INDO-US 123 agreement – a saga of controversies and compromises

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Abstract: The text of the Agreement for Cooperation between The Government of India and The Government of USA concerning Peaceful Uses of Nuclear Energy (123 Agreement) has been released for public scrutiny before final execution. It has faced unprecedented criticism in both countries and is, perhaps, one of the most difficult negotiations carried out in this field in recent times. The contents of the agreement are subject to contradictory interpretations, some of which are fraught with suspicion and mutual mistrust. An analysis of the text is attempted in the present paper.

Keywords: Indo-US nuclear agreement; The Hyde Act 2006.

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1 Introduction

Pursuant to a Joint Statement[1] signed on 18th July 2005 by the President of the United States of America and the Prime Minister of India relating to a Bilateral Cooperation in Civilian Nuclear Energy, the US has enacted "The Henry J. Hyde US-India Peaceful Atomic Energy Cooperation Act of 2006"[2] briefly referred to as "The Hyde Act", which received the assent of the US President on 18 December 2006. Prior to the enactment of this act, India had identified its nuclear establishments into civilian and non-civilian categories and had submitted its separation plan for the purposes of introducing

international safeguards. In the intervening period from July 2005–December 2006, the Prime Minister of India made several commitments before the Indian Parliament emphasising that any cooperation with the US in the field of civil nuclear energy shall not compromise India's interests, which appeared difficult to achieve in view of the provisions of The Hyde Act 2006 (Singh, in press). Consequently, a proper structuring of the text for the bilateral agreement between the two parties upholding Section 123 of the US Atomic Energy Act 1954 became a Herculean task. Nonetheless, formal negotiations on the terms and conditions of such an agreement started at the beginning of 2007 and the negotiators of both countries held numerous meetings in India, the US and Europe. While the negotiations were on-going, the general public of both countries was kept in the dark about the progress with the exception of occasional press releases indicating hot and cold arguments that transpired in the meetings, ups and downs in the negotiation progress and high hopes, great disappointments and even frustrations among the negotiators. Aggrieved with this secrecy on the text of the agreement, three writ petitions (public interest litigations) were filed in the Supreme Court of India seeking judicial intervention to direct the Government of India for public release of the text of the agreement. Though the negotiators announced the finalisation of the agreement text on July 22nd 2007, its contents were still not disclosed to the public-at-large in either of the countries. Nonetheless, The Prime Minister of India, through press releases, indicated that the agreement text would be released in both the countries simultaneously. However, he assured that the Indian legislators will certainly be briefed when the parliament reassembles for its monsoon session on the 10th August 2007. It might be a pure coincidence or an act of design that one of the abovementioned writ petitions (No. 391 of 2007) was scheduled for hearing before the Supreme Court on 3rd August 2007 and the text of the 123-agreement was released in both the countries in the morning of the same day. This writ petition No.391 of 2007, being thus rendered in-fructuous, consequently had to be withdrawn while the other two have been subsequently dismissed by the Apex Court.

The released text of the 123-Agreement[3] has attracted a great public debate in India, causing extreme embarrassment to the coalition governance of the country. The present communication attempts to analyse some of the provisions of the Indo-US 123-Agreement and its relationship with The Hyde Act 2006, together with some of India's concerns.

2 Non-nuclear issues

The recital clauses in the preamble of the 123-Agreement are focused mainly on nuclear materials and technology and their peaceful uses, except for two clauses in paragraphs five and ten that state:

> "AFFIRMING that cooperation under this Agreement is between two States possessing advanced nuclear technology, both Parties having the same benefits and advantages, both committed to preventing WMD proliferation."

> "Mindful of their shared commitment to preventing the proliferation of weapons of mass destruction."

