global Security Newswire, Nuclear Threat Initiative, 26 Jan. 2006, URL <http://www.nti.org/d_newswire/issues/2006_1_26.html>.