

Statement by Robert J. Einhorn
Senior Adviser, Center for Strategic and International Studies
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The U.S.-India Civil Nuclear Deal

Mr. Chairman, thank you for the opportunity to testify before the Committee on the nonproliferation implications of the U.S.-India agreement on civil nuclear cooperation.

The argument for overcoming the nuclear impasse with India – for altering the nuclear status quo that cut India off from international civil nuclear cooperation for over 30 years – has become increasingly persuasive. It has been clear for many years that maintaining existing U.S. laws and Nuclear Suppliers Group (NSG) guidelines prohibiting such cooperation would not succeed in inducing New Delhi to join the NPT or give up nuclear weapons. And as the Bush Administration has argued, modifying those laws and guidelines for India could give a boost to U.S. relations with a rising democratic world power and assist in addressing India's growing energy needs.

The dilemma we now face is how to achieve the benefits of changing the rules without undermining the vital U.S. interest of preventing the proliferation of nuclear weapons. How, for example, can the United States seek exceptions to the rules for India without opening the door to exceptions in less worthy cases – indeed, without weakening the overall fabric of rules the U.S. worked so hard to create? How would U.S. allies and friends who had to choose between nuclear weapons and civil nuclear cooperation (and who made what the U.S. regarded as the right choice) view giving India the opportunity to have its cake and eat it too? How can we avoid conveying the impression to countries contemplating the nuclear option in the future that, if they opted for nuclear weapons, the world would eventually accept them into the nuclear club?

Given the inevitable nonproliferation risks involved in reversing three decades of U.S. law and multilateral policy to permit nuclear cooperation with India, it is essential that such a major shift be accompanied by Indian steps that, on balance, strengthen the nonproliferation regime. Moreover, a policy departure of such magnitude should be preceded by thorough discussions with the Congress and key international partners to ensure they are comfortable with the initiative and share the view that it does not undercut nonproliferation interests.

But the U.S.-India civil nuclear cooperation deal negotiated by the Bush Administration doesn't meet those requirements. In the Administration's eagerness for a foreign policy success, the deal was concluded in great haste, driven by the calendar of Bush-Singh meetings rather than by the seriousness and complexity of the task at hand. Key stakeholders in the U.S. Congress and the 45-nation Nuclear Suppliers Group (NSG) were not consulted in advance. While speed and exclusivity are often necessary to

overcome bureaucratic and international resistance to major initiatives, this must be balanced against the need for buy-in, especially when the success of the initiative depends on approval by both the Congress and NSG. In its desire to show boldness and demonstrate a clean break with the past, the Administration gave too little weight to the nonproliferation downsides and too much weight to proving to the Indians its dedication to building a qualitatively new relationship. In the process, it failed to use the leverage available to it to achieve U.S. objectives.

As a result, the deal outlined in the Joint Statement concluded when Prime Minister Singh visited Washington last July, and further elaborated on March 2nd when President Bush was in Delhi, gave the Indians virtually all that they wanted – the ability to acquire nuclear equipment and technology and desperately needed uranium on the world market, acceptance as a nuclear weapon state in all consequential respects, and complete freedom to continue and expand production of fissile material for nuclear weapons. 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.

Benefits for nonproliferation are modest

Recognizing that much of the criticism of the civil nuclear deal would be based on its implications for nonproliferation, the Administration has made a special effort to show that the deal strengthens the global nonproliferation regime. But the arguments are not very convincing.

Several of the steps promised by India are simply reaffirmations of existing commitments, including its pledges to continue its unilateral moratorium on nuclear weapons testing, strengthen its national system of export controls, and work toward the conclusion of a multilateral fissile material cutoff treaty. Some other steps – including adherence to the guidelines of the NSG and the Missile Technology Control Regime – were actions India was already planning to take before the July 18th Joint Statement as part of a U.S.-Indian dialogue on technology transfer and export control. Still others – such as the promise to refrain from transferring enrichment and reprocessing technologies to countries that do not yet possess them – were codifications of existing Indian policies and practices.

The potentially significant new development was India's commitment in July to separate civilian and military nuclear facilities and put the civilian facilities under International Atomic Energy Agency (IAEA) safeguards, thereby placing them off-limits for the production of plutonium for India's nuclear weapons program. But the separation plan insisted upon by India's nuclear establishment, backed by Prime Minister Singh, and accepted by President Bush in March would put only 14 of 22 existing or planned nuclear power reactors under safeguards (including the six imported reactors India has no choice but to put under safeguards) and would allow New Delhi to decide entirely on its own which future reactors it wished to designate as civilian and submit to safeguards.