It is significant to note that 'WMD' is not defined anywhere in the 123-Agreement and, considering that the agreement itself is conceived with reference to Section 123a of the US

Atomic Energy Act 1954, WMD has to be interpreted in a narrower sense to mean and refer only to nuclear weapons. This becomes clear as is more specifically mentioned under Article 9 of the Agreement as follows:

> "Article 9 – PEACEFUL USE: Nuclear material, equipment and components transferred pursuant to this Agreement and nuclear material and by-product material used in or produced through the use of any material, equipment and components so transferred shall not be used by the recipient Party for any nuclear explosive device, for research on or development of any explosive device or for any military purpose."

Nonetheless, The Hyde Act 2006 u/s 103(b)(3)(C) while describing the US Policy with respect to South Asia requires to "Secure India's public announcement to conform its export control laws, regulations and policies with Australia Group and with the Guidelines, Procedures, Criteria and Control Lists of the Wassenaar Arrangement.

This is further mentioned u/s 104(g) (2)(K) (iii) & (iv) of the said Act as follows:

"Sec. 104 WAIVER AUTHORITY AND CONGRESSIONAL APPROVAL
(g)– REPORTING TO CONGRESS
(2) – IMPLEMENTATION AND COMPLIANCE REPORT –
Not later than 180 days after the date on which an Agreement for Cooperation with India arranged pursuant to section 123 of the Atomic Energy Act of 1954 (42 U.S.C. 2153) enters into force and annually thereafter, the President shall submit to the appropriate congressional committees a report including:
(K) a detailed description of efforts and progress made toward the achievement of India's
(i) ---
(ii) ---
(iii) public announcement of its decision to conform its export control laws, regulations and policies with Australia Group and with the Guidelines, Procedures, Criteria and Control Lists of the Wassenaar Arrangement.
(iv) effective implementation of the decision described in clause (iii)."

It must be kept in mind that the 123-Agreement is pursuant to the US Atomic Energy Act of 1954 flowing through The Hyde Act 2006. The Australia Group is an informal group of 41 countries established in 1985 to control the spread of chemical and biological weapons. The Wassenaar Arrangement also known as "The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies" is a convention established in 1996 with a current membership of 41 countries, essentially the same as those in the Australia Group except that the Russian Federation and South Africa are replaced by Cyprus and the European Commission in the Australia Group and that this arrangement relates to conventional weapons. India is not a signatory to either of these but The Hyde Act 2006 appears to mandate India's accession to both these pacts under the 123-Agreement by bringing into its fold the above-mentioned recital clauses containing the word 'WMD' not being specifically defined therein. In this connection it may be mentioned that in *Jones Apparel Group, Inc. vs Polo Ralph Lauren Corp*[4], the US Court held that recitals in a contract are not part of operative agreement "and at most indicate but

the purposes and motives of the parties"[5]. The Supreme Court of India in *Narayanan vs Kumaran and Ors*[6], on the other hand, has held that if the circumstances may demand otherwise, when intention of the parties is clear, the schedule to the document should not be allowed to override the recital clause. Thus, one would be inclined to infer from the above-mentioned recital clauses in the preamble of the agreement that India's commitment to these pacts becomes mandatory once the Indo-US Bilateral 123-Agreement is executed, since the intention of the parties herein is ambiguous and is not confined to nuclear weapons but to all weapons of mass destruction encompassing the conventional, chemical and biological warfare devices. This may be interpreted by Indian opponents of the agreement as a sinister move to double-check on India since India has already signed and ratified the respective UN Conventions on Conventional Weapons[7] (CCW), Biological Weapons[8] (CBW) and Chemical Weapons[9] (CWC).

3 Raison d'être

Great controversy has arisen in India about the relevance of The Hyde Act 2006 to the India specific 123-Agreement in respect of Article 2.1 of the Agreement which states:

> "Article 2.1-SCOPE OF COOPERATION: The Parties shall cooperate in the use of nuclear energy for peaceful purposes in accordance with the provisions of this Agreement. Each Party shall implement this Agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes."

Two schools of thought have emerged among the Indian intelligentsia. One school firmly believes that the treaties, national laws, regulations and license requirements referred to herein-above relate to the existing procedures for the implementation of the agreement per se and not to The Hyde Act 2006 or treaties such as NPT. This is fiercely contested by the other school of thought holding that Article 2.1 of the agreement obligates the parties to obey and behave in conformity with their international treaties, national laws and regulations which, in the case of the US, would be the Atomic Energy Act 1954, The Hyde Act 2006 and the NPT in addition to other normal procedural requirements for nuclear trade.

