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THE U.S.-INDIA STRATEGIC NUCLEAR PARTNERSHIP: A DEBILITATING BLOW TO THE NON-PROLIFERATION REGIME

INTRODUCTION

In July of 2005, the United States and India announced their cooperative agreement on nuclear proliferation. Policy analysts see this development as a *realpolitik* move by the United States in balancing an increasingly competitive China.¹ As a legal matter, this agreement raises compelling issues about the United States' compliance with the 1968 Nuclear Non-Proliferation Treaty ("NPT")² and India's status as a legally "unrecognized" nuclear weapons state ("NWS").³ Interestingly, by the terms of the NPT and pursuant to statutory law of the United States, "non-nuclear weapon states" as recipients of nuclear transfers need not be parties to the NPT or other arms control agreements.⁴ Under U.S. law,

1. George Perkovich, *Policy Outlook: Faulty Promises*, Carnegie Endowment for International Peace, Sept. 2005, at 1, available at <http://www.carnegieendowment.org/files/PO21.Perkovich.pdf>.

2. Multilateral Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]; see also United Nations [U.N.], Treaty on the Non-Proliferation of Nuclear Weapons, <http://www.un.org/Depts/dda/WMD/treaty> (last visited Mar. 10, 2008). The U.N. explains that:

[t]he NPT is a landmark international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Opened for signature in 1968, the Treaty entered into force in 1970. A total of 187 parties have joined the Treaty, including the five nuclear-weapon States. More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the Treaty's significance.

Id.

3. Article IX of the NPT defines a nuclear weapon state ("NWS") as one that had "manufactured or exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967." NPT, *supra* note 2, 21 U.S.T. at 494, 729 U.N.T.S. at 172. India conducted a "peaceful" nuclear test in 1974. See *infra* notes 66–80 and accompanying text.

4. Article IV(1) of the NPT recognizes the "inalienable right of all Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination. . . ." The pertinent portion of paragraph 2 reads,

Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together *with other States* or international organizations to the further development of the applications of nuclear energy for peaceful purposes, espe-

pursuant to the Atomic Energy Act of 1954, the main requirement for allowing nuclear exports is that the recipient state bring all its peaceful nuclear activities under International Atomic Energy Agency ("IAEA") safeguards.⁵ Even this requirement can be waived by a presidential determination that adhering to the policy would be "seriously prejudicial to achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security."⁶ India was a beneficiary of this exemption in the past and the proposed U.S.-India nuclear cooperation agreement would, in effect, be a permanent exemption.⁷

Proponents of the agreement argue that it will enhance India's compliance with non-proliferation in exchange for the promises of nuclear trade liberalization between the two countries.⁸ Thus, the effects of this agree-

cially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing world.

NPT, *supra* note 2, 21 U.S.T. at 491, 729 U.N.T.S. at 169 (emphasis added). This paragraph makes it clear that parties to the NPT can further nuclear development in non-party states without violating the treaty particularly in light of the special allowance made for non-NWS in the final clause. *Id.*

The United States echoes this policy in its statutory law. *See* Nuclear Non-Proliferation Act of 1978 § 203, 22 U.S.C. § 3243 (2006) (paragraph 1 expresses the need to adopt principles and procedures in the event that a nation violates any "material obligation" with respect to the peaceful use of nuclear materials" and expressly distinguishes NPT party states as a subset of those who would be eligible for peaceful use of nuclear energy).

5. Atomic Energy Act of 1954, 42 U.S.C. § 2153 (2006) (allowing for cooperation with "non-nuclear weapon states" provided that they maintain International Atomic Energy Agency ("IAEA") safeguards, discussed *infra*, on all nuclear materials in all peaceful activities within their territory). The IAEA was established in 1957 amidst growing fears of a global nuclear war and took root in President Eisenhower's famous "Atoms for Peace" speech. International Atomic Energy Agency [IAEA], About IAEA, <http://www.iaea.org/About/index.html> (last visited Nov. 29, 2006). Currently, the IAEA promulgates standard "safeguards" that protect against the diversion of nuclear materials into bomb-making uses:

The IAEA inspects nuclear and related facilities under safeguards agreements with more than 140 States. Most agreements are with States that have internationally committed themselves not to possess nuclear weapons. They are concluded pursuant to the global Treaty on the Non-Proliferation of Nuclear Weapons (NPT), for which the IAEA is the verification authority.

IAEA, Our Work, <http://www.iaea.org/OurWork/SV/index.html> (last visited Mar. 10, 2008).

6. 42 U.S.C. § 2153 (a)(9).

7. India's past exemption is discussed *infra* in Part I.

8. *Hearing on U.S.-India Civil Nuclear Cooperation Initiative: Prepared Remarks before the S. Foreign Relations Comm.*, 109th Cong. (2005) (statement of Robert G. Jo-

ment can be cast in a light that heralds the addition of a major nuclear weapons state into the broader non-proliferation regime.⁹ Conversely, the agreement can be construed as a threat to the already weak international ordering of nuclear non-proliferation given that India is not a signatory to the NPT and therefore does not bear the same international obligations that were undertaken by the five recognized nuclear weapons states (“NWS”).¹⁰

Part I of this Note will examine the terms of the India-U.S. nuclear deal and consider potential obstacles to implementing the terms in light of existing IAEA safeguards. The analysis will employ the theory of international regimes, which envisions states developing “shared expectations of behavior” that lead to “consistent practices converging around specific principles, norms, rules, and decision-making procedures.”¹¹ Adopting the regime theory as a model, this Note argues that India’s behavioral patterns in the nuclear-proliferation arena have demonstrated its unwillingness to share in the principles embraced by the non-proliferation regime and therefore the U.S.-India agreement is a premature liberalization of nuclear-trade when it is not remotely apparent that India intends to commit itself to the ambitious goals of the NPT.

Second, because the agreement is a bilateral measure between India and the United States that stands apart from the multilateral non-proliferation community, the enforceability of treaties and agreements within that regime will become severely undermined if due care is not taken to assure the remainder of states that those agreements still reflect the policy goals common to the major NWS. Specifically, Part II will emphasize the U.S. withdrawal from the Anti-Ballistic Missile Treaty (“ABMT”)¹² and its failure to ratify the 1996 Comprehensive Test Ban

seph, Under Sec’y for Arms Control and Int’l Sec., Dep’t of State), available at <http://www.state.gov/t/us/rm/55968.htm>.

9. “Most recognize the need to come to terms with India and not to allow it to remain completely outside the international non-proliferation system.” *Id.*

10. The big five NWS are: United States, Russia, United Kingdom, France, and China. One such obligation common to all NWS is the cessation of production of fissile materials (discussed *infra*) for weapons purposes. Perkovich, *supra* note 1, at 8.

11. Edward M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1592 (1991) (discussing the utility of international regime theory and domestic relational theory to supplement existing consent-based rules with the hope of understanding state compliance with/defection from evolving international obligations).

12. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435 [hereinafter ABMT] (bilateral treaty limiting the United States and Soviet Union from employing missile defense systems that would spur on their offensive weapons race discussed in detail *infra* Part II).

Treaty ("CTBT").¹³ It will also highlight India's conspicuous rejection of all relevant multilateral nuclear arms instruments. In light of these two behavioral patterns, the U.S.-India partnership is a stark rejection by both states of international customary law that embraces the brokering of nuclear-weapons-free zones ("NWFZs") and multi-lateral disarmament measures.¹⁴ Part II of this Note will utilize Professor Thomas M. Franck's¹⁵ theory of legitimacy among nations to argue that the liberalization of nuclear trade between the two states has the potential to undermine the legitimacy of existing multilateral nuclear-weapons free zones in two distinct ways: 1) by establishing a practice that is inconsistent with and rationally unexceptionable from the customary practice of states entering multilateral agreements on non-proliferation, hence undermining the regime's coherence¹⁶ and 2) by contravening the expectations of

13. Comprehensive Test Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439 [hereinafter CTBT] (multilateral treaty banning the testing of any nuclear explosive device yet to enter into force due to its strict entry-into-force provision discussed in detail *infra* Part II).

14. The nuclear-weapons-free zones ("NWFZs") discussed in this Note are not representative of all such agreements now in existence. In addition to the 1968 Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 6 I.L.M. 521 [hereinafter Treaty of Tlatelolco] and the 1985 South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 24 I.L.M. 1442 [hereinafter Treaty of Rarotonga] (discussed in Part II *infra*), the following treaties have established NWFZs: Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 1961 WL 62657 (U.S. is a party and has ratified, India has acceded); Treaty on the Southeast Asia Nuclear Weapon-Free Zone, *opened for signature* Dec. 15, 1995, 35 I.L.M. 635 (entered into force 1997 after ratifications by Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. The Protocol inviting a non-use promise of nuclear weapons against states party to the treaty has not been signed or ratified by any of the five official NWS); African Nuclear Weapons Free Zone Treaty, *opened for signature* Apr. 11, 1996, 35 I.L.M. 698 (conducted under the auspices of the Organization of African Unity ("OAU"), this treaty will enter into force upon the deposit of the twenty-eighth instrument). As of November 2005, there were twenty ratifications and the United States has signed but not ratified the non-use Protocol. See List of Countries That Have Signed, Ratified/Acceded to the African NWFZ Treaty, http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Pelindaba%20Treaty.pdf (last visited Mar. 10, 2008). For recent updates on the status of various NWFZs, see Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, <http://www.opanal.org> (last visited Mar. 10, 2008).

15. Thomas Franck is considered one of the leading scholars in international legal theory and is a Murry and Ida Becker Professor of Law Emeritus at New York University. New York University Faculty Profiles, <http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=bio.main&personID=19925> (last visited Mar. 10, 2008).

16. "[W]hen states do not act consistently, no principle of general application appears on the surface of what looks like an erratic pattern of conduct. States may thus conclude that there is, and can be, no legitimate rule to command their adherence." THOMAS M.

states party to such agreements, bringing into question the determinacy of rules that structure relationships between NPT and non-NPT signatories, and ultimately decreasing the non-proliferation regime's "compliance-pull."¹⁷

Third, the U.S.-India agreement must be read in the context of the yet-to-be-resolved conflict between India and its bitter rival, Pakistan.¹⁸ In the context of the current agreement, because Pakistan is likewise a non-signatory of any international non-proliferation treaties and China is widely recognized as having furthered proliferation in Pakistan, there is no reason to believe that a similar cooperative agreement could not emerge between Pakistan and China to balance the U.S.-India alignment.¹⁹ Alternatively, even if such a formal agreement were implausible, the very existence of a U.S.-India partnership gives Pakistan a substantial incentive to surreptitiously pursue illicit proliferation measures to assuage its security concerns.²⁰ This would certainly not be uncharacteristic of Pakistani behavior in the realm of nuclear arms given that the Pakistani government infamously enabled A.Q. Khan to engineer his illicit nuclear arms smuggling ring.²¹ Part III of this Note will analyze the U.S.-India agreement through the lens of the game theory model, the pris-

FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 174 (Oxford Univ. Press 1990) (explaining that coherent application of a rule plays a vital role in shaping perceptions of the rule's legitimacy).

17. *Id.* at 42–43.

18. The animosity between the two states dates back to the Partition of 1947 following the British withdrawal from its colonial seat, which divided the sub-continent into the Islamic Nation of Pakistan and a secular India. This Note will not delve into the details of Indo-Pakistani tensions but rather highlight the imprudence of the U.S.-India nuclear partnership in light of this regional dilemma. See *India-Pakistan: Troubled Relations*, BBC NEWS, http://news.bbc.co.uk/hi/english/static/in_depth/south_asia/2002/india_pakistan/timeline/default.stm (last visited Mar. 10, 2008) (providing a brief timeline that describes the above stated events in more detail).

19. In fact, certain technology transfers between China and Pakistan may very well already be "grandfathered in" as a response to the U.S.-India partnership. See discussion *infra* notes 175–178 and accompanying text.

20. Indo-Asian News Service, *Pakistan Nuclear Authority Concerned Over US-India Deal*, YAHOO! INDIA NEWS, Apr. 12, 2006, <http://in.news.yahoo.com/060412/43/63i3u.html>. See also Seema Sridhar, *India-US Defence Agreement: Impact on Indo-Pak Peace Process*, INSTITUTE OF PEACE AND CONFLICT STUDIES, July 28, 2005, http://www.ipcs.org/Pak_articles2.jsp?action=showView&kValue=1817&country=1016&status=article&mod=a.