The Administration has trumpeted as a major nonproliferation gain that India will have 65 percent of its thermal reactors under safeguards. As a gesture of support for the IAEA's safeguards system, India's putting eight more reactors under safeguards than it would otherwise be obliged to do is welcome. But strategically, the percentage of reactors under safeguards is meaningless.

The purpose of IAEA safeguards is to prevent non-nuclear weapon states from diverting nuclear materials from civilian facilities to a nuclear weapons program. For nuclear powers like India, which can use unsafeguarded facilities to produce fissile material for their weapons programs, safeguards covering only a portion of their facilities serve primarily a symbolic function – to reduce the perceived discrimination between countries that are obliged to accept safeguards on all their facilities (i.e., NPT non-nuclear states) and those that are not. Much more meaningful than the percentage of reactors covered by safeguards is the amount of fissile material that could be produced at facilities **not** covered by safeguards. Under the separation plan approved on March 2nd, India has kept open plenty of options for producing fissile material for its weapons program (including at fast breeder reactors well-suited to producing bomb-grade plutonium).

The Administration claims that the nuclear deal is a major breakthrough because “for the first time” it brings India into the international nonproliferation “mainstream.” In her April 5th testimony, Secretary Rice argued that: “We better secure our future by bringing India into the international nonproliferation system, not by allowing India to remain isolated for the next thirty years the way it has been for the last thirty. We are clearly better off having India most of the way in rather than all the way out.”

This statement creates the impression that India today is totally outside the rules and, because of that, perhaps even a potential source of proliferation difficulties. But India, to its credit, has been moving into the nonproliferation “mainstream” for quite some time – in such areas as export controls, physical protection of nuclear materials, and interdictions of WMD-related shipments. It still has a distance to go before its export controls meet the highest international standards (and indeed the U.S. has sanctioned Indian entities for sensitive assistance to Iraq, Libya, and Iran). But it is working hard to strengthen its controls – and it will continue to do so because it is a responsible country that recognizes that nonproliferation controls are in its own self interest. The civil nuclear deal would reinforce these positive trends, but they will continue with or without the deal.

The risks are substantial

While the nonproliferation gains that can be attributed directly to the civil nuclear deal are modest, the potential downsides are substantial.

By seeking an exception to the rules for a country with which the United States wishes to build a special friendship, the nuclear deal will reinforce the impression internationally that the U.S. approach to nonproliferation has become selective and self-serving, not consistent and principled. Rules the U.S. previously championed will be

perceived as less binding and more optional. In general, the deal will send the signal that the U.S. – the country the world has always looked to as the leader in the global fight against proliferation – is now de-emphasizing nonproliferation and giving it a back seat to other foreign policy and commercial goals.

If the U.S. is seen as changing or bending the rules when they no longer suit us, others can be expected to follow suit. Indeed, that already seems to be happening. Russia, which a year ago said it couldn't provide nuclear fuel to India's Tarapur reactors because of its Nuclear Suppliers Group obligations, recently sent a large fuel shipment to those reactors, arguing (over the objections of most NSG members) that it was entitled to do so under the NSG's "safety exception." It is highly unlikely that Russia would have played so fast and loose with the NSG's rules in the absence of the U.S.-India nuclear deal. It is also not by coincidence that, not long after the U.S.-India deal, China and Pakistan began discussing additional reactor sales. It is not clear whether they will await NSG approval for such sales or simply proceed outside the guidelines of the NSG.

The U.S.-India deal could make it harder to achieve Bush Administration nonproliferation initiatives. The U.S. is now asking the NSG to permit nuclear cooperation only with countries that adhere to the IAEA's Additional Protocol and to ban transfers of enrichment and reprocessing technologies to states that do not already possess fuel-cycle facilities. But getting NSG partners to tighten the rules in ways favored by the U.S. will be much harder if they are also being asked to bend one of their cardinal rules (i.e., no nuclear trade with non-parties to the NPT) because the U.S. now finds it too constraining.

The civil nuclear deal could also reduce the perceived costs to states that might consider "going nuclear" in the future. In calculating whether to pursue nuclear weapons, a major factor for most countries will be how the U.S. is likely to react. Implementation of the deal with India will inevitably send the signal, especially to countries with good relations with Washington, that the U.S. will tolerate and eventually accommodate to a decision to acquire nuclear weapons.