In this connection it would be prudent to recapitulate the circumstances culminating in the text of the 123-Agreement. Any nuclear trade into which the US may agree to enter with another country has to be in accordance with Section 123 of the Atomic Energy Act 1954 which provides separate methodologies for a 123-Agreement with a non-nuclear weapons country, whether it be a signatory to the NPT or a non-signatory to the NPT accepting full scope IAEA Safeguards. India is very uniquely placed, being a non-signatory to the NPT but possessing nuclear weapons. It has accepted only voluntary IAEA safeguards for some of its nuclear establishments. In addition, India has not been and cannot be designated as a Nuclear Weapon country under Article IX(3) of the NPT which requires that India should have manufactured and exploded a nuclear weapon or any other nuclear explosive device prior to 1st January 1967. However, India's first nuclear device was a PNE in 1974 and, later in 1998, India conducted a series of explosions including a thermonuclear device. Hence, India does not fall into either group as designated herein-above under the Atomic Energy Act 1954. Still, the US Atomic Energy

Act 1954 is amenable to waivers granted by the US President but conditions for such waivers are very stringent. The Hyde Act 2006 was actually enacted to allow the US President certain waivers for nuclear trade with India having a unique position as mentioned above. It cannot, therefore, be denied that the proposed Indo-US Bilateral 123-Agreement under section 123 of the Atomic Energy Act 1954 flows through The Hyde Act 2006. In the circumstances, India may not be directly obligated to the provisions of The Hyde Act but the US certainly is. Hence, all legal requirements, licenses and export authorisations from the US government in respect of nuclear trade with India ought to be governed by The Hyde Act 2006, including the various other compliance provisions such as the certifications by the US President to appropriate congress committees as provided u/s 104(g) of The Hyde Act, the consequential implications whereof are discussed herein below.

The above contention becomes clear from a comparison of this agreement with Article 2.1 of the Sino-US 123 agreement that describes:

> "The parties recognise, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[10]

This provision is conspicuously missing in the 123-Agreement with India. Hence while the Sino-US Agreement is governed by the principles of international laws, the implementation of the present agreement will be subject to the provisions of The Hyde Act 2006 and the Atomic Energy Act 1954.

3 Fuel supply assurances

The supply of nuclear fuel to India as and when required is assured under Article 5.4 of the agreement that states:

> "The quantity of nuclear material transferred under this Agreement shall be consistent with any of the following purposes: use in . . . or operation of reactors for their lifetime. . ."

Under Article 5.6(a) this assurance is established further as:

> "The US has conveyed its commitment to the reliable supply of fuel to India . . . the US has also affirmed its assurances to create the necessary conditions for India to have assured and full access to fuel for its reactors."

and

> ". . . the US is committed to working with friends and allies to adjust the practices of the Nuclear Suppliers Group to create the necessary conditions for India to obtain full access to the international fuel market, including reliable, uninterrupted and continual access to fuel supplies from firms in several nations."

So far as a continual fuel supply for the operational requirements of the Indian nuclear reactors is concerned it is, apparently, assured. However, the assurance of the continual fuel supply from the US thus given in the 123-Agreement may not fructify in view of the provisions of Section 102(13) of The Hyde Act 2006 which provides:

> ". . .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 the US law."

With respect to fuel reserves the story is different. Firstly, Article 2.2.(e) in the 123-Agreement provides that the parties may pursue cooperation in all relevant areas to include:

> "Development of a strategic reserve of nuclear fuel to guard against any disruption of supply over the lifetime of India's reactors."

Article 5.6(b)(iii) further assures on strategic reserves for reactor fuels as follows:

> "The US will support an Indian effort to develop a strategic reserve of nuclear fuel to guard against any disruption of supply over the lifetime of India's reactors."