21. Commander Kevin M. Brew, *The Re-Emergence of Nuclear Weapons as "The Coin of The Realm" and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles Still Hangs by a Thread*, 52 NAVAL L. REV. 177, 191–92 (2005).

oner's dilemma.²² In this context, the primary players are India and Pakistan, regional nuclear rivals who have clashed in several wars over the past five decades and maintained low-level conflict across their shared border in the state of Kashmir. In the prisoner's dilemma, both players have an offensive incentive to defect from any agreement or understanding that intends to avoid escalation or rekindling of conflict.²³ Therefore, given this backdrop in the sub-continent, an agreement that aligns India's security interests with that of the United States can only exacerbate Pakistan's defensive incentives. Any half-hearted efforts to secure assurances from Pakistan that it will place a moratorium on production of fissile material²⁴ for nuclear weapons "would be foolhardy" given that states with an offensive incentive to defect have the concomitant incentive to mislead others about their compliance.²⁵ Thus, assurances are unsatisfactory substitutes to fill the void of international legal instruments governing weapons proliferation in the sub-continent.

Finally, this Note concludes that the U.S.-India agreement stands in stark contradiction to the international interests in non-proliferation, let alone disarmament. That is, the weaknesses of IAEA safeguards, particularly in the verification and enforcement respects, coupled with the precarious state of international non-proliferation instruments as affected by the conduct of the United States, taken in light of the regional security dilemma enmeshed in the South Asian sub-continent promise that the U.S.-India nuclear deal will, over time, undo what little progress has been made in this intractable field of international law.

I. THE U.S.-INDIA PARTNERSHIP AND THE NON-PROLIFERATION REGIME

On July 27, 2006, the United States House of Representatives supported the Henry J. Hyde United States-India Peaceful Atomic Energy

22. In this model, the players are confronted with a collective action problem in which no player can be sure what course of action the other players will take and unilateral defection from the collective purpose can produce the greatest individual benefits. Arms control presents precisely such a predicament. See discussion *infra* notes 181–204 and accompanying text. For more on game theory as applied to arms control, see Kenneth W. Abbott, "Trust but Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993).

23. *Id.* at 26.

24. Fissile material refers to the substance that results when uranium is highly enriched or plutonium is separated from the spent nuclear fuel. Both forms are used to produce nuclear weapons. See Institute for Energy and Environmental Research, Fissile Material Basics, http://www.ieer.org/fctsheets/fm_basic.html (last visited Mar. 8, 2008).

25. Abbot, *supra* note 22. Regarding U.S. policy objectives related to Pakistan and the U.S.-India nuclear deal, see United States-India Peaceful Atomic Energy Cooperation Act of 2006, H.R. 5682, 109th Cong. (2d. Sess. 2006).

Cooperation Act (“the Act”) by a majority of 359 to 68.²⁶ On November 16, 2006, the Senate passed the bill with several amendments; the overall effect of the act is to waive restrictions under the aforementioned 1954 Atomic Energy Act²⁷ and exempt India from applying full-scope safeguards (“FSS”) on all its nuclear facilities.²⁸ The significant bipartisan support this bill has enjoyed can, in part, be explained by the prospect that the contemplated partnership is slated to generate \$100 billion in energy sales for U.S. companies.²⁹

At this juncture it would be beneficial to clarify the legal standing of the partnership that the Act envisions. The agreement is not a treaty but rather a “strategic partnership.”³⁰ In order for the agreement’s terms (discussed in greater detail below) to be carried out, the United States must first amend the 1954 Atomic Energy Act excepting India from full-scope safeguard restrictions.³¹ This has virtually been accomplished as the bill awaits the President’s signature. Once amended, the United States and India would enter into what is known as a “123 cooperative agreement” under section 123 of the Atomic Energy Act, which would embody the actual terms of the deal.³² Even after domestic legislation is amended, the

26. Lea Terhune, *U.S. House of Representatives Approves U.S.-India Nuclear Deal*, U.S. DEP’T OF STATE, July 27, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=July&x=20060727121049mlenuhret3.629702e-02>. See United States-India Peaceful Atomic Energy Cooperation Act, H.R. 5682, 109th Cong. (2d. Sess. 2006).

27. 42 U.S.C. § 2153.

28. Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act, 22 U.S.C. § 8003 (2006). The bill was co-sponsored by a bipartisan contingency comprised of twelve Democrats and twenty-two Republicans. United States-India Peaceful Atomic Energy Cooperation Act 2006, Bill Tracking H.R. 5682, 109th Cong. (2d. Sess. 2006).

29. Judy Mathewson, *U.S.-India Nuclear Deal May Stall in Congress as Time Runs Out*, BLOOMBERG.COM, Sept. 22, 2006, <http://www.ransac.org/Projects%20and%20Publications/News/Nuclear%20News/2006/926200693510AM.html#2G>.

30. Office of the Press Secretary, Fact Sheet: United States and India: Strategic Partnership, Mar. 2, 2006, <http://www.whitehouse.gov/news/releases/2006/03/20060302-13.html>; Telephone Interview with Katherine Schultz, India Affairs, U.S. Dep’t of State, in Washington, D.C., [hereinafter Shultz Interview] (Nov. 9, 2006).

31. Schultz Interview, *supra* note 30.

32. *Id.* Schultz expressed that the agreement would not be a promise of unrestricted trade in nuclear technology. This suggests the agreement is less than a binding exchange of promises but rather an exchange of conditional assurances. The danger in this arrangement is if India is found to be non-compliant with the terms and the United States suspends or terminates performance under section 129 of the Atomic Energy Act, India could argue that its facilities are no longer legally bound to IAEA safeguards. This fear was prevalent during the previous U.S.-India nuclear cooperation agreement that supplied technology to the Tarapur reactors, discussed *infra* notes 67–80 and accompanying text). See also Atomic Energy Act § 129.

Nuclear Suppliers Group (“NSG”), a forty-five state consortium dedicated to the cessation of the spread of nuclear weapons would have to unanimously agree to except India from its policy proscribing transfers of atomic fuel and other nuclear technologies to states that are not party to the NPT or other non-proliferation instruments and have not adopted FSS.³³

While the likelihood of the NSG enthusiastically approving this agreement is debatable,³⁴ there is an unquestionable need for solemn reflection on the partnership’s legal implications for the non-proliferation regime. According to Esther Pan of the Council on Foreign Relations, the agreement consists of the following terms:

1. India agrees to allow inspectors from the International Atomic Energy Association (IAEA), the United Nations’ nuclear watchdog group, access to its civilian nuclear program. But India would decide which of its many nuclear facilities to classify as civilian. . . . Teresita Schaffer, director of the South Asia program at the Center for Strategic and International Studies, says these will now include domestically built plants, which India has not been willing to safeguard before now. Military facilities—and stockpiles of nuclear fuel that India has produced up to now—will be exempt from inspections or safeguards.
2. India commits to signing an Additional Protocol—which allows more intrusive IAEA inspections—of its civilian facilities.
3. India agrees to continue its moratorium on nuclear weapons testing.
4. India commits to strengthening the security of its nuclear arsenals.
5. India works toward negotiating a Fissile Material Cutoff Treaty (FMCT) with the United States banning the production of fissile material for weapons purposes. India agrees to prevent the spread of enrichment and reprocessing technologies to states that don’t possess them and to support international non-proliferation efforts.

33. Schultz Interview, *supra* note 30. To reiterate, full-scope safeguards (“FSS”) signify the oversight of the IAEA on all peaceful nuclear activities of a state and obtain the result of monitoring the use of spent nuclear fuel to ensure that it is not being diverted for weapons production. International Atomic Energy Agency [IAEA], Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, INFCIRC/254/Rev.8/Part 1, Mar. 2006, at para. 4. The application of FSS to all of a state’s *peaceful* nuclear activities is effective when applied to non-nuclear weapon states because all of their nuclear capability is presumptively non-military. Because India already has nuclear weapons capability, FSS will not achieve the comprehensive oversight it is designed to impose.

34. See discussion *infra* note 174 and accompanying text.

6. U.S. companies will be allowed to build nuclear reactors in India and provide nuclear fuel for its civilian energy program.³⁵

A. Weaknesses Inherent in the IAEA Structure Will Carry Over to the U.S.-India Deal

The first term, which allows India to select the facilities that will be subject to safeguards, bespeaks of the limitations inherent in the nuclear arrangement that India and the U.S. seek to consummate. Given that the application of IAEA safeguards is predicated on a state's declaration of what is and is not a civilian (as opposed to military) facility, the declaration is unrepresentative of a state's actual production and use of nuclear materials, namely any use directed at weapons production.³⁶ This distinction between "civilian" and "military" facilities is embedded in the architecture of the IAEA and applies to all the recognized NWS, thereby entitling them to harbor un-safeguarded military facilities; this is, in effect, the regime's deference to each NWS state's sovereign right to self-defense.³⁷ While India is not bound by the NPT, the joint statement issued by the United States and India committed India "to assume the same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology, such as the United States."³⁸ Assuming that the NPT's underlying obligations can be extended to India by association, the safeguard provisions applicable to contracting parties of the NPT themselves offer significant allowances that exempt certain nuclear material from the IAEA's vigil. Paragraphs 14 and 37 of the IAEA's guidelines for safeguarding agree-

35. Esther Pan, *The U.S.-India Nuclear Deal*, Background, Council on Foreign Relations, Feb. 24, 2006, http://www.cfr.org/publication/9663/usindia_nuclear_deal.html#2.

36. In other words, classifying certain facilities as civilian and excluding others necessarily means that India intends to retain exclusive and opaque control over its military uses for nuclear materials. As mentioned *supra* at note 24, spent nuclear fuel can yield plutonium, which can then be used to produce nuclear weapons. Having thus far operated its facilities largely beyond the reach of international oversight, Esther Pan suggests that India has already accumulated significant amounts of weapons-grade material not subject to any safeguards on its future use. Pan, *supra* note 35.

37. "The safeguards system comprises measures by which the Agency independently verifies the declarations made by States about their nuclear material and activities." IAEA, About Safeguards, <http://www.iaea.org/OurWork/SV/Safeguards/about.html> (last visited Mar. 10, 2008). However, the scope of the IAEA's duty only ensures safeguards on all of a contracting state's nuclear material in all its *peaceful* nuclear activities. IAEA, The Safeguards System of the International Atomic Energy Agency, at 2, http://www.iaea.org/OurWork/SV/Safeguards/safeg_system.pdf (last visited Mar. 10, 2008).

38. Press Release, India-U.S. Joint Statement, EMBASSY OF INDIA, July 18, 2005, http://www.indianembassy.org/press_release/2005/July/21.htm.

ments allow for exemptions from safeguards at the discretionary request of a state.³⁹ Paragraph 37 imposes certain quantitative limitations on exempted nuclear materials and parties to the Additional Protocol⁴⁰ must declare the amounts, locations, and uses of such materials.⁴¹

39. Paragraph 14 reads:

The Agreement should provide that if the State intends to exercise its discretion to use nuclear material which is required to be safeguarded thereunder in a nuclear activity which does not require the application of safeguards under the Agreement, the following procedures will apply:

a. The State shall inform the Agency of the activity, making it clear:

- i. That the use of the *nuclear material* in a non-proscribed military activity will not be in conflict with an undertaking the State may have given and in respect of which Agency safeguards apply, that the *nuclear material* will be used only in a peaceful nuclear activity; and
- ii. That during the period of non-application of safeguards the *nuclear material* will not be used for the production of nuclear weapons or other nuclear explosive devices;

b. The Agency and the State shall make an arrangement so that, only while the *nuclear material* is in such an activity, the safeguards provided for in the Agreement will not be applied. The arrangement shall identify, to the extent possible, the period or circumstances during which safeguards will not be applied. In any event, the safeguards provided for in the Agreement shall again apply as soon as the *nuclear material* is reintroduced into a peaceful nuclear activity. The Agency shall be kept informed of the total quantity and composition of such unsafeguarded *nuclear material* in the State and of any exports of such material; and

c. Each arrangement shall be made in agreement with the Agency. The Agency's agreement shall be given as promptly as possible; it shall only relate to the temporal and procedural provisions, reporting arrangements, etc., but shall not involve any approval or classified knowledge of the military activity or relate to the use of the *nuclear material* therein.

The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Unofficial version INFCIRC/153 (Corrected) June 1972 [hereinafter IAEA Structure and Content] available at <http://www.iaea.org/Publications/Documents/Infcircs/index.html> (last visited Mar 10, 2008) (emphasis in original).