In the near term, U.S. plans to engage in nuclear cooperation with India will make it more difficult to address proliferation challenges such as Iran. Of course, Iran's interest in nuclear weapons long pre-dated the India deal and its motives for seeking nuclear weapons have nothing to do with the deal. But the U.S.-India agreement has strengthened the case Iran can make – and is already making – internationally and at home. Why, Iranian officials ask publicly, should Iran give up its right as an NPT party to an enrichment capability when India, a non-party to the NPT, can keep even its nuclear weapons and still benefit from nuclear cooperation? It is an argument, however flawed and disingenuous, that resonates well with the Iranian public and with developing countries around the world and weakens the pressures that can be brought to bear on Tehran.

The most serious defect of the U.S.-India nuclear deal is its failure to constrain the further production of bomb-making fissile material – plutonium and highly enriched

uranium – for nuclear weapons. Indeed, as it now stands, the deal could actually help India dramatically increase its fissile material stocks.

India's indigenous uranium supplies are limited. Domestic uranium ore is of low quality and expensive to mine and process into yellowcake. Annual production is low and has difficulty keeping up with demand for both the civil energy and nuclear weapons programs. Under current nonproliferation restrictions, which prevent India from buying uranium on the world market, India will soon face serious shortages and painful trade-offs. Under the Bush Administration plan to change U.S. law and NSG guidelines, India could satisfy the needs of an expanding civil nuclear energy program through imports, while freeing up its domestic uranium reserves for military purposes. It would be a windfall gain for the nuclear weapons program.

In negotiations leading up to the July 18th Joint Statement, the Bush Administration proposed that India stop producing fissile material for nuclear weapons, which would have prevented India from taking advantage of freed-up uranium supplies for weapons purposes. India rejected the proposal. The Administration then made a further attempt to limit fissile material production by proposing that most Indian nuclear facilities, including its fast breeder reactors, be placed under IAEA safeguards and therefore made ineligible for weapons plutonium production.

But India's nuclear establishment dug in its heels, calling publicly for minimizing safeguards coverage and avoiding constraints on India's bomb-making capacity. Prime Minister Manmohan Singh, already under attack on the nuclear deal from his left-wing coalition partners, backed up the nuclear establishment's demands. Anxious to conclude the nuclear deal lest the Delhi summit be seen as a failure and calculating that Singh had less political room for maneuver than President Bush, the Administration threw in the towel on placing meaningful limits on India's fissile material production capacity.

As a result, a third of India's reactors that currently exist or are under construction will be outside safeguards and available for plutonium production. Any future reactor, thermal or breeder, can be designated by India as outside safeguards. Of course, the Indians will not devote all their unsafeguarded nuclear reactors to weapons plutonium production. Indeed, given India's ambitious nuclear energy goals, we would expect most of those reactors to be used for civilian purposes. But even if only two or three large reactors were used as bomb factories, India could produce enough plutonium for well over 50 nuclear weapons each year.

Why should the U.S. care about Indian production of fissile material? After all, India is a friend and a responsible nuclear power. One reason we should care is that, especially after 9/11, we have a vital interest in limiting the availability of bomb-making materials around the world and preventing such materials from falling into the hands of terrorist groups who, we know, are actively seeking to acquire them. If India steps up production, Pakistan can be expected to follow suit, China could decide to resume production, and others may be encouraged to seek their own production capabilities. The

more materials produced, the more difficult and costly it will be to secure them, and the greater the risks of nuclear terrorism.

Another reason we should care about stepped up Indian production of fissile materials is that it could lead to increased tensions and destabilizing arms competition in southern Asia, involving India, Pakistan, and China. Pakistani authorities have publicly taken special note of the failure of the U.S.-India nuclear deal to limit Indian fissile material production. Reportedly, the Pakistani National Command Authority recently met to assess the impact of the deal and consider adjustments Pakistan may need to make to its own strategic plans. President Musharraf said, "We cannot remain oblivious to the changes evolving in the region. All the steps will be taken for the defense, security, and safety of Pakistan." Moreover, China has warned that the deal threatens to "undermine global disarmament moves," suggesting that Beijing may also decide that it needs to respond programmatically.

Of course, continued or even stepped up nuclear weapons production in the region would not necessarily translate into increased tensions. Relations between Indian and Pakistan and between Indian and China have both been improving in recent years. But India's insistence on keeping substantial fissile material production capacity outside of safeguards – thereby keeping options open for a substantial strategic build-up – could raise suspicions about its intentions in the minds of its neighbors and have an adverse effect on the processes of reconciliation underway in the region.