Also Article 5.6(b)(iv) further states:

> "If despite these arrangements, a disruption of fuel supplies to India occurs, the US and India would jointly convene a group of friendly supplier countries to include countries such as Russia, France and the UK to pursue such measures as would restore fuel supply to India."

These provisions in the 123-Agreement will have to be read with Section 103 (b)(10) of The Hyde Act which is relevant:

> "Any nuclear power reactor fuel reserve provided to the Government of India for use in safe-guarded civilian nuclear facilities should be commensurate with reasonable operating requirements."

This has to be further read with the Joint Explanatory Statement of The Committee of Conference describing the Background and Need for the Legislation (page 12) where it is specifically mentioned that:

> ". . . US Officials testified, however, that the US does not intend to help build a stockpile of nuclear fuel for the purpose of riding out any sanctions that might be imposed in response to Indian actions such as conducting another nuclear test. . . .. They endorse the Senate proposal, however, that there be a clear US policy that any fuel reserve provided to India should be commensurate with normal operating requirements for India's safeguarded reactors."

This contention is further strengthened from the carefully worded Article 4.1 of the 123-Agreement as:

> ". . . The parties recognise that reliability of supplies is essential to ensure smooth and uninterrupted operation of nuclear facilities and that industry in both the Parties needs continuing reassurance that deliveries can be made *on time* (emphasis intended) in order to plan for the efficient operation of nuclear installations."

In view of these circumstances the assurances on fuel reserves for the lifetime of the reactors can be highly debatable, in spite of what has been incorporated into Article 5.6(b)(iii) of the agreement as mentioned above.

Hence, except for fuel reserves, the assurances only for normal supplies of nuclear fuel for safeguarded reactors against disruption due to market constraints in the US are contained in the 123-Agreement under Article 5.6(a) & (b). However, many of these provisions appear either casually phrased or relate to uncertain futuristic events. For instance, Article 5.6(b)(i) of the 123-Agreement states:

> "The US is willing to incorporate assurances regarding fuel supply in the Bilateral US-India agreement on peaceful uses of nuclear energy under Section 123 of the US Atomic Energy Act which would be submitted to the US Congress."

The said casualness can be found in this paraphrasing which appears to have been finalised much before the 123-Agreement was actually drafted. In a similar manner, the text of Article 5.6(a) too seems to have been written even before the enactment of The Hyde Act 2006 as it states

> ". . . The US is committed to seeking agreement from the US Congress to amend its domestic laws . . ."

which had been done much before the text of the 123-Agreement was finalised on 22nd July 2007.

The uncertainty of a future event is evident in the Article 5.6(b)(iv) of the 123-Agreement which states:

> ". . . the US and India would jointly convene a group of friendly supplier countries to include countries such as Russia, France and the UK to pursue such measures as would restore fuel supply to India. . ."

This paraphrasing also seems to have been done much earlier since it forms a part of the statement made by the Indian Prime Minister in parliament on 7th March 2006. Additionally, Article 5.6(b)(ii) is equally an uncertain event to occur and has been drafted as forming part of the Prime Minister's statement of 7th March 2006 as:

> "The US will join India in seeking to negotiate with the IAEA an India-Specific fuel supply agreement."

The Indian critics of the Indo-US 123-Agreement have termed such paraphrasing in the agreement as sugar coated and eye-wash.

5 Safeguards

Undoubtedly India and the US have affirmed their strong support for the objectives of the IAEA and its safeguard system in the preamble of the 123-Agreement. Even though India is not a signatory to the NPT, it has accepted voluntary IAEA safeguards to some of its present nuclear establishments and also committed for those declared as civilian nuclear centres under the separation plan that was presented to the Indian Parliament on 7th March 2006 and, later, in greater detail on 11th May 2006. Needless to say, the separation plan was a prerequisite for a waiver of authority and congressional approval under section 104(b)(1) of The Hyde Act 2006 but the separation plan per se gets no mention in the 123-Agreement except for Article 5.6(c) which mentions it indirectly as:

> "In the light of the above understandings with the US, an India specific safeguards agreement will be negotiated between India and IAEA providing for safeguards to guard against withdrawal of safeguarded nuclear material from civil use at any time . . .. Taking this into account, India will place its civilian nuclear facilities under India-specific safeguards in perpetuity and negotiate an appropriate safeguards agreement to this end with the IAEA."