40. The Additional Protocol to the IAEA Safeguards Agreement, under article 5, requires party states to provide the agency with access to "any place on a *site*" where the word "site," under article 18, is defined as the location of an active or decommissioned civilian facility and any adjacent locations where nuclear materials are used or locations that are essential to serving nuclear facilities. Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corrected), International Atomic Energy Agency

By allowing a state to temporarily exempt certain materials from safeguarding and acknowledging that these materials could be diverted for “non-proscribed” military purposes, the IAEA has effectively provided every state with a loophole that could be used to legitimize activities that may in fact be directed towards weapons proliferation. This is not to say that the safeguarding system is completely impotent in carrying out its mandate. By requiring states to declare the amounts and locations of nuclear fuel circulating in their civilian facilities and allowing for intrusive inspections, the IAEA has provided for means to confirm the *accuracy* as well as *completeness* of a state’s representations.⁴² Signatories of the Additional Protocol must, pursuant to article 5, provide the IAEA with access to sites containing safeguard-exempt material or, where access is not forthcoming, must make other reasonable efforts to fulfill IAEA requirements.⁴³

B. Insufficient Attention Has Been Paid to the Legal Implications of a Stand-Alone Bilateral Agreement between India and the United States

For U.S. lawmakers and the administration, India’s good standing in the international community, which it has earned over the years, informs the decision to promote the cooperative agreement.⁴⁴ While this is not an invalid starting point, advocates of the partnership pay insufficient credence and respect to the legal implications of a stand-alone bilateral agreement with the United States that subjects India’s activities to IAEA safeguards versus obligations it would have as a party to the NPT. At first glance, one might argue that, by accepting IAEA safeguards, India has essentially been allowed in as a de facto NPT state and therefore is under the same obligations as other NWS parties. A closer comparison between the provisions of the NPT and the model safeguards agreement reveals that under a stand-alone bilateral agreement, the United States and India have left room for significant divergences from non-

available at <http://www.iaea.org/OurWork/SV/Safeguards/index.html> [hereinafter IAEA Additional Model Protocol] (last visited Mar. 10, 2008).

41. *Id.* at art. 2 (vii)(a) & (b).

42. According to the Agency, “completeness” was a factor that did not become of great concern until the discovery of Iraq’s clandestine weapons program. See IAEA, *The Safeguards System of the International Atomic Agency*, *supra* note 37, at 4.

43. IAEA Additional Model Protocol, *supra* note 40, at art. 5.

44. See *Hearing on U.S.-India Civil Nuclear Cooperation Initiative*, *supra* note 8 (“India has clearly demonstrated over the past several years its desire to work with the United States and the international community to fight the spread of sensitive nuclear technologies.”)

proliferation goals to the prejudice of the control regimes and other parties to the NPT.

Article I of the NPT reads,

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.⁴⁵

A strict constructionist interpretation of this provision would support a strong argument that the agreement can potentially bring the United States in violation of article I. As mentioned above, India is to this day, under the terms of the NPT, a "non-nuclear weapons state" since, under article IX, it did not explode a device until after January 1, 1967. If technologies acquired by India through its liberalized relationship with the United States are diverted to support its existing weapons systems or to enhance aspects thereof, the United States would be in direct violation of article I. Since nothing in the agreement indicates that India has committed to an explicit cessation of any and all development of nuclear weapons technology, such a scenario is well within the realm of probability.⁴⁶ Given the broad language of the prohibition, one could even argue that a Pakistan that is threatened by the U.S.-India alignment could be "induced indirectly" by the United States to proliferate nuclear weapons in order to increase its deterrence level. This would also be a violation of article I of the NPT.

An even more probable difficulty that could arise is the issue relating to transfers/retransfers of technology. When considering this topic, four bodies of law are relevant to the discussion: the NPT, the IAEA safeguards agreement, and the domestic export laws of the United States and India. As discussed above, article I of the NPT adopts broad language that prohibits a state from transferring nuclear weapons or other nuclear devices both directly or indirectly and prohibits "inducing" a state to acquire the same. India, as a non-party to this treaty, would not be bound by this provision. Therefore the remaining bodies of law governing its

45. NPT, *supra* note 2, U.S.T. at 488, 729 U.N.T.S. at 166.

46. In fact, part of the agreement is to pursue cooperation on issues of national security and defense. *See* Office of the Press Secretary, Fact Sheet: United States and India: Strategic Partnership, *supra* note 30 ("The United States reaffirmed its goal to help meet India's defense needs and to provide the important technologies and capabilities that India seeks.").

transfer are limited to the IAEA safeguards and provisions in U.S. and Indian export laws.

A careful scrutiny of the requirements governing transfers under the IAEA safeguards agreement indicates that the agency exercises only a post-hoc review capacity over transfer agreements between a safeguarded state and a receiving state. Paragraph 92 of the IAEA document, which promulgates requirements for safeguard agreements, reads:

The Agreement should provide that any intended transfer out of the State of safeguarded *nuclear material* in an amount exceeding one *effective kilogram*, or by successive shipments to the same State within a period of three months each of less than one *effective kilogram* but exceeding in total one *effective kilogram*, shall be notified to the Agency after the conclusion of the contractual arrangements leading to the transfer and normally at least two weeks before the *nuclear material* is to be prepared for shipping.⁴⁷

This provision clearly adopts a deferential approach to interstate transactions in nuclear materials given that it allows for the fruition of a contract before any notice is required from a state of its intentions to transfer sensitive safeguarded materials. What is more, it only allows a two week window between time of notice and delivery of such materials, within which the IAEA may take actions only to confirm the amounts of nuclear material being shipped and its destinations.⁴⁸ Furthermore, and in perhaps its most prostrate and submissive statement, the IAEA qualifies its oversight duties with this: “However, the transfer of the *nuclear material* shall not be delayed in any way by any action taken or contemplated by the Agency pursuant to this notification.”⁴⁹ If a contractual relationship comes into being and the transferor gives only two weeks notice to the relevant “authority” regarding the transfer of sensitive nuclear materials, it defies reason to maintain that the IAEA has any preventive value if it cannot stay or abate what it deems an unsafe transfer of nuclear materials. Lastly, it should not come as a surprise that a state subject to a safeguard agreement is not obligated to ensure that a recipient state of its transfers adheres to or is also subject to IAEA safeguards.⁵⁰ All that is required is that the receiving state notifies the IAEA of the successful receipt of the materials declared to have been transferred by the state of origin.⁵¹

47. IAEA Structure and Content, *supra* note 42 (emphasis in original).

48. *Id.* at para. 93.

49. *Id.* (emphasis in original).

50. *Id.* at para 94.

51. *Id.*

In light of this apparent shortcoming of the agency's oversight and review capacity, one is forced to turn to each country's domestic export laws to find a more rigid review mechanism. However, if this is conceded as the only reliable means of oversight, it is also conceded that each country is entitled to make its own authoritative interpretation of NPT article I, regardless of whether it is consistent with the NPT's goals of non-proliferation. Each country may interpret what constitutes "direct" or "indirect" transfers, whether its actions truly "assist, encourage or induce" another to acquire nuclear weapons, or even what constitutes the "manufacture" and "acquisition" of nuclear weapons. As troubling as this observation may be, whatever semblance of authority the NPT does retain would be squandered if India were allowed to "end-run" the treaty's obligations and only needed to commit to select safeguards under the IAEA. In pursuing this policy initiative, the United States has tacitly rebuffed the NPT's relevance to non-proliferation goals, thereby undermining the regime's capability to foster "shared expectations of behavior" between states and increasing the likelihood of states acting unilaterally to thwart its overall vision.⁵²

C. The U.S.-India Agreement is a Premature Liberalization of Nuclear Trade When it is not Remotely Apparent that India Intends to Commit Itself to the Ambitious Goals of the NPT Regime

Despite its weaknesses, the NPT's strength as an international legal institution derives from the widespread deference it has obtained through its ratification by 187 countries that have accepted its ambitious goals of non-proliferation, disarmament, and peaceful use of nuclear energy.⁵³ Inconsistencies in practice amounting to non-compliance do not necessitate a finding that the regime lacks legal significance.⁵⁴ However, when a state stands apart from the NPT, rejects its very architecture but nevertheless leverages the regime's visions of peaceful nuclear use to obtain materials essential to the production of nuclear weapons, one can conclude that a widely shared sense of obligation to pursue non-proliferation is not extant in the minds of Indian policymakers.

52. Smith, *supra* note 11, at 1592.

53. These goals are often referred to as the "three pillars" of the NPT. See United Nations, Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2; FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL AND DOMESTIC AFFAIRS 62-63 (Cambridge Univ. Press, 1989). For data of number of NPT ratifications, see United Nations, Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2.

54. Smith, *supra* note 11, at 1589.

In the October 1998 issue of *Foreign Affairs*, Jaswant Singh, Senior Adviser on Defense and Foreign Affairs to then Indian Prime Minister Atal Bihari Vajpayee published an article defending India's May 1998 nuclear tests. The tests had shocked the world and ushered in India as a de facto nuclear-weapons state. In explicating India's security dilemma, Mr. Singh essentially asserted India's sovereign right to employ nuclear weapons as a means to secure its national interests just as the existing five NWS had done.⁵⁵ However, this assertion was grounded in a much broader assessment of the state of nuclear weapons:

The Americas are under the U.S. nuclear deterrent as members of the Organization of American States. South Korea, Japan, and Australasia are also under the U.S. umbrella. China is, of course, a major nuclear power. Only Africa and southern Asia remain outside this new international nuclear paradigm where nuclear weapons and their role in international conduct are paradoxically legitimized. These differentiated standards of national security—a sort of international nuclear apartheid—are not simply a challenge to India but demonstrate the inequality of the entire non-proliferation regime.⁵⁶

Speaking for the entire sub-continent and the continent of Africa, Mr. Singh articulates a dangerous proposition that any state not under a nuclear “umbrella” may rightfully assert its entitlement to acquire nuclear-weapons capability. While this position is defensible under a strict positivist construction of statehood and security, the fact that South Asian countries such as Nepal and several African countries such as Cameroon and Zimbabwe have ratified the treaty indicates that “unsheltered” states feel obliged to defer to the collective decision that the proliferation of nuclear weapons is inimical to international peace and security.⁵⁷ That is, under international regime theory, the legitimacy and strength of a regime results from the “deference to *authoritative* decisions that establish[] what ‘the law’ is, or from the acceptance of norm-regulated practice.”⁵⁸ In the case of the NPT, the fact that 187 states have ratified the treaty and are bound by its provisions is indicative of an institution that

55. Jaswant Singh, *Against Nuclear Apartheid*, FOREIGN AFFAIRS, Sept-Oct. 1998 available at [http://www.indianembassy.org/pic/js/js\(foreignaffairs\).html](http://www.indianembassy.org/pic/js/js(foreignaffairs).html). The fact that this article is still available on the Indian Embassy's Web site is itself an indication of India's adherence to its position justifying its 1998 tests. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2), cmt. b (1987) (The article's availability can be construed as a diplomatic act that constitutes practice indicating its unilateral legal stance on nuclear weapons.).

56. *Id.*

57. See NPT, *supra* note 2, 21 U.S.T. at 484, 729 U.N.T.S. at 162.

58. KRATOCHWIL, *supra* note 53, at 62–63 (emphasis in original).

induces the "acceptance of decisions as authoritative . . . which have been made collectively."⁵⁹ Absent an unequivocal assent by India to the preeminent instrument governing nuclear non-proliferation or active efforts to ensure regional disarmament, a mere promise to "commit to play a leading role in international efforts to prevent the proliferation of Weapons of Mass Destruction" seems to ring hollow.⁶⁰

The third pillar of the NPT, peaceful use, is expressed in article IV, which recognizes the "inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes"⁶¹ Paragraph 2 provides for parties to "undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."⁶² The second sentence of paragraph 2 places an explicit onus on what can most readily be construed as the NWS to further development of peaceful uses of nuclear energy with an eye towards the needs of the developing areas of the world.⁶³ The striking aspect of this paragraph is that it encourages cooperation, initiated unilaterally or otherwise, between parties to the treaty and "States or international organizations" to further develop the application of peaceful nuclear energy.⁶⁴ This broad language leaves open the option for an NPT state to engage a non-NPT state in the exchange of nuclear technology. However, an NPT state that does enter such a relationship, under article III of the NPT, must ensure that any such transfer subjects the materials to IAEA FSS.⁶⁵ Therefore, strictly speaking, even if India's conduct is consistent with the peaceful uses of nuclear energy, the U.S.-India Agreement violates the NPT on its face given the inevitable absence of

59. *Id.*

60. Press Release, India-U.S. Joint Statement, *supra* note 38.

61. NPT, *supra* note 2, 21 U.S.T. at 491, 729 U.N.T.S. at 169.

62. *Id.*

63. Paragraph 2 in its entirety reads:

All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

Id.