Can the deal be strengthened?

As it currently stands, the U.S.-India civil nuclear cooperation deal is a net loss for nonproliferation. Can it be transformed into a net nonproliferation gain? The answer, at this stage, lies mainly with the U.S. Congress.

The Bush Administration and the Indian Government would naturally like to see the Congress approve the deal as is, on the basis of the draft legislation the Administration has already submitted, and to do so as quickly as possible. But especially given the unprecedented character of the deal and its far-reaching implications, Congress has a responsibility to scrutinize it carefully before passing judgment and to adopt any modifications or conditions it deems necessary to protect U.S. interests, including in preventing the proliferation of nuclear weapons or fissile materials.

Implementation of the civil nuclear deal will require Congressional approval of amendments to the Atomic Energy Act as well as a bilateral U.S.-India agreement for peaceful nuclear cooperation. In addition, India and the IAEA will have to conclude an agreement that applies IAEA safeguards to Indian nuclear facilities as well as an Additional Protocol to that agreement. And finally, the NSG will have to agree by consensus to modify its guideline that currently precludes nuclear cooperation with states outside the NPT. All of these arrangements are interrelated. For example, the Bush Administration's willingness to seek changes in U.S. law and NSG policies depended on

India's willingness to accept IAEA safeguards on certain Indian nuclear facilities in perpetuity.

Before deciding to amend the Atomic Energy Act, the Congress should therefore insist on seeing as much of the overall package as possible, including the IAEA-India safeguards agreements (concluded but not necessarily already approved by the IAEA Board) and a concluded U.S.-India agreement for peaceful nuclear cooperation. The need to assess these arrangements as a package is particularly justified because some of them will be unprecedented. India has put the IAEA on notice that its safeguards agreement will not follow standard models but will be "India-specific." The meaning of India-specific is not yet clear. Moreover, because India is a nuclear power that must still be treated as a non-nuclear state for the purposes of U.S. law, the U.S.-India peaceful nuclear cooperation agreement will be different from any previous U.S. agreement for cooperation. Negotiations on the IAEA-India safeguards agreements and the U.S.-India agreement for peaceful nuclear cooperation have already gotten underway; and so assuming those negotiations go smoothly, Congressional insistence on looking at the package as a whole need not cause significant delays.

Congress should not permit normal approval processes to be short-circuited. The Atomic Energy Act provides that agreements for peaceful nuclear cooperation that meet all the requirements of U.S. law will be approved automatically if the Congress does not pass a joint resolution of disapproval within 90 days; whereas agreements that do not meet all the statutory requirements (i.e., in cases where those requirements are waived) must be approved by both houses of Congress. Although the U.S.-India agreement for cooperation will not meet all the requirements of law (it is the first of about 40 such U.S. agreements not to do so) and will therefore require a waiver (because India will not have safeguards on all of its nuclear facilities), the Administration is nonetheless proposing that the agreement be fast-tracked with the much less demanding approval procedure. Clearly, the India case deserves more scrutiny, not less. Congress should insist that both houses of Congress get the opportunity to review and vote on the U.S.-India agreement.

In terms of the substantive elements of the U.S.-India civil nuclear deal, there are several the Congress will want to probe and understand more clearly. Among them will be whether an Indian nuclear test explosion – or some other Indian actions – would trigger the termination of U.S. nuclear cooperation. A related question is whether the U.S. would be committed to assist India in obtaining reactor fuel from third parties if U.S. fuel supplies had to be cut off as a result of an Indian nuclear test or some other action.

Based on its review of the nuclear deal, Congress may wish to adopt legislation that strengthens the deal and minimizes the risks it poses to the global nonproliferation regime.

One means of minimizing those risks would be to restrict the scope of nuclear cooperation with India that would be permitted by the new legislation. A long-standing element of the nonproliferation regime has been the "NPT preference policy," which has

meant giving NPT parties benefits in the civil nuclear energy area not available to those outside the NPT. A way of maintaining some preferential treatment for NPT parties would be to modify U.S. law (and NSG guidelines) to permit nuclear-related exports to India *except* equipment, materials, or technologies related to sensitive fuel-cycle facilities, including enrichment, reprocessing, and heavy water production. Such a distinction would permit India to acquire uranium, enriched fuel, nuclear reactors and components, and a wide range of other nuclear items, but would retain the ban on transfers of those items that are most closely related to a nuclear weapons program. The British and French, both of whom are strong supporters of nuclear cooperation with India, reportedly believe that nuclear cooperation with India should not include fuel-cycle equipment and technologies.