This is, in fact, a necessary requirement under Section 104(b)(2) of The Hyde Act 2006 for the grant of waiver authority and the congressional approval.

The details of safeguards as provided under Article 10 of the 123-Agreement relate to the nuclear material, equipment and all special materials transferred under the agreement. It may suffice to quote Article 10.2 as:

> "Taking into account Article 5.6 of this Agreement, India agrees that nuclear material and equipment transferred to India by the USA pursuant to this Agreement and any nuclear material used in or produced through the use of nuclear material, non-nuclear material, equipment or components so transferred shall be subject to safeguards in perpetuity in accordance with the India-specific Safeguards Agreement between India and the IAEA (identifying data) and an Additional Protocol, when in force."

From the above, one would infer that the safeguards have to be in perpetuity in respect of the material, equipment and/or technology transferred to India under the present agreement or similar derived therefrom and also in respect of the civilian nuclear establishments declared by India under the separation plan for all times to come. This commitment remains even after the determination of the 123-Agreement by efflux of time (40 years + additional periods of ten years each under Article 16.2) or by it being suspended or prematurely terminated by either party for any reasons.

Article 10.4 of the 123-Agreement provides contingencies when IAEA may find it difficult to execute the safeguards programme in India. It states:

> "If IAEA decides that the application of safeguards is no longer possible, the supplier and recipient should consult and agree on appropriate verification measures."

This article flows from of The Hyde Act 2006 under section 104(d)(5)(B)(iii) wherein it is provided as under:

> "Nuclear Export Accountability Program Measures – The measures taken pursuant to subparagraph (A) shall include the following: "In the event the IAEA is unable to implement safeguards as required by an agreement for cooperation arranged pursuant to section 123 of the Atomic Energy Act of 1954 (42USC 2153), appropriate assurance that arrangements will be put in place expeditiously that are consistent with the requirements of section 123a.(1) of such Act (42USC 2153(a)(1) regarding the maintenance of safeguards as set forth in the agreement regardless of whether the agreement is terminated or suspended for any reason."

The explanatory statement on The Hyde Act 2006 emphasises continued existence of the safeguards regardless of whether the agreement is terminated or suspended by any party for any reason. The act further requires assurances that 'fall-back safeguards' to exist in perpetuity will be an essential feature of any agreement as provided in one or more of such US agreements for cooperation with other countries.

Thus, Article 10.4 anticipates only consultations between the pParties for continuing the safeguards in the event the IAEA fails to fulfill its obligations. Apprehensions abound in India that if the IAEA failed to implement the safeguards for reasons, say, of a shortage of inspecting personnel or finances, will the US then depute its own experts/inspectors for the purpose? This apprehension arises, rightly or wrongly, particularly from the second part of Article 12(3) of the agreement which states:

> "When execution of a agreement or contract pursuant to this Agreement between Indian and US organisations requires exchanges of experts, the Parties shall facilitate entry of experts to their territories and their stay therein consistent with national laws, regulations and practices. When other cooperation pursuant to this Agreement requires visits of experts, the Parties shall facilitate entry of the experts to their territory and their stay therein consistent with national laws, regulations and practices."

It is doubtful if India has its own trained experts/inspectors to cooperate with the US experts who may have to do it alone.