64. *Id.*

65. NPT, *supra* note 2, 21 U.S.T at 490, 729 U.N.T.S. at 168.

FSS on India's military nuclear facilities. Even where applicable, the IAEA safeguards, as already discussed, are less than satisfactory in their verification methods. This leaves one to search for a more robust verification scheme enmeshed in the agreements made pursuant to article IV.

The United States has been down this road before with India. On August 8, 1963, the United States and India entered into the Agreement for Cooperation for Civil Uses of Atomic Energy between the United States and India.⁶⁶ The agreement was reached to facilitate the construction of a civil nuclear power plant near Tarapur in the state of Maharashtra.⁶⁷ The agreement would last for thirty years and would provide India with sales of

all requirements of the Government of India for enriched uranium for use as fuel at the Tarapur Atomic Power Station, it being understood that the Tarapur Atomic Power Station shall be operated on no other special nuclear material than that made available by the United States Commission and special nuclear material produced therefrom.⁶⁸

During the period of this agreement, India and the United States encountered several key disputes over the interpretation of the agreement's term and scope of limitations on expiration.⁶⁹ India asserted the right to use plutonium, the spent fuel from the reactors, for military purposes upon expiration of the thirty year term.⁷⁰ Furthermore, it asserted a right to extract spent plutonium during the term of the agreement without regard for the requirement of U.S. approved safeguards authorizing such action under article VI of the agreement.⁷¹ These arguments were indicative of India's intention to divert uranium (which can become explosive when it is highly enriched or when it is converted to plutonium by irradiation) acquired from the Tarapur agreement to its very active nuclear weapons program.⁷² In fact, after India tested its first "peaceful" nuclear explosive in 1974, it became clear that U.S. supplied heavy water⁷³ had

66. India Atomic Energy: Cooperation for Civil Uses, U.S.-India, Aug. 8, 1963, 14 U.S.T. 1484 [hereinafter Tarapur Agreement].

67. *Id.*

68. *Id.*

69. Gary Milhollin, *Stopping the Indian Bomb*, 81 AM. J. INT'L L. 593, 594 (1987).

70. *Id.*

71. Tarapur Agreement, *supra* note 66, 14 U.S.T. at 1494; Milhollin, *supra* note 69, at 598.

72. Milhollin, *supra* note 69, at 594.

73. Heavy water is involved in an alternative method that can be used to produce plutonium from uranium without the need for any enrichment of uranium. See Federation of American Scientists, Heavy Water Production, <http://www.fas.org/nuke/intro/nuke/heavy.htm> (last visited Mar. 10, 2008).

contributed to the successful test.⁷⁴ Even after this apparent failure of non-proliferation policy and despite its right to suspend or terminate the agreement “[i]n the event of noncompliance with the guarantees” therein,⁷⁵ the United States resolved to stay engaged with India on the Tarapur issue in the fear that “denial of [performance] . . . would free India from existing safeguards on the Tarapur atomic reactor.”⁷⁶

While there are difficult policy choices to consider when making such decisions, the legal implications of a state’s interactions with regimes that govern areas of crucial and common international interest demand a heightened level of scrutiny. The foregoing discussion has pointed to India’s historic rejection of the NPT’s architecture and its behavior in engaging an NPT state, the United States, in order to acquire nuclear materials and ultimately subvert non-proliferation principles. One is unlikely to conclude that India has made any significant overtures that indicate that it embraces the goals of the NPT and the means the regime employs to achieve them.⁷⁷ Therefore, an agreement between the United States and India cannot reasonably be said to further the development of “shared expectations of behavior” that are consistent with the NPT.⁷⁸ In fact, while instances of non-compliance and deviations from the rules and decision-making procedures may actually further embed the regime’s legal obligations given their adaptive flexibility, “substantial modification of the principles and norms of a regime reveals fundamental variations posing risks to the continuation of the regime.”⁷⁹ Engaging India, given its stance regarding the NPT, clearly falls within the latter class of deviations where India’s position against the NPT is emboldened now that it has a major NPT-NWS state’s seal of approval.

74. Milhollin, *supra* note 69, at 595. *See also* Tahirih V. Lee, *The Effect of Chadha on the Creation of Nuclear Cooperation Agreements: The United States-China Agreement on Nuclear Energy*, 2 EMORY J. INT’L DISP. RESOL. 73, 92 (1987).

75. Tarapur Agreement, *supra* note 66, 14 U.S.T. at 1494.

76. Lee, *supra* note 74, at 94 (discussing President Carter’s decision to approve an export license for a shipment of uranium to India, informed by concerns of unsafeguarded facilities and the geopolitics of Soviet presence in Afghanistan, amidst Senate resolutions expressing disapproval of the shipment).

77. There are instances of Indian policy with respect to nuclear non-proliferation that could be argued to bring it within the scope of the international non-proliferation regime’s principles. *See* discussion *infra* note 206 and accompanying text.

78. Smith, *supra* note 11, at 1592.

79. *Id.* at 1593 (citing Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 2, 2 (S. Krasner ed. 1983)).

II. THE U.S.-INDIA PARTNERSHIP: AN AFFRONT TO MULTILATERALISM

The U.S.-India nuclear cooperation initiative is essentially being undertaken without the blessing of the multilateral non-proliferation regime. What this means for the future of the regime can be ascertained through an analysis of Thomas M. Franck's theory of legitimacy and traditional models.⁸⁰ On the one hand, the initiative can be construed as a defection by the United States from the principles of the non-proliferation regime that ultimately derogates from the regime's capacity to obligate.⁸¹ On the other hand, if the United States argues that this initiative is consistent with the goals of the non-proliferation regime (which it fervently has)⁸² then the regime's legitimacy is nevertheless dealt a blow, this time by an undermining of its *determinacy*.⁸³ In other words, this would signal to the remaining states, especially those with considerable access to nuclear technologies, that reaching similar arrangements with non-NPT signatories would be acceptable behavior under the non-proliferation regime. In either case, the consequences are the same: states will be induced into behavior that threatens to increase the likelihood of nuclear weapons proliferation.

In order to proceed with this line of analysis, it is first necessary to establish that the non-proliferation regime embodies rules that govern state practice. It is a basic tenet of international law that a practice generally followed by states out of a sense of legal obligation gives rise to customary international law, which is binding on all states.⁸⁴ The term "practice" contemplates diplomatic acts, statements of policy, or even inaction of a state in the face of outside-state behavior that may affect its legal rights.⁸⁵ Therefore, the signing of international instruments itself can contribute to the crystallization of customary rules of international law.⁸⁶

80. FRANCK, *supra* note 16.

81. Franck argues that disobedience of a rule does not necessarily terminate its ability to obligate but repeated instances of disobedience can yield an atmosphere that renders defection from the rule acceptable, thereby threatening the rule's demise. *Id.* at 44.

82. See discussion *infra* notes 170–171 and accompanying text.

83. Determinacy, according to Franck, is roughly synonymous with "textual clarity," in that it gives states precise prescriptions on how to conduct themselves. FRANCK, *supra* note 16, at 52.

84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(1)(a), cmts. b, c (1987). Under comment d, a state that expresses dissent during the principle's development will not be bound by the custom. Therefore, it can be said that India, having refused to sign the NPT from its inception, demonstrated its dissent from any customary law that may have developed obligating states to refrain from weapons proliferation. *Id.* at § 102(1)(a), cmt. d.

85. *Id.*

86. *Id.* at § 102(1)(a), cmt. i.

In this vein, it is a testament to the existence of a customary law that 187 countries have ratified the NPT, making it the most widely accepted arms limiting or disarmament instrument in history.⁸⁷

Second, the existence of nuclear weapons-free zones, test bans, and other non-proliferation treaties, virtually all of which are codified in multilateral instruments, further buttresses the proposition that there exists an obligation to pursue non-proliferation methods consistent with the existing regime's practice under customary international law.⁸⁸ Third, the legitimacy of the regime is underscored when one examines the nuclear weapons control issue as a classic example of the prisoner's dilemma ("PD"). In this game theory model, the players are confronted with a collective action problem in which no player can be sure what course of action the other players will take and unilateral defection from the collective purpose can produce the greatest individual benefits. Arms control presents precisely such a predicament.⁸⁹ However, despite the strong pull of non-compliance in this context, 182 non-nuclear weapons states have signed the NPT and those with nuclear programs have submitted to full-scope safeguards on *all* their nuclear energy facilities.⁹⁰ This fact alone illustrates the degree of legitimacy the non-proliferation regime has attained notwithstanding its aforementioned shortcomings. When states forgo short-term strategic advantages while paying deference to long-term "communitarian interests," it evinces a collective desire to see the regime's rules reinforced.⁹¹ A corollary of this principle is that a defecting state will be regarded a threat to the long-term interests of other states.⁹²

87. United Nations, Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2.

88. In furtherance of this goal, the decision of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* recognized the existence of an obligation of all states under customary international law to pursue disarmament in good faith. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 265-67 (Jul. 8).

89. Abbott, *supra* note 22, at 8.

90. See Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, *supra* note 33, at para. 4.

91. FRANCK, *supra* note 16, at 57.

92. *Id.* at 150-51.

A. The U.S.-India Deal Represents a Rejection of Multilateralism as an Effective Means to Further Non-Proliferation that Threatens the Regime's Legitimacy

Although the purported interests of both India and the United States in entering this agreement are to further the goals of non-proliferation,⁹³ the means they have undertaken stand in stark contrast to and are incoherent with the multilateral approach that is embraced by the remainder of the non-proliferation regime. Franck posits that a rule's legitimacy depends, in part, on the coherence with which it is pursued by the states subscribing to its authority.⁹⁴ Consequently, inconsistent application of a rule by states should be rationally distinguishable as exceptions that do not detract from its overall coherence.⁹⁵ Therefore, if one accepts the assertion that multilateral international agreements represent the customary expression of non-proliferation policies, a bilateral agreement with a non-nuclear weapons state must conform to the custom at least to a degree that can be considered not incoherent with the regime's rules. Alternatively, some rational explanation should distinguish the agreement so as to maintain the coherence of the multilateral regime's rule. This cannot be said of the partnership between the United States and India.

To better understand the primacy of multilateralism in the non-proliferation regime, it would be helpful to survey four landmark agreements and, where applicable, discuss the conduct of the United States and India in each respective context:

1. Latin American Treaty of Tlatelolco⁹⁶

The Treaty of Tlatelolco established the first nuclear-weapons-free zone ("NWFZ"), which recognized that "militarily denuclearized zones are not an end in themselves but rather a means for achieving general and complete disarmament at a later stage"⁹⁷ Under article 1 of the agreement, parties undertake to use nuclear material and facilities solely for peaceful purposes and are under an affirmative duty to prohibit and prevent the manufacture, production, acquisition, receipt, storage, installation, or deployment of such weapons, "directly or indirectly, by the parties themselves, by anyone on their behalf or *in any other way*."⁹⁸

93. See Office of the Press Secretary, Fact Sheet: United States and India: Strategic Partnership, *supra* note 30.

94. FRANCK, *supra* note 16, at 151.

95. *Id.* at 153.

96. Treaty of Tlatelolco, *supra* note 14.

97. *Id.*

98. *Id.* at 523 (emphasis added).

This broadly stated obligation is indicative of the drafters' intention to encourage not only multilateral accord on the issue of non-proliferation, but cooperative and collective efforts to prevent their development in any subject territory.⁹⁹ Consistent with this vision, article 7 establishes an international organ known as the Agency for Prohibition of Nuclear Weapons in Latin America that is comprised of representatives of the contracting parties.¹⁰⁰ The General Conference is the Agency's supreme decision-making organ and its decisions relating to procedural and substantive obligations under the agreement are binding on the contracting parties. Perhaps the most powerful expression of multilateralism displacing state sovereignty is the "special inspections" provision under article 16.¹⁰¹ It provides for either the IAEA to conduct an inspection in accordance with safeguards agreements or for the Council (a body of five representatives elected by the General Conference) to request a special inspection when there is reason to suspect some proscribed activity by or on behalf of a contracting party.¹⁰²

All thirty-three Latin American countries are parties to this treaty.¹⁰³ In addition, as a signatory of the Additional Protocol II to the Treaty, the United States has agreed not to use or threaten to use nuclear weapons against the contracting parties.¹⁰⁴ Thus, the Tlatelolco Treaty undeniably expresses solidarity of the Latin American states in their adherence to non-proliferation. Coupled with the endorsement by the United States as

99. Such a purpose can be gleaned from clause 12 of the Preamble, which reads, "That the privileged situation of the signatory States, whose territories are wholly free from nuclear weapons, imposes upon them the inescapable duty of preserving that situation both in their own interests and for the good of mankind. . . ." *Id.* at 522.