Another way of reducing nonproliferation risks would be to implement the nuclear deal in a country-neutral manner – not as a special exception to the rules for India alone, which is what the Administration has proposed. A problem with the country-specific approach is that it accentuates concerns that the U.S. is acting selectively on the basis of foreign policy considerations rather than on the basis of objective factors related to nonproliferation performance.

To avoid the pitfalls of making a country-specific exception without opening the door to nuclear cooperation in cases where it is clearly not yet merited, the Congress might consider permitting nuclear cooperation with any state not party to the NPT that meets certain criteria of responsible nuclear behavior (e.g., moratorium on nuclear testing, effective export controls, strong nuclear security measures, cooperation in stopping illicit nuclear trafficking). While such an approach would be country-neutral, it would still enable the U.S. Government (and other NSG members) to distinguish among non-parties to the NPT in terms of whether – and how soon – they would be eligible for nuclear cooperation.

By far the most important way to reduce nonproliferation risks – and to turn the civil nuclear deal into a net nonproliferation gain – would be for Congress to take action that would make the deal a catalyst for curbing or even capping the worldwide buildup of fissile material. In particular, Congress should adopt legislation that permits nuclear cooperation to proceed when India stops producing fissile material for nuclear weapons, either by ceasing production unilaterally, by joining other nuclear powers (including China and Pakistan) in a multilateral moratorium, or by adhering to a multilateral, verifiable treaty banning the production of fissile material for nuclear weapons (i.e., a fissile material cutoff treaty, or FMCT).

In the run-up to the July 18th Joint Statement, India rejected a Bush Administration proposal that it stop producing fissile material for nuclear weapons. But it is possible New Delhi might take a different view toward ending production not unilaterally but as part of a multilateral moratorium or treaty. After all, India has long declared its support for a multilateral FMCT. Indeed, in their July 18th Joint Statement, India and the United States agreed to work together to achieve an FMCT. If that is a serious undertaking and not a throwaway line, it would not be unrealistic for the key

nuclear powers to reach agreement on a cutoff in a reasonably short period of time. The U.S., U.K., France, and Russia have all ceased producing fissile material for nuclear weapons as a matter of policy. China is also believed to have stopped production. With intensive diplomatic effort, it should be possible for India and the U.S. to persuade Pakistan to join them and these other nuclear powers in a multilateral moratorium pending completion of a formal multilateral treaty. By linking nuclear cooperation to the termination of fissile material production, Congress could provide additional incentive for Washington and New Delhi to reach agreement at an early date.

Conclusion

In seeking to make India an exception to longstanding nonproliferation rules, the Bush Administration has given India virtually all that it wanted and has run major risks with the future of the nonproliferation regime. It is therefore reasonable to ask India to take steps to minimize the risks and demonstrate its own strong commitment to fighting proliferation. But the Administration has settled for far less than what is required to make the civil nuclear deal a net gain for nonproliferation.

India has long wanted to be regarded as a legitimate member of the nuclear club, not a pariah or outsider. The Administration is right that it is time that India be brought into the nonproliferation mainstream. But with membership comes responsibilities – not just in ensuring against leakage of nuclear equipment or technology to other countries but also in practicing strategic restraint that can increase international security generally. India has stated that it is prepared to assume the same responsibilities and practices as other nuclear powers. It so happens that the five original nuclear weapons states have all stopped producing fissile material for nuclear weapons. Should India not be asked to join them?

Indian leaders might be expected to say that, since the original five nuclear powers have produced more bomb-grade material than India, India should be entitled to catch up. But since its May 1998 nuclear tests, India has often stated that its strategic requirements are not open-ended and that it doesn't seek nuclear parity with China or any other country. Instead, it has consistently maintained that it requires only a "credible, minimum deterrent capability." If that remains the case, perhaps it can soon decide that it has accumulated sufficient fissile material for its minimum deterrent needs and can afford to forgo further production.

A multilateral cap on the accumulation of fissile material would make a major contribution to fighting nuclear proliferation and preventing nuclear terrorism. Making a U.S.-India civil nuclear deal a catalyst for achieving such an outcome would transform the deal from a substantial loss to a substantial gain. It would enable the U.S. to advance its strategic interest in a qualitatively improved relationship with India as well as serve its nonproliferation interests – not promote one at the expense of the other. Congress can play a key role in achieving such an outcome.