6 Termination and cessation of cooperation

Article 14 of the 123-Agreement specifies conditions for termination of the cooperation between the two parties wherein either party may terminate it on one year's written notice, providing the reasons for seeking such termination. In that event, the parties shall consider the relevant circumstances and promptly hold consultations to address the reasons cited therein. If a mutually acceptable resolution of outstanding issues has not been possible or cannot be achieved through consultations, the party seeking termination has the right to cease further cooperation under the agreement. In any case, the agreement shall stand terminated one year after the date of notice for termination. It is further provided under Article 14.3 that, following the cessation of the cooperation, either party shall have the right to require the return by the other party of any nuclear material, equipment etc. transferred under the agreement. It is to be noted that all legal obligations pertaining to the agreement shall cease except those relating to the safeguards and other related issues which shall apply with respect to any nuclear items still remaining on the territory of the party concerned.

It is further provided in the agreement that either party exercising the right of return promptly shall compensate, prior to removal of items, that party for their fair market value and for the costs of such removals. However the quantification of the fair market value may become a matter of great dispute.

It ought to be further mentioned here that in a nuclear reactor the material which would be removed (i.e. fuel) on cessation of the agreement may constitute only a minor part of the total cost of the reactor but, on its removal, the rest of the building structure, equipment and other auxiliary establishments associated with the nuclear reactor shall be rendered permanently idle and wasted. The 123-Agreement does not provide for equitable and justifiable damages.

It is significant that the 123-Agreement does not specifically mention nuclear tests as cause of termination of the cooperation but it is enshrined in The Hyde Act and the US Atomic Energy Act of 1954.

7 Certification and reporting to the congress

As provided under The Hyde Act 2006, the determination and waiver provisions are extinguished after the enactment of the 123-Agreement through the joint resolution but the US President is still required under section 104(g)(2) of the act to keep appropriate congressional committees fully and currently informed of almost all nuclear activities of India, including those in subsection (H) relating to the amount of uranium mined and milled in India; the amount of such uranium that has likely been used or allocated for the production of nuclear explosive devices and the rate of production in India of fissile material for nuclear explosive devices and nuclear explosive devices per se. It need not be emphasised that such information is normally confidential under the domestic law of India and Article 3.4 of the agreement also provides that:

> "Restricted data as defined by each Party shall not be transferred under this Agreement."

Thus, authentic information on India's nuclear activities to be submitted by the US President to the appropriate committees is only possible when India amends its Atomic Energy Act 1962. Until such time, will the 123-Agreement remain non-operational?

Under The Hyde Act 2006, it is further mandatory for the US President that within 180 days after the date on which 123-Agreement enters into force, the President shall submit to the appropriate congressional committees a report as to whether India is in full compliance with the commitments and obligations contained in the agreement and other documents referenced in clauses (i) to (vi) of para (1)(A) and whether India is fully and actively participating in the US and international efforts to dissuade, isolate and, if necessary, sanction and contain Iran for its efforts to acquire weapons of mass destruction, including nuclear weapons capability . . . including a description of the specific measures that India has taken in this regard and, if not, assessed what measures US Government has taken to secure India's full and active participation in such efforts.

The Hyde Act 2006, as well as the 123-Agreement, is silent on what would happen in an unfortunate event of India being found and reported by the US President to the congressional committees as lacking in compliance with its aforesaid commitments and obligations and also being adamant in attitude to change its foreign policy or the nuclear policy in conformity with the US policy. Once again, until then will the 123-Agreement remain non-operational?

8 Uncertainties in the 123-Agreement

8.1 Sensitive nuclear technology

Although the 123-Agreement has basically evolved on the understandings expressed in the India-US Joint Statement of July 18, 2005 to enable full civil nuclear energy cooperation between the two parties, it falls short of a full nuclear cooperation since it provides nothing in respect of sensitive nuclear technology, heavy water production technology, sensitive nuclear facilities, heavy water production facilities and major critical components of such facilities which may be transferred pursuant to an amendment (yet undecided) to the present agreement. Article 5.2 of the Agreement provides that this agreement may be amended for the aforesaid purposes if the parties so agree and then the amendment shall

enter into force on the date on which the parties exchange diplomatic notes informing each other that their respective internal legal procedures necessary for the entry into force have been completed. It is to be presumed that, when the sgreement is finally enacted by the joint resolution as mentioned above, the amendment of the sgreement shall require the same path to be followed.