100. *Id.*

101. *Id.* at 527.

102. *Id.* Article 24 of the Tlatelolco Treaty contains a compromise clause accepting the compulsory jurisdiction of the International Court of Justice in the event of a dispute between the Parties. *Id.* at 530.

103. Adam Shapiro, *Nuclear-Weapon-Free Zones- The Solution to Nuclear Disarmament?*, UN CHRONICLE ONLINE EDITION, http://www.un.org/Pubs/chronicle/2004/webArticles/081204_nwfs.asp (last visited Mar. 10, 2008).

104. Understandably in light of the Cold War context in which this was signed, this promise is qualified by the caveat that, "the United States would have to consider an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the Contracting Party's corresponding obligations under Article I of the Treaty." Treaty for the Prohibition of Nuclear Weapons in Latin America, Its Status and the Status of Additional Protocols I and II, May 2, 1989, 28 I.L.M. 1404, 1420. *See also* Additional Protocol I, which imposes a duty on non-Latin American signatory states to enforce the articles of the Treaty in territories under their de jure or de facto control that fall within the territorial scope of the treaty. Treaty of Tlatelolco, *supra* note 14, 6 I.L.M. at 533.

a Protocol II signatory, this arrangement would tend to demonstrate the superior legal authority and influence a multilateral framework provides.

2. The South Pacific Treaty of Rarotonga¹⁰⁵

In 1985, the thirteen independent states comprising the South Pacific Forum adopted an arguably more ambitious substantive approach in prohibiting nuclear weapons and nuclear explosive devices in general.¹⁰⁶ Unlike the Tlatelolco Treaty, which makes an allowance for peaceful nuclear explosions under article 18, Rarotonga expressly renounces nuclear explosions of any kind in several places throughout the treaty.¹⁰⁷ With respect to decision-making authority, under annex 3 the Rarotonga establishes the Consultative Committee, which is the Tlatelolco Council's counterpart. It is charged with reviewing complaints by parties and where necessary appointing "suitably qualified inspectors" who will report on any alleged breaches, triggering a consultative meeting of the contracting parties.¹⁰⁸ Finally, the Rarotonga is furnished with Additional Protocol II, which invites the five NWSs to undertake not to use or threaten to use any nuclear explosive device against parties to the treaty.¹⁰⁹ As of June 20, 2002 all the invitees except the United States had ratified this Protocol.¹¹⁰

The differential treatment afforded the Rarotonga NWFZ as opposed to the Tlatelolco is indicative of the realist policy approach Washington employs in the realm of nuclear non-proliferation. By ratifying the "non-use" protocol for Latin America with the Cold War as a backdrop, the United States was subsuming the American continents under its nuclear umbrella and avoiding their co-option by the former Soviet Union. This same treatment is denied to the South Pacific NWFZ despite its adherence to even higher legal standards of nuclear abstinence and despite the remaining four nuclear powers assuring "non-use" through ratification.

105. Treaty of Rarotonga, *supra* note 14.

106. The thirteen contracting states: Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Western Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Adam Shapiro, *supra* note 103.

107. See Treaty of Rarotonga, *supra* note 14, 24 I.L.M. at 1444 (art. 1(c) reads: "'nuclear explosive device' means any nuclear weapon or other explosive device capable of releasing nuclear energy, *irrespective* of the purpose. . . .") (emphasis added). Also of interest are article 3 (Renunciation of Nuclear Explosive Devices), article 5 (Prevention of Stationing of Nuclear Explosive Devices), and article 6 (Prevention of Testing Nuclear Explosive Devices). *Id.* at 1444-46.

108. *Id.* at 1456.

109. *Id.* at 1461.

110. Status of the South Pacific Nuclear Free Zone Treaty, <http://www.opanal.org/NWFZ/Rarotonga/rarotonga.htm> (on file with author).

In this case, the U.S. approach is an inconsistent recognition of the value of NWFZ to the non-proliferation regime and detracts from the coherence of the underlying principles informing such instruments.¹¹¹ This ultimately undermines the compliance-pull of NWFZ from the perspective of other NWSs.

3. The 1972 Anti-Ballistic Missile Treaty (“ABMT”)¹¹²

The ABMT was a bilateral mutual assurance agreement between the former Soviet Union and the United States that sought to restrain the defensive arms race between the two nations with the ultimate intended effect of stymieing the strategic offensive arms race.¹¹³ Under the treaty, each party undertakes to limit its development and deployment of anti-ballistic missile (“ABM”) systems and promises to refrain from deploying such systems in the air, sea, space, or through mobile land-based technology.¹¹⁴ Article III allows for an exception whereby each country can employ ABM systems covering two limited areas, the capital and another 150 kilometer radius of its choosing.¹¹⁵ The treaty’s design is indicative of the unique bipolar paradigm that was the Cold War and therefore should not be criticized for its lack of multilateralism.¹¹⁶ What is material to this discussion, however, is the reactionary nature of U.S. non-proliferation policy, which tends to write-off extant legal obligations for the sake of short-term offensive strategic advantages.

On December 13, 2001, three months after the terrorist attacks of September 11, 2001, the Bush administration executed what it had been planning well before the attacks: citing the emergent security context

111. FRANCK, *supra* note 16, at 174.

112. ABMT, *supra* note 12.

113. *Id.* See also Hillary A. Smith, *Is Honesty Still the Best Policy: Considering Legal Options for Missile Defense and the Antiballistic Missile Treaty*, 31 GA. J. INT'L & COMP. L. 199, 202 (2002) (discussing the underlying principle of Mutually Assured Destruction (“MAD”) as the cornerstone of the ABM treaty; explaining that a missile-defense system would remove the nuclear-stalemate, enabling one party to counter a retaliatory counter-attack, thereby reviving an incentive to develop more destructive offensive weapons).

114. ABMT, *supra* note 12, at 3439, 3441.

115. In 1976, the Treaty was amended by a Protocol, which further restricted the number of zones each Party could protect with ABM systems, required that each country choose either to protect its capital or the alternative region provided for under article III, and dismantle the alternate with notice to the other Party. *Limitation of Anti-ballistic Missile Systems, Protocol to the Treaty of May 26, 1972, U.S.-U.S.S.R., July 3, 1974*, 27 U.S.T. 1645.

116. Richard L. Williamson, *Hard Law, Softlaw, And Non-Law In Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 64–65 (2003) (positing that “[b]ilateral nuclear arms control is virtually synonymous with the unique case of arms control between the US and the Soviet Union” given the high probability of MAD).

involving “terrorists” and “rogue states”, it unilaterally announced the irrelevance of the ABMT and withdrew from the instrument.¹¹⁷ In light of this changed circumstance, the United States argued, Russia was no longer its primary national security concern and therefore, its obligations owed to Russia under the ABMT were without purpose.¹¹⁸ Needless to say, Russia was strongly opposed to this position and emphasized the vital role the ABMT plays in the larger non-proliferation regime.¹¹⁹ While relations between the two states have significantly improved from the constant state of enmity that prevailed before the dissolution of the U.S.S.R., beginning in 2001 with the U.S. withdrawal from the ABMT, there are indications that U.S. policy has emboldened Russia to increase its potency, albeit selectively, as a nuclear power.¹²⁰

Though the only parties to the treaty were the United States and Russia, the broader community of states considered the withdrawal as a significant threat to international security.¹²¹ Not the least of these concerned states was China, given that a United States equipped with an effective missile defense system would nullify the nuclear deterrent value of its own arsenal, thereby, perhaps justifiably, provoking it to abandon

117. John R. Burroughs, Jonathan Granoff, John H. Harrington, Bonnie D. Jenkins, Barry Kellman & Mark S. Zaid, *Arms Control and National Security*, 36 INT’L LAW 471, 497 (2001) (citing U.S. Dep’t of State, President Discusses National Missile Defense, Remarks by George W. Bush, President, The Rose Garden, Washington D.C. (Dec. 13, 2001)). See also First Committee, Closer to a Nuclear-Weapon-Free World, UN CHRONICLE ONLINE EDITION, ¶¶ 10–11, <http://www.un.org/Pubs/chronicle/2000/issue4/0400p32.htm> (citing arguments made by U.S. ambassador to the U.N. Robert Gray at the NPT Review Conference in April 2000) (last visited Mar. 10, 2008).

118. Burroughs, et. al., *supra* note 117.

119. *Id.* at 499 (citing ARMS CONTROL ASSOCIATION, *Russian Statements on U.S. Missile Defense Plans*, Oct. 2001, <http://www.armscontrol.org/factsheets/russianmd.asp>).

120. See Christine Kucia, *Russia Mulls Altered Nuclear Doctrine*, ARMS CONTROL ASSOCIATION, Nov. 2003, http://www.armscontrol.org/act/2003_11/Russiannucleardoctrine.asp (discussing Russia’s announcement of its intention to “rejuvenate[]” its land based nuclear-weapons arsenal in order to secure a satisfactory deterrent level for thirty years). Despite this apparent push towards nuclear weapons development, Russia and the United States signed another bilateral measure in 2002. The Strategic Offensive Reductions Treaty (“SORT”), or “Moscow Treaty,” provided that each country would, “cut their deployed strategic nuclear forces to 1,700-2,200 warheads each—approximately a two-thirds reduction from current levels.” Philipp C. Bleek, *U.S., Russia Sign Treaty Cutting Deployed Nuclear Forces*, ARMS CONTROL ASSOCIATION, June 2002, http://www.armscontrol.org/act/2002_06/sortjune02.asp. See also The Strategic Offensive Reductions Treaty, U.S.-U.S.S.R., May 24, 2002, 41 I.L.M. 799.

121. Burroughs, *supra* note 117, at 499 (citing the Final Document of the 2000 NPT Review Conference where NPT states view the ABMT as being “a cornerstone of strategic stability and a basis for further reductions of strategic weapons”).

its own commitments under the NPT.¹²² Here again, one witnesses the myopic realist calculations of the Pentagon and the White House defining non-proliferation policies and having the ultimate effect of eroding international faith in the control regimes.

4. The 1996 Comprehensive Test Ban Treaty ("CTBT")¹²³

President Clinton lauded the CTBT as an essential and pivotal step towards realizing global non-proliferation and disarmament.¹²⁴ Because testing of nuclear technology is a necessary procedure in the sound development of nuclear weapons systems, a complete ban on testing would effectively halt significant advances in arms development.¹²⁵ Under its basic obligations, the CTBT requires parties to refrain from conducting or participating in any nuclear explosive tests and to adopt domestic laws prohibiting the same.¹²⁶ The CTBT opened for signature on September 24, 1996.¹²⁷ President Clinton was the first head of state to sign the Treaty.¹²⁸ On October 13, 1999, the Senate declined to give its advice and consent to the CTBT,¹²⁹ making it the first arms control treaty to be rejected by the Senate in eighty years.¹³⁰ As of September 2007, 177

122. *Id.* See also Paul Kerr, *China Stresses Common Approach With Bush Administration's Non-proliferation Policy*, ARMS CONTROL ASSOCIATION, Jan./Feb. 2004, http://www.armscontrol.org/act/2004_01-02/China.asp (discussing the shift in tone of Beijing's policy on nuclear non-proliferation released in a white paper expressing criticism against the U.S. pursuit of a missile defense system, leaving unaddressed goals of disarmament, and stressing multilateral, peaceful measures for achieving non-proliferation goals).

123. CTBT, *supra* note 13.

124. Burroughs, et. al., *supra* note 117, at 490 (citing Press Release, White House, Remarks by the President to the 52nd Session of the United Nations General Assembly (Sept. 22, 1997)).

