

Indo-US Nuclear Agreement

Satish K. Jain*

Centre for Economic Studies and Planning

School of Social Sciences

Jawaharlal Nehru University

New Delhi 110067

Email: satish.k.jain@gmail.com

Possibly the most controversial matter in relation to the Indo-US 123 Agreement has been the question of relevance of Hyde Act which lays down the framework for the 123 Agreement. As Hyde act has several provisions which any country which wishes to pursue an independent foreign policy and is jealous of guarding its freedom and sovereignty would find it extremely difficult to swallow, the officials of Indian Government, including the Prime Minister, have been repeatedly asserting that the Hyde act is an internal law of US, that India is not bound by its provisions and that the Act is irrelevant in the context of Indo-US Agreement. It is certainly true that India is not bound either by the Hyde Act or for that matter any other US law. But not being bound by the Hyde Act does not establish that the act is irrelevant in the context of 123 Agreement. When a treaty or an agreement is entered into by two States, in order to analyze and evaluate it and form an idea about the likely outcomes from it, one must of necessity take into consideration the rational expectations that the State parties can have of each other and the likely consequences of a breach by one or the other of the parties of the provisions of the treaty.

In the context of treaties between States it would be utterly irrational to presume that any of them might undertake actions in connection with the treaty which would be violative of its own domestic laws. In the US the laws

*Published in the Janata issue of November 25, 2007.

enacted by the Congress are supreme with the exception of the Constitution. The treaties entered into by the US are treated on par with the laws enacted by the US Congress. In case of a conflict between two laws enacted by the Congress the provisions of the law enacted later in time prevail over the provisions of the law enacted earlier. The same rule applies if there is a conflict between a treaty and an Act of Congress. Assuming that the 123 Agreement is ratified by the US without any change in it and that there is no subsequent legislation contradicting its provisions, then all the provisions of the Hyde Act which are not in conflict with 123 Agreement as well as all the provisions of 123 Agreement would prevail. Only those provisions of Hyde Act would not prevail which would be in conflict with 123 Agreement. It is important to emphasize here that this conclusion is dependent on there being no subsequent legislation contradicting the provisions of 123 Agreement. According to American officials there is no conflict between the Hyde act and the 123 Agreement. If correct, this would imply that all the provisions of Hyde act as well as 123 Act would prevail. The relevance of the Hyde Act is immediate if we assume that the American authorities will act within the framework of the US laws. In view of the above, it seems that the real purpose behind assertions to the effect that India is not bound by the Hyde Act is at best to mislead. The really important and relevant question of whether US is bound by the Hyde Act has an unambiguous answer.

The contention by the American officials that there is no conflict between the Hyde Act and the Agreement seems to be by and large correct. The conflict between the two texts seems to be limited to two items. The Hyde Act is categorical that 'the United States should not seek to facilitate or encourage the continuation of nuclear exports to India by any other party if such exports are terminated under United States law'. On the other hand, 123 Agreement has the clause 'If despite these arrangements, a disruption of fuel supplies to India occurs, the United States and India would jointly convene a group of friendly supplier countries to include countries such as Russia, France and the United Kingdom to pursue such measures as would restore fuel supply to India.' It is in this context that the bill introduced by Representative Howard Berman in the House of Representatives on October 4 assumes importance. The bill seeks to nullify the assurances regarding fuel supply contained in the 123 text on the ground that they undermine United States nonproliferation policy and the United States commercial interests.

The second point on which the two texts seem to be in conflict relates to the question of detonation of a nuclear explosive device by India. While the Hyde Act is categorical that a detonation by India would result in the cessation of the waiver, the Agreement is somewhat ambiguous and appears to leave some discretion with the US authorities. The bill introduced by Howard Berman mentioned above seeks to remove this ambiguity by requiring the inclusion of the provision of 'immediate termination of all nuclear commerce by NSG member states if India detonates a nuclear explosive device'. Although Indian officials have repeatedly asserted that India's right to conduct nuclear tests remains unaffected, these assertions have time and again been contradicted by American officials. Some of the statements issued by US spokespersons in this connection are quite unambiguous in asserting that a nuclear test by India would result in termination of the Agreement.

It is clear that if expectations as to what the US is likely to do in the eventuality of India detonating a nuclear device are formed rationally the conclusion seems to be inescapable that there would be termination of the Agreement by the US. India would not even be able to argue that there has been breach of Agreement by US. In view of the unambiguous statements made by the US authorities in this connection, some for directly contradicting assertions made by the Indian officials, and there being no listing of the circumstances under which the US would be justified in terminating the Agreement coupled with the termination provision, there is no possibility of a neutral observer declaring US to be in breach of its commitments under the 123 Agreement in case of termination consequent upon detonation of an explosive device by India.

In fact, one of the most peculiar features of the 123 Agreement is that regardless of what the US does, it would be well-nigh impossible to establish that US has breached the provisions of the agreement. If an Agreement is such that more or less all binding commitments are made by one party only; and the other party simply lists what it might decide to do without making any firm commitments we will have an Agreement which for all practical purposes can be violated only by one of the two parties. How can a party be held responsible for violating an Agreement when it is not making any definite and binding commitments? The peculiarity of 123 Agreement mentioned above is flowing from the fact that all commitments which really matter are being made by India and none by US. The peculiarity is also reflected in the fact

that while US can terminate the Agreement, termination by India would be devoid of any meaning as India would remain bound in perpetuity by all the safeguard provisions.