8.2 Duel use technology

Article 5.2 in the 123-Agreement excludes its applicability to 'dual use' items that could be used in enrichment, reprocessing or heavy water production facilities and the transfer of these items will be subject to the parties' respective applicable laws, regulations and license policies. This is seen as a short fall in the aspirations contained in the Joint Statement dated 18th July 2005.

8.3 Fuel reprocessing

The major achievement claimed by the Indian negotiators is contained in Article 6(iii) of the agreement which relates to the prior

> ". . . consent to reprocess or otherwise alter in form and content nuclear material transferred pursuant to this Agreement and nuclear material and by-product material used in or produced through the use of nuclear material, non nuclear material, or equipment so transferred."

India has hardly any reason to rejoice on it since the said article further continues:

> "To bring these rights into effect, India will establish a new national reprocessing facility dedicated to reprocessing safeguarded nuclear material under IAEA safeguards"

but the uncertainty glares when the sentence continues

> "and the parties will agree on arrangements and procedures under which such reprocessing or other alteration in form or content will take place in this new facility."

The parties are yet to agree on arrangements and procedures and consultations thereon "shall begin within six months of a request by either party and will be concluded within one year". It must be kept in mind that, practically, it is India and not the US which would make the 'request' for consultations on the arrangements and procedures after having established the said national reprocessing facility at enormous cost. As mentioned above, if the 'consultations' fail, there being no other further alternative remedy available to India in the 123-Agreement, India could only cry foul. Whether IAEA safeguards yet to be negotiated will provide some relief in this respect is a matter of speculation.

8.4 Dispute settlement

Article 15 in the agreement provides:

> "Any dispute concerning the interpretation or implementation of the provisions of this Agreement shall be promptly negotiated by the Parties with a view to resolving that dispute."

Disputes are bound to occur, be it because of the IAEA's failure to implement safeguards (paragraph 5), on the fair market price of the material being returned (paragraph 6) or on account of any other reasons and in all cases the 123-Agreement provides for consultations between the parties. The procedure for initiating and conducting 'consultations' has been laid down under Article 13 of the 123-Agreement. In the unfortunate event of consultations failing, there is no further provision in the agreement for the dispute redressal. It is pertinent to mention that the cardinal principle of law requires that disputes should be, firstly, settled by mutual consultations, failing which by conciliation where a third party intervenes and tries to work out a solution by discussing with the concerned parties separately. If that also fails, the process of mediation is adopted where a third party discusses the issues together with the disputants and seeks an amicable solution, failing which arbitration is the next step followed by adjudication before a proper court of law. The dispute settlement under the 123-Agreement contemplates consultations/ negotiations and no further steps.

9 Conclusions

It would be prudent to presume that the 123-Agreement flows from the Atomic Energy Act 1954 through The Hyde Act 2006 and, once the agreement is formalised in the US after the joint resolution, the waiver granted to the US President gets exhausted while the other provisions of the act survive. Hence, any amendment to it thereafter would be governed by the provisions of the 1954 Act and any US trade with India in nuclear field shall then be regulated as per the provisions in agreement read with the Atomic Energy Act 1954 in view whereof the possibility of nuclear fuel reserves for the lifetime of India's reactors remains questionable.

Termination of the agreement is, theoretically, open to either party but, in practice, it would be India at the receiving end which may face the brunt of fuel supply disruptions. Having made huge investments in infrastructures in nuclear establishments and with the Damocles sword of right of return of the material to the supplier hanging over its head, India gets into double jeopardy, firstly, financial wastage in creating the infra-structures and, secondly, accepting the IAEA safeguards in perpetuity, which India has so far been avoiding by not signing the NPT.

The dispute settlement methodology being confined only to consultations between the parties, the agreement is silent on further remedies if the mutual consultations do not materialise into an amicable settlement.

For a sustained successful nuclear trade between the parties under the agreement, India is unwittingly obliged to several other non-nuclear policy commitments through The Hyde Act even though the 123-Agreement conspicuously does not mention any of these in particular.

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