125. Sarah Elizabeth Kreps and Anthony Clark Arend, *Why States Follow the Rules: Toward a Positional Theory of Adherence to International Regimes*, 16 DUKE J. COMP. & INT'L L. 331, 355 (Spring 2006). See also Masahiko Asada, *CTBT: Legal Questions Arising from Its Non-Entry-Into-Force*, 7 J. CONFLICT & SECURITY L. 85, 88 (2002).

126. CTBT, *supra* note 13, at 1444.

127. The Status of the Comprehensive Test Ban Treaty: Signatories and Ratifiers, ARMS CONTROL ASSOCIATION, Apr. 2006, <http://www.armscontrol.org/factsheets/ctbtsg.asp>.

128. Burroughs, et. al., *supra* note 117, at 489.

129. The defeat was brought about by a vote of fifty-one to forty-eight. *Id.*

130. *Id.* See also Craig Cerniello, *Senate Rejects Comprehensive Test Ban Treaty: Clinton Vows to Continue Moratorium*, ARMS CONTROL ASSOCIATION, Sept./Oct. 1999, http://www.armscontrol.org/act/1999_09-10/ctbso99.asp. In the wake of the Senate's rejection of the CTBT, the Clinton administration not only vowed to observe its moratorium on testing but seemed to allude to this course of action as one arising out of a sense of legal obligation as a signatory to the CTBT. See Asada, *supra* note 125 at 96 (citing

countries had signed the treaty and 140 countries had ratified.¹³¹ The CTBT will come into force only when forty-four countries designated as “nuclear capable” have signed and ratified the treaty.¹³² Of those countries, thirty-four have ratified but India, Pakistan, and North Korea, also required states, have not signed.¹³³

The strict entry-into-force clause of the CTBT indicates the absolute necessity for “nuclear-capable” states to be bound by such an instrument in order to ensure a stable legal foundation for non-proliferation.¹³⁴ Another factor, which may explain the stringent entry-into-force requirement, is the CTBT’s robust verification regime, which includes an international monitoring system (“IMS”) and allows for on-site inspections (“OSI”).¹³⁵ The IMS envisions monitoring facilities placed in approximately ninety countries throughout the world that are administered and operated by a host country in collaboration with the CTBT Organization (“CTBTO”) to monitor signals underground, underwater, and above-ground.¹³⁶ The OSI provision contains a liberal procedure by which a state party suspicious of a nuclear test may request an on-site inspection based on information gathered by either the IMS and/or “any relevant technical information obtained by national technical means of verification in a manner consistent with generally recognized principles of international law”¹³⁷ Furthermore, there is no exhaustion requirement obliging the complaining state to pursue consultation or clarification with the party under suspicion.¹³⁸

Given the lofty ambitions of this instrument, it would behoove the United States, as the world’s most prominent advocate of non-proliferation, to ensure the survival and success of the CTBT. In the

Secretary of State Madeleine Albright’s statement professing U.S. intentions to abide by its obligations, “as a signatory under international law,” in *The Imperial Presidency*, WASH. TIMES, Nov. 5, 1999).

131. The Status of the Comprehensive Test Ban Treaty, *supra* note 127.

132. *Id.* (listing the necessary ratifications).

133. *Id.*

134. In fact, as Asada pointedly remarks, “the CTBT is redundant for the non-nuclear-weapon states party to the NPT, which have already been prohibited from possessing nuclear weapons in the first place, let alone conducting testing on them.” Asada, *supra* note 125, at 87.

135. CTBT, *supra* note 13, at 1458.

136. In contrast, the Partial Test Ban Treaty of 1963 “only prohibited nuclear test explosions in the atmosphere, outer space and under water” and relied solely upon national technical means of verification administered unilaterally. Asada, *supra* note 125, at 89–90.

137. CTBT, *supra* note 13, 1449.

138. Asada, *supra* note 125, at 91.

wake of the Senate's rejection of the treaty in 1999, one could at least argue that the Clinton administration's assurances to remain loyal to the spirit of the CTBT demonstrated good faith in accordance with article VI of the NPT.¹³⁹ In addition, Asada argues that mere signatories to a treaty may derive a legal obligation from customary international law to refrain from acts that would defeat the purpose of the instrument.¹⁴⁰ In this vein, the United States, under the direction of the Bush administration has thrown the viability of the CTBT into serious question whilst ignoring its obligations under international law.

Contemplating the difficulties that would inhere in attaining full-fledged legal enforcement of the treaty, the drafters of the CTBT provided for intermittent conferences under article XIV.¹⁴¹ This provision allows a majority of ratifying states to call a conference in order to consider measures that could further progress towards entry-into-force.¹⁴² A majority of ratifying states called such a conference in November of 2001.¹⁴³ Although the conference is convened by ratifying states, under paragraph 4 of article XIV, signatories are invited to attend as observers.¹⁴⁴ The United States declined to attend the conference at the United Nations, sending ripples of disappointment throughout the international community.¹⁴⁵ This reaffirmed the Bush administration's previous declarations that it would not resubmit the CTBT to the Senate for ratification.¹⁴⁶ In contrast, China, also a non-ratifying signatory, attended the

139. Article VI of the NPT reads, "Each of the Parties undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control." NPT, *supra* note 2, 21 U.S.T. at 492, 729 U.N.T.S. at 170.

140. Asada, *supra* note 125, at 98.

141. CTBT, *supra* note 13, at 1457.

142. *Id.* The first conference was held in Vienna from October 6–8, 1999 in accordance with paragraph 2 of Article XIV calling for the first conference three years after the adoption of the treaty in the case it had not entered into force. Burroughs, et. al., *supra* note 117, at 491.

143. Philipp C. Bleek, *UN Conference Shows Support For Test Ban; U.S. Absent*, ARMS CONTROL ASSOCIATION, Dec. 2001, http://www.armscontrol.org/act/2001_12/ctbtdec01.asp.

144. CTBT, *supra* note 13, 35 I.L.M. at 1457.

145. So overt was the recalcitrance of the United States that U.S. Ambassador to the U.N. John Negroponte, was quoted as saying, "We're just not going to engage." Bleek, *supra* note 143, ¶ 4. See Daryl G. Kimball, *CTBT Rogue State?*, ARMS CONTROL ASSOCIATION, Dec. 2001, http://www.armscontrol.org/act/2001_12/ctbtanalysisdec01.asp (describing, in detail, the unilateralist pattern of the Bush administration in dealing with non-proliferation and the reactions by concerned states).

146. Bleek, *supra* note 143. See also Burroughs, et. al., *supra* note 117, at 492.

2001 conference, once again demonstrating the conspicuous reluctance of the United States to embrace multilateralism.¹⁴⁷ Moreover, the U.S. failure to support this conference and its refusal to resume ratification procedures domestically can be viewed as breaches of its duty to negotiate in good faith under article VI of the NPT and its duty to avoid acts that defeat the purpose of the treaty under customary international law.¹⁴⁸

Finally, the United States compounds the inconsistencies in its non-proliferation record by partially funding the CTBT Preparatory Commission.¹⁴⁹ The CTBT provides for a preparatory commission (“PrepCom”) that envisions that the aforementioned IMS and OSI programs will be functional upon the entry-into-force of the CTBT.¹⁵⁰ In March of 2002, in its proposed budget for the 2003 fiscal year, the Bush administration requested from Congress funding in the amount of \$18.2 million to support the development of the IMS only.¹⁵¹ This selective endorsement of one aspect of the CTBT, while arguably an overture consistent with the goals of non-proliferation, has been received by many states with uneasiness given the conflicting interest of the Bush administration in pursuing low-yield nuclear weapons.¹⁵² On balance, in light of Thomas Franck’s theory of legitimacy as a function of coherence, the inconsistency of U.S. policy vis-à-vis the CTBT cultivates an atmosphere of unpredictability. This in turn will inevitably discourage other key states (a state most pertinent to our discussion, India), whose ratification is required for entry-into-force, to abstain from ratification and threaten the very survival of the treaty itself.

India’s treatment of the CTBT has been consistent with its historical blend of principled criticism of and willingness to engage with the non-proliferation regime. India’s criticism of the CTBT came primarily during the negotiations over its text in the 1996 Conference on Disarmament (“CD”) in Geneva, where it vetoed the full text of the CTBT.¹⁵³ Later, a

147. Burroughs, et. al., *supra* note 117, at 491.

148. The latter argument would follow given that the failure of the United States to ratify would preclude the entry into force of the CTBT, thereby relieving all ratifying states from the basic textual duty to abstain from testing.

149. Burroughs, et. al., *supra* note 116, at 492.

150. Asada, *supra* note 125, at 104.

151. News Briefs, *Bush Requests Funds for CTBT Monitoring*, ARMS CONTROL ASSOCIATION, Mar. 2002, http://www.armscontrol.org/act/2002_03/briefsmarch02.asp#ctbt.

152. Burroughs, et. al., *supra* note 117, at 491. The uneasiness is justified if one considers the amount of leverage the United States will have over the international monitoring system by funding it, all the while remaining a party not bound by the treaty’s obligations.

153. Asada, *supra* note 125, at 86.

U.N. General Assembly Resolution adopted the text and opened it for signature despite dissenting votes from India, Libya, and Bhutan.¹⁵⁴ Given India's nuclear tests, which would follow in 1998, India's resistance to the CTBT's adoption is readily explained.¹⁵⁵ After its successful tests, however, facing sanctions by the United States, India voiced its willingness to sign the CTBT in exchange for a lifting of sanctions and unilaterally declared a moratorium on testing.¹⁵⁶ To date, India has not signed the CTBT, most likely taking its cue from the United States' failure to ratify the same. Therefore, the U.S.-India agreement as it stands would allow India to escape commitments it made after its nuclear tests. Because by the terms of the agreement all that is required of India is that it maintain its moratorium on testing, the deal overlooks India's additional responsibility of signing the CTBT pursuant to its assurances following the 1998 tests.

The foregoing discussion has attempted to demonstrate the primacy of multilateralism as a followed custom in the realm of non-proliferation and the inconsistency with which the United States has pursued its policies on the same. The United States often sacrifices legal coherence for the sake of perceived strategic advantages. The U.S.-India Strategic Partnership is another manifestation of this behavior that will undoubtedly detract from the non-proliferation regime's coherence and consequently, its legitimacy. Alternatively, the partnership can have the effect of bringing into question the legally permissible conduct of a NWS with respect to a state that is not a party to any nuclear arms control instrument. In Franck's words, the agreement can undermine the regime's determinacy by clouding the scope of acceptable behavior, thereby raising the specter of other nuclear capable countries trading freely in nuclear technology with unbound states.¹⁵⁷

154. Steve Andreasen, *Book Review: Treaty and Tragedy—The Comprehensive Nuclear Test Ban Treaty: An Insider's Perspective* by Keith A. Hansen, ARMS CONTROL ASSOCIATION, May 2006, http://www.armscontrol.org/act/2006_05/bookreview.asp.

155. *Id.*

156. Howard Diamond, *India, Pakistan Commit to Sign CTB Treaty by September 1999*, ARMS CONTROL ASSOCIATION, Oct. 1998, http://www.armscontrol.org/act/1998_10/ipoc98.asp (citing statements made by Prime Minister Atal Bihari Vajpayee at the United Nations in September of 1998, four months after the Indian tests).

157. FRANCK, *supra* note 16.

B. The U.S.-India Deal Threatens the Non-Proliferation Regime's Determinacy thereby Inducing State Behavior Injurious to the Regime's Goals

According to Franck, a rule's compliance pull is largely dependent on its determinacy or elasticity.¹⁵⁸ The more a rule is susceptible to several conflicting interpretations, the easier it becomes to justify non-compliance.¹⁵⁹ This also may be an indication that the drafters and architects of the rule themselves were at odds on what kinds of behavior they were setting out to cultivate.¹⁶⁰ The NPT certainly exhibits such elasticity and one may intuit that its drafters deliberately sought to preserve flexibility for the future.¹⁶¹ However, as discussed in Part II.A above, the broader non-proliferation regime has evolved since the adoption of the NPT in favor of oversight and transfer of nuclear technology for peaceful purposes through multilateral institutions. This Part will argue that 1) the justifications being proffered by the United States in support of its nuclear partnership with India stand in direct opposition to the regime's expected patterns of behavior and 2) if these justifications are accepted and endorsed by the several states comprising the regime, what little progress has been made towards crystallization of a more determinate rule of non-proliferation will be squandered away.