If, in spite of a majority of members of Indian Parliament being against it, the Agreement materializes then it would produce a Catch-22 situation for the country. Once the country has invested enormous amounts of resources in building nuclear power plants with equipment and material imported under the Agreement, any termination of the Agreement would result in most of the investment becoming a heap of rubble. This would mean that every time the country faced a choice between continuance of the Agreement coupled with succumbing to incremental US pressure and termination of the Agreement with consequent disruptions and enormous waste of resources, in all likelihood the choice would be in favour of succumbing to US pressure for the continuance of the Agreement. In this context one should not get deceived by the provision of compensation in the 123 Agreement. The compensation is envisaged at the market value and not at the replacement value. Given the fact that the used equipment of a specialized kind can at best command a small fraction of its original price in the market, getting compensation at the market value for returned equipment is not going to be anything other than small consolation. Furthermore, for ensuring the non-functionality of a nuclear plant, return of all equipment is not required; and consequently the amount of compensation needed to be paid can be quite small. Apart from the Agreement creating such unenviable conditions in the economic domain, there is also much cause for worry from national security perspective in view of India being bound in perpetuity by the safeguard clauses.

In view of the above, it is not surprising that a majority of members of Parliament are against the deal. The main ruling party instead of abandoning the Agreement because of opposition by a majority in the Parliament seems to have taken a most peculiar and constitutionally indefensible position in the matter. What has been asserted by various spokespersons of the main ruling party essentially amounts to the position that negotiating and ratifying treaties and agreements is the exclusive prerogative of the Executive and that the Parliament has no role to play in these matters. To see the utter invalidity of this position, one only has to provisionally accept it and then try to see where it leads to. One of the cardinal principles on which a democratic system is based on is that the sovereignty lies with the people.

If so, then it must be the case that all organs of the Government must be deriving their authority through delegation, either explicitly or implicitly. The Parliament has full powers of the people of India in all those domains for which the people have delegated to it their authority for the specified period. In a similar fashion the Executive derives its authority from the authority of the Parliament. It is certainly true that in the domain of foreign relations and intelligence activities national legislatures of democratic states often do not require approval and ratification of individual actions for obvious reasons. But to conclude from this that the Executive has powers in these domains independent of the powers of the parliament would be to argue that the Executive has some powers which are not powers delegated by the people, directly or indirectly. Which in turn would imply that there is another source, other than the people, of power, negating the democratic principle that the people are sovereign.

It is of course not the first time in the history of Independent India that such spurious arguments are being invoked by a major political party with potential to weaken the democratic foundations of our polity in a major way. During the emergency the same political party which now does not see anything undemocratic in pushing through an Agreement opposed by a majority of members of the Parliament argued that the Parliament was supreme and consequently had the full constitutional right to do anything including the right to extend its own life for as long as it wished. It is interesting to note that although in the two instances the stands taken by the party in relation to the powers of parliament are diametrically opposite; in one instance declaring parliament to be supreme and in another declaring certain matters to be outside the jurisdiction of the parliament; in both instances the same principle is negated, namely the principle of the sovereignty of the people. The parliament which was elected in 1971 had a five-year mandate from the people, i.e., up to 1976. But this parliament extended its own term by one year by declaring itself to be supreme; negating by implication the correct source of their power, namely delegated authority from the people for a specified period. In the present instance the supremacy of the parliament in certain domains is being questioned implying assertion of a source of power for the executive independent of any delegated power by parliament; and therefore independent of any delegated power by the people. The constitutional position in India is very clear. The basic structure of the Indian Constitution is non-amendable. This also means that all laws, conventions and practices to-

gether with their interpretations must conform to the basic structure of the Constitution. To put it somewhat differently, laws, conventions and practices inconsistent with the basic structure of the Constitution, to the extent of inconsistency, must be regarded as null and void. The democratic principle, together with its implications, would be regarded as an integral part of the non-amendable basic structure of the Constitution by almost everyone.

Notwithstanding the fact that the Agreement has been put in the cold storage for the time being, the danger is far from over. Given the intense pressure from the US to go ahead with the deal, it would be premature to write-off the deal altogether. The importance of the Agreement for the long-term strategic interests of US can be gouged from the fact that even someone of the stature of Henry Kissinger, Secretary of State under Nixon and one of the greatest strategists that the US has produced in the last several decades, is lobbying for the deal. One possibility to which adequate attention has not been paid is that of dissolution of the current parliament and completion of all formalities relating to the deal during the period between the dissolution of parliament and the constitution of new parliament. Although proceeding with the Agreement after the dissolution of current parliament would violate the same democratic principle which has been discussed above, it is unlikely to be a deterrent for those intent on pursuing the matter of operationalizing the deal.

The constitutional questions are not wholly devoid of significance in the context of international treaties and agreements. For instance, it is a recognized principle in international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it; as violation of the constitutional laws implies that the state's authorities and representatives concluding the treaty must have exceeded their powers in doing so [See Oppenheim's International Law].

Only time will tell whether the main ruling party bows down to the wishes of the majority in the Parliament; or whether it decides to interpret constitution, laws and practices in a manner repugnant to the democratic principle but conducive to binding the nation to an agreement to which the duly elected parliament is opposed. It is important to start thinking about the latter, and more likely, possibility with a view to arrive at a set of measures which could be undertaken to minimize the harm the Agreement is likely to

inflict on the country.