In order to understand the irony of the U.S. proposed nuclear partnership with India, it is important to recall that the Nuclear Suppliers Group ("NSG") must, by consensus, approve the deal, thereby excepting India from its policy requiring recipient states 1) to be parties to the NPT and 2) to apply full-scope IAEA safeguards, i.e., oversight on *all* their peaceful nuclear activities.¹⁶² Because India already has military nuclear facilities and will essentially choose those that it designates as "civil," the comprehensive scope intended by IAEA's language is thwarted. The NSG was created following India's "peaceful nuclear explosion" in 1974 when it became apparent that nuclear materials transferred for peaceful

158. *Id.* at 54.

159. *Id.*

160. *Id.* at 53.

161. *Id.* at 54. The ambivalence of the NPT's drafters is enshrined in the tension between articles I and II of the treaty prohibiting transfer or receipt of nuclear weapons related technology and article IV, which encourages transfer of nuclear technology for "peaceful purposes." NPT, *supra* note 2, 21 U.S.T. at 488-89, 492, 729 U.N.T.S. at 166-67, 170.

162. Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, *supra* note 33; *See also* IAEA, The Nuclear Suppliers Group: Its Origins, Role and Activities, INFCIRC/539/Rev.3 at 5, May 30, 2005 [hereinafter NSG Origins].

purposes could be invidiously diverted for use in weapons production.¹⁶³ Currently, the NSG consortium is comprised of forty-five states that represent the nuclear suppliers of the world.¹⁶⁴ In 1978, the NSG published guidelines that incorporated a "Trigger List" of items that would trigger the requirement for full-scope IAEA safeguards as a precondition for transfer to a non-NWS of materials that could directly contribute to weapons production.¹⁶⁵ Shortly after 1990, Iraq presented a new dilemma to NSG through its clandestine weapons program. Iraq sought to procure lower-level dual-use items not covered by the guidelines and then, "to build its own Trigger-List materials."¹⁶⁶ This prompted the NSG to adopt separate dual-use guidelines in 1992 that generally prohibit the transfer of certain agreed upon dual-use items when there is an "unacceptable risk of diversion to such an activity, or when the transfers are contrary to the objective of averting the proliferation of nuclear weapons."¹⁶⁷

In light of this obvious movement towards thorough risk assessment of nuclear weapons proliferation by the world's major multilateral organ representing nuclear suppliers, the U.S.-India nuclear partnership would cast the legitimacy and integrity of the institution into serious doubt should the NSG approve the arrangement. Throughout its history, the NSG has sought to balance accessibility to nuclear technology with the interests of achieving full-scope safeguards on any recipient country's fuel-cycle.¹⁶⁸ As it stands now, the envisioned U.S. agreement with India would not require it to bring all its nuclear facilities under the auspices of

163. See Milhollin, *supra* note 69. See also Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, *supra* note 33, at 5.

164. Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and United States. NSG Origins, *supra* note 162, at 14.

165. *Id.* at 5.

166. *Id.* at 6.

167. International Atomic Energy Agency, Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology, INFCIRC/254/Rev.7/Part 2, Mar. 20, 2006, at 4. Dual-use technology is generally defined as a broad array technology that can be employed in military uses as well as nonviolent civil applications (e.g., software, semiconductors, machine tools, etc.). Antonia Alice Badway, *Controlling the Export of Dual-Use Technology in a Post-9/11 World*, 18 TRANSNAT'L LAW. 431, 432 (2005).

168. NSG Origins, *supra* note 162, at 6.

the IAEA.¹⁶⁹ Nevertheless, the Bush administration has adamantly defended the partnership with India as consistent with the principles of non-proliferation and maintains that, if anything, the partnership will enhance the non-proliferation regime by bringing two-thirds of India's civilian nuclear facilities under IAEA safeguards.¹⁷⁰ In her address to the Senate Foreign Relations Committee on April 5, 2006, Secretary of State Condoleezza Rice responded to concerns that India has yet to sign the NPT:

We have to recognize that the NPT is the cornerstone, but one part of a maturing non-proliferation framework in which we are also working to have rules of the game that the Nuclear Suppliers Group has on certain standards of behavior. India is agreeing to adhere to those unilaterally.¹⁷¹

This statement is absolutely misleading since India *has not* agreed to the standards of behavior promulgated by the NSG and in fact, the NSG must exempt it from the heretofore essential precondition of FSS. Moreover, according to one representative for the Department of State who specializes in Indian affairs, Katherine Schultz, it is highly improbable that India will ever agree to full-scope safeguards.¹⁷² Even the limited partial-safeguard pledge that India made as part of the agreement has proven to be less than forthcoming.¹⁷³ Understandably then, following a confidential presentation by Indian officials on October 12, 2006 in front

169. Bernard Gwertzman, *Interview with Lawrence Scheinman: New U.S.-India Agreement Undercuts U.S. Allegiance to Non-proliferation of Nuclear Weapons*, COUNCIL ON FOREIGN RELATIONS, Nov. 3, 2005, <http://www.cfr.org/publication/9149/scheinman.html?breadcrumb=default> (Scheinman, an arms control expert, explains that India has agreed to separate its civilian nuclear facilities from its military facilities and bring the civilian ones under IAEA safeguards. However, it is India's sovereign right to deem as it chooses what it considers civilian versus military facilities. How it makes this decision depends on its strategic policy of minimum deterrence which can change with circumstances.).

170. David Shelby, *Rice Urges Congress to Support India Civil Nuclear Cooperation*, U.S. DEP'T OF STATE, Apr. 5, 2006, <http://usinfo.state.gov/sa/Archive/2006/Apr/05-767496.html>.

171. *Id.*

172. Schultz Interview, *supra* note 30.

173. "New Delhi has repeatedly stated that Washington must change U.S. law before India takes steps to fulfill its side of the deal." Wade Boese, *Senate Vote on U.S.-Indian Deal Delayed*, ARMS CONTROL ASSOCIATION, Oct. 2006, http://www.armscontrol.org/act/2006_10/USIndia.asp. Interestingly enough, in order to assuage concerns in Congress, Secretary of State Rice said, "that the administration has pressed India to move ahead in its discussions with the IAEA and said the U.S. legislative changes could not take effect until the IAEA safeguards are in place." Shelby, *supra* note 170.

of the NSG, two NSG member officials expressed skepticism as to the reliability of India's assurances.¹⁷⁴

All this uncertainty surrounding the U.S.-India proposal raises the question: why force such a sweeping exception through a fragile control system that is just recently becoming enmeshed in international law? One obvious albeit simplistic response is money. The U.S. Chamber of Commerce has estimated that the deal can generate \$100 billion in energy sales for U.S. companies.¹⁷⁵ Ron Somers, President of the U.S. Chamber of Commerce's U.S.-India Business Council, fears that if the United States does not feed India's growing demand for nuclear energy, competitors such as France, Canada, and Germany will capture that market, resulting in major losses for U.S. companies.¹⁷⁶ This economic reasoning, however, fails to take into account the fate of the legal regime governing transfer of nuclear technology. Recalling Franck's theory of determinacy, it can reasonably be said that the NSG's categorical requirement of full-scope safeguards is a clear rule outlining behavior expected of states. It should follow that states are less willing to ignore this rule for the sake of short term instant gratification in the interest of pursuing long-term communitarian goals.¹⁷⁷ Therefore, if the NSG itself approves the exception for India and allows the U.S.-India deal to go through, it would implicitly endorse the troubling behavior of pursuing economic gains at the expense of ensuring non-proliferation. Even now, while NSG's stamp of approval is pending, the moral hazard that the deal presents to the rest of the nuclear-capable states is palpable. China, for its part, has already "grandfathered" certain technology transfer agreements it made with Pakistan.¹⁷⁸ Scheinman's fear is that other countries will

174. Wade Boese, *Nuclear Suppliers Updated on U.S.-Indian Deal*, ARMS CONTROL ASSOCIATION, Nov. 2006, http://www.armscontrol.org/act/2006_11/NucSuppliers.asp.

175. Mathewson, *supra* note 29.

176. The U.S.-India Business Council represents companies such as General Electric Co. and Westinghouse Electric Co., which are ready to supply India with nuclear equipment. *Id.*

177. FRANCK, *supra* note 16, at 57.

178. Gwertzman, *supra* note 169. China is widely recognized as being a critical factor in Pakistan's attainment of nuclear-weapons capability. See Federation of American Scientists, *Pakistan Nuclear Weapons: A Brief History of Pakistan's Nuclear Program*, <http://www.fas.org/nuke/guide/pakistan/nuke/index.html> ("In the past, China played a major role in the development of Pakistan's nuclear infrastructure, especially when increasingly stringent export controls in western countries made it difficult for Pakistan to acquire materials and technology elsewhere. According to a 2001 Department of Defense report, China has supplied Pakistan with nuclear materials and expertise and has provided critical assistance in the construction of Pakistan's nuclear facilities.") (last visited Mar. 10, 2008).

also see Pakistan (not to mention other similarly situated states such as Israel) as a lucrative business opportunity and transfer sensitive technologies to it without ensuring comprehensive safeguards.¹⁷⁹ This fear is not unfounded as it has become clear that Russia, Britain, France, and Australia have all spoken out in favor of this agreement.¹⁸⁰

In conclusion, should the U.S.-India Civil Nuclear Agreement reach fruition with the blessing of the NSG, it would undermine the determinacy of the non-proliferation regime thereby inducing widespread non-compliance. This result will naturally follow since the agreement creates a moral hazard for other states to pursue similar arrangements with the aim of realizing short term monetary gains while forgoing long-term collective goals of non-proliferation that have heretofore been of primary importance to the NSG and the international community at large.

III. THE U.S.-INDIA PARTNERSHIP THREATENS AN UNSTABLE PEACE

It is beyond the scope of this Note to provide a detailed outline of the events giving rise to the historical animosity between India and Pakistan.¹⁸¹ The purpose of this Part is simply to frame the U.S.-India nuclear partnership within the seemingly intractable discord between India and

179. Gwertzman, *supra* note 169 (In her interview, Scheinman elaborates, “to the extent that [the United States is] making those transfers, [it is] relieving [India] of the need to produce [its] own material for [its] civil programs domestically and the workload that would have gone into producing that civil nuclear material could, in theory, be dedicated to producing nuclear material for weapons purposes. So, in a sense, [the United States] would be assisting [India] in [its] proliferation.”).

180. Statement of R. Nicholas Burns, Under Sec’y of State for Political Affairs, U.S.-India Civil Nuclear Agreement: Foreign Press Center Briefing, March 22, 2006, <http://fpc.state.gov/fpc/63542.htm>.

181. Beginning with the partition of the sub-continent in 1947, India and Pakistan have been at odds with each other, primarily contesting domain over the territory of Kashmir, a state that is now under India’s control. The first war between the two states took place in 1947 when it was sparked by Muslim separatists in Kashmir. India agreed to support the then Maharaja (provincial ruler) of Kashmir against the insurgency in exchange for the state’s accession into the Indian Union. The validity of that accession has been challenged by Pakistan as well as Kashmiri separatists. The next significant clash came in 1971 when a civil war in East Pakistan provoked India to support the East Pakistani rebels against the armies of West Pakistan. Shortly after India’s intervention, East Pakistan became an independent state now known as Bangladesh. Subsequently, frequent armed disturbances erupted in Kashmir, provoking India to blame Pakistan for staging a protracted proxy war on its territory. After the 1998 nuclear tests of India and then Pakistan, 1999 saw another armed conflict erupt when India launched an armed attack against Pakistani-backed forces that had infiltrated Kashmir. A massive troop build-up along the border threatened the onset of a full-scale war. Most recently, a similar situation was precipitated when Islamic militants attacked the Indian Parliament in 2001. *See India-Pakistan: Troubled Relations*, *supra* note 18.

Pakistan and to once again emphasize the importance of legal regimes in cultivating transparency, compliance, and predictable behavior. It will be argued that the prisoner's dilemma paradigm, in which collective action is often improbable given the strong incentive to cheat for individual gains, is all the more true in the case of India and Pakistan, given their acrimonious past.¹⁸² Second, because there is no binding regional pact that obliges the states to abstain from nuclear weapons proliferation and because no agreement subjects Pakistan's nuclear facilities to IAEA safeguards, history counsels that the most probable outcome is increased proliferation by Pakistan. Therefore, absent a broader arrangement that brings Pakistan's facilities under safeguards, the U.S.-India deal will more than likely have the unintended effect of accelerating proliferation in the region.

The standard prisoner's dilemma model envisions players who must decide only one move, where the choice is between a collective scenario promising a desirable outcome for all, a selfish scenario where cheating while others cooperate maximizes individual gain, and a worst-case scenario where everyone cheats and the group suffers a substantial joint penalty.¹⁸³ In this setting, the theory proposes that each player has two logically distinct incentives to defect, i.e., cheat.¹⁸⁴ On the one hand, there is an "offensive incentive" to defect because a player can realize the best individual outcome while the other cooperates. Conversely, there is a "defensive incentive" to defect in order for a player to avoid being on the receiving end of an offensive defection, i.e., to avoid the "sucker's payoff" by unilateral cooperation.¹⁸⁵

Before proceeding with this line of analysis, it is necessary to establish what legal regime India and Pakistan would be complying with or defecting from. The simple truth of the matter is that neither state is a party to any international arms agreement circumscribing its right to expand its nuclear arsenal. The only relevant treaty binding both parties that arguably limits their ability to proliferate in one narrow respect is the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water.¹⁸⁶ Popularly known as the Limited Test Ban Treaty ("LTBT"), the agreement prohibits states from conducting nuclear test explosions in the atmosphere, outer-space or underwater, including

182. Abbott, *supra* note 22, at 16.

183. *Id.* at 7 (providing a chart that explains various outcomes of the game).

184. *Id.* at 8.

185. *Id.*

186. Billy Merck, *International Law and the Nuclear Threat in Kashmir: A Proposal for a U.S. Led Resolution to the Dispute Under UN Authority*, 32 GA. J. INT'L & COMP. L. 167, 176 (2004).

territorial waters or high seas.¹⁸⁷ This treaty did not in any way inhibit either country from conducting underground nuclear tests in 1998. Since those tests, however, both India and Pakistan have declared unilateral moratoriums on nuclear tests that can potentially be regarded as conduct arising out of a legal obligation.¹⁸⁸ Both states assumed this policy stance in the wake of their 1998 nuclear tests, which had provoked the United States to impose sanctions.¹⁸⁹ The sanctions were promptly waived just six months after the tests when the leaders of India and Pakistan expressed a commitment to the entry-into-force of the CTBT and adherence to their moratorium pledges.¹⁹⁰ While India went as far as acknowledging the possibility of a legal obligation prohibiting further tests, Pakistan cited the pendency of the CTBT and pledged to refrain from tests, “unless another extraordinary event” proved inimical to its security interests.¹⁹¹ The last possible source of legal obligation restricting the conduct of both states is the Lahore Declaration and Memorandum of Understanding (“MOU”), signed on February 21, 1999.¹⁹² These instruments commit both states to abide by their unilateral testing moratoriums, compel both states to engage in confidence building measures, and require them to adopt national policies that reduce the risks of a nuclear exchange.¹⁹³

187. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

188. Alex Wagner, *India Reaffirms its CTBT Policy, Pakistan Follows*, ARMS CONTROL ASSOCIATION, Oct. 2005, http://www.armscontrol.org/act/2000_10/indpakoc00.asp (reporting that both India and Pakistan committed to voluntary moratoriums on nuclear tests, pledged not to block the entry-into-force of the CTBT, and India expressed the willingness to convert its voluntary moratorium into a *de jure* obligation). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(1)(a), cmt. b (1987) (“a practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it”).

189. Howard Diamond, *U.S. Waives Many Test-Related Sanctions on India, Pakistan*, ARMS CONTROL ASSOCIATION, Nov./Dec. 1998, http://www.armscontrol.org/act/1998_11-12/ipnd98.asp.

190. *Id.*

191. Wagner, *supra* note 188 (quoting Pakistani Foreign Minister Abdul Sattar at a news conference held on September 25, 2000).

192. Lahore Declaration between India and Pakistan, EMBASSY OF INDIA, Feb. 21, 1999, http://www.indianembassy.org/South_Asia/Pakistan/lahoredeclaration.html; Memorandum of Understanding in Lahore, EMBASSY OF INDIA, Feb. 21, 1999, [http://www.indianembassy.org/South_Asia/Pakistan/mou\(lahore01211999\).html](http://www.indianembassy.org/South_Asia/Pakistan/mou(lahore01211999).html).

193. One such confidence building measure is the requirement that a state notify the other of a forthcoming ballistic missile test so as to avoid misunderstandings that can lead to an armed conflict. Memorandum of Understanding in Lahore, *supra* note 192.

Provided with this very tenuous legal framework, it is clear that the U.S.-India deal serves to exacerbate both the offensive incentive for India to defect as well as the defensive incentive for Pakistan to defect.¹⁹⁴ On the one hand, India would now enjoy liberalized trade in nuclear material and be tempted to gain a marked advantage over the Pakistani nuclear arsenal, thereby defusing Pakistan's deterrence value.¹⁹⁵ This is especially likely in the case of India if one subscribes to Abbott's assertion that "offensive defection is largely a problem of inadequate information."¹⁹⁶ Since India will not be subject to full-scope safeguards on its nuclear facilities, one can presume inadequate information. Therefore, the need for a more robust verification scheme at least between Pakistan and India should be a primary objective for the United States if it chooses to proceed with the nuclear partnership with India.

On the other hand, faced with a history of India's aggressive behavior in nuclear proliferation, Pakistan would fear the "sucker's payoff" and would be induced to expand its nuclear arsenal.¹⁹⁷ If the immediate diplomatic reaction of a state is any indication of how it will conduct itself in the not-too-distant future, then it is not insignificant that Pakistan cancelled the diplomatic visit of its Prime Minister, Shaukat Aziz, to the United States after the announcement of the India-U.S. nuclear partnership.¹⁹⁸ Moreover, Pakistan's primary concern is in fact what the prisoner's dilemma envisions as outlined above, i.e., the lack of adequate information and the need for verification. Pakistan is primarily concerned with the possibility that India can now produce increased quantities of weapons-grade material in its unsafeguarded facilities.¹⁹⁹ The National Command Authority, Pakistan's nuclear authority, ominously declared, "In view of the fact that the agreement would enable India to produce significant quantities of fissile material and nuclear weapons from un-

194. Here it is worthy of mention that both states continue to engage in aggressive weapons posturing with the use of missile-tests that demonstrate their capacity to deliver warheads. See Rose Gordon, *India, Pakistan Trade Tit-for-Tat Missile Tests*, ARMS CONTROL ASSOCIATION, Apr. 2003, http://www.armscontrol.org/act/2003_04/missiletest_apr03.asp.

195. Abbott, *supra* note 22, at 16. ("The offensive incentive is an incentive of temptation. It leads parties to cheat or shirk on their commitments in ways they hope will not be observed, rather than to withdraw from those commitments altogether. . . .").

196. *Id.*

197. *Id.* ("Concern over offensive defection will also be strong when the overall relationship between the parties is one of suspicion-based on reputation or prior experience or unfamiliarity.")

198. Sridhar, *supra* note 20.

199. Indo Asian News Service, *Pakistan Nuclear Authority Concerned over US-India Deal*, *supra* note 20.

safeguarded nuclear reactors, the NCA expressed firm resolve that our credible minimum deterrence requirements would be met[. . .]²⁰⁰

Ignoring these very clear signals emanating from Pakistan, the United States is emphasizing the benefit of having India's civil nuclear facilities (the ones it designates as civil) under IAEA safeguards. Responding to a question that raised the issue of Pakistan's security concerns, Under Secretary of Political Affairs Nicholas Burns was quoted as saying,

this arrangement between the United States and India is good for all of the countries of South Asia, including Pakistan, because India's nuclear program, civil nuclear program, which has been outside of international supervision, outside of international safeguards for 30 years, is now going to come into international safeguards and the IAEA is going to place safeguards on fully three-quarters of India's program. That ought to be, you would think, an attractive proposition to all the neighbors of India, including Pakistan.²⁰¹

However, as the discussion in Part II demonstrated, increasing the accessibility of nuclear materials to India in its civilian programs necessarily frees up nuclear fuel already within its possession for military purposes and Pakistan is keenly aware of this.²⁰² Therefore, India's promises amount to mere assurances, which, if relied on by the United States, can increase the likelihood of offensive defection.²⁰³

In conclusion, India's history of mutual enmity and suspicion with Pakistan, which to this day remains unresolved largely due to the struggling peace process over Kashmir, makes the U.S.-India nuclear partnership a lightning rod for conflict under the present circumstances. Second, the dearth of legal regimes governing the conduct of either India or Pakistan in the nuclear weapons realm make the proposition of liberalizing nuclear trade with India highly risky. This is especially the case when Pakistan's unilateral moratorium on testing was predicated on the condition that the CTBT entered into force and nothing transpired that would prove deleterious to its security interests.²⁰⁴ Because the CTBT's future is seriously in question after the United States shifted its policy with respect to that instrument, Pakistan's right to remedy any regional imbalance of power it perceives is legally unfettered. The probability that Pakistan will pursue this course of action is high given its record of as-

200. *Id.*

201. R. Nicholas Burns, *supra* note 180.

202. See Indo-Asian News Service, *Pakistan Nuclear Authority Concerned over US-India Deal*, *supra* note 20.

203. Abbot, *supra* note 22, at 26.

204. See Wagner, *supra* note 188.

piring to match India in military might as well as the principles governing the prisoner's dilemma paradigm.

CONCLUSION

This Note has set out the legal landscape that the U.S.-India nuclear partnership confronts. Part I began by explicating the inherent weakness of the IAEA safeguards system with its allowances for military exemptions and inability to prevent risky transfers before the materials are delivered. This weakness was juxtaposed with India's historical stance towards non-proliferation and its proclivity to subvert the goals of non-proliferation by feigning cooperation in order to win concessions from nuclear suppliers, particularly the United States, and ultimately diverting those concessions to non-peaceful uses. There has been no significant indication, in legal stance or otherwise, that India will change this behavior.

Part II examined the U.S.-India nuclear partnership in the context of the broader non-proliferation regime and Franck's theory of regime legitimacy. It argued that, as a matter of customary international law, states pursue non-proliferation objectives through multilateral channels or means not inconsistent with multilateral obligations. Because India is not a party to any multilateral treaty proscribing its right to expand its nuclear arsenal, the U.S.-India nuclear partnership threatens to undermine the legitimacy of the non-proliferation regime in two ways: 1) as a major bilateral measure by the United States that is inconsistent with the goals of non-proliferation, it detracts from the regime's coherence and 2) if the relevant multilateral bodies, such as the NSG, accept the agreement as consistent with the goals of non-proliferation, it undermines the regime's determinacy by creating a moral hazard that tempts other supplier nations to capture markets of nuclear ambitious countries with unsafeguarded facilities.

Part III briefly described the protracted and easily aggravated tensions between India and Pakistan, which will only be inflamed by the United States liberalizing nuclear trade with India. Given the dearth of legal regimes in South Asia governing weapons proliferation, the United States is relying on India's assurances that it will exercise restraint in its nuclear weapons program and hoping that Pakistan's incentive to proliferate will be mitigated by bringing India's civilian facilities under IAEA safeguards.²⁰⁵

205. For instance, paragraph (g) of the United States-India Peaceful Atomic Energy Cooperation Act requires India to declare the amount of uranium mined in India during the previous year, the amount of such uranium that has likely been used or allocated for

For its part, India recently passed a bill promulgating guidelines for nuclear transfers, amending its own Atomic Energy Act of 1962.²⁰⁶ It generally adopts a principle of non-proliferation, prohibits export of nuclear technology directed towards development of nuclear weapons, requires IAEA safeguards to apply to any recipient of its exports, and reserves the right to place special controls on sensitive exports as a matter of national policy.²⁰⁷ As reassuring as this piece of domestic legislation may be, it is no guarantee that the U.S.-India partnership will avoid the proliferation of nuclear weapons in the sub-continent. Furthermore, it is no substitute for legal obligations that emanate from the well established multilateral non-proliferation regime. Therefore, the foregoing legal considerations taken together lead to the inescapable conclusion that the U.S.-India Strategic Nuclear Partnership deals a debilitating blow to the non-proliferation regime.

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the production of nuclear explosive devices, and the rate of production in India of fissile material and nuclear explosive devices. In addition, it envisions the United States acting as a liaison between India and Pakistan in helping facilitate disclosure and transparency of one another's nuclear weapons program. 22 U.S.C. § 8003(g) (2006).

206. Guidelines for Nuclear Transfers (Exports), GOV'T OF INDIA, DEP'T OF ATOMIC ENERGY, Feb. 1, 2006, <http://www.dae.gov.in/sectt/im/gazfeb06.htm>.

207. *Id.*

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