Canadian Policy on Nuclear Cooperation with India: Confronting New Dilemmas

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Big Empty Spot: "Recognition" and India's Nuclear Weapon Status

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This paper will examine some issues arising from the US-India Joint Statement of July 18, 2005 (White House 2005). The question of how India should be treated in the context of this co-operative proposal raises basic issues for the nuclear non-proliferation regime, in suggesting an exception to the existing distinction, established in the NPT, between NWS and NNWS. Whether such an exception should be made, whether, if made, it should be regarded as a one-off or be rules-based, and what its contents should be are all matters of considerable disagreement. As a way of cutting through the potential implications, the paper will draw on the concept of recognition in international law. Although that concept is legal, it also has political and psychological aspects that are of possible use here.

Setting the General Problem

Following earlier Indian tests, a discussion occurred among some members of the international nuclear non-proliferation academic community over whether India should be termed a "nuclear weapon state." The question, which was arcane rather than unrealistic, concerned the political and legal implications of applying that term to a state that, while possessing nuclear weapons, was not one of the five designated NWS of the NPT. Would using this term give India a status, whether political or legal, that might be undesirable in this light, by indicating an acceptance or even a rewarding of its tests, with negative implications for the nuclear non-proliferation regime? To avoid complications in terminology, this paper shall adopt the convention of reserving the term NWS for those so designated under the NPT, and shall instead term India a "state with nuclear weapons" (SNW).[1] Therefore, though in terms of the NPT (for the states party to it) and in terms of domestic law in many states, India is often treated as an NNWS, it is a non-NPT NNWS that is an SNW. This is why things can get confusing. Adding India to the list of NWS is not at issue here; rather, the question is now how to handle it as a state with nuclear weapons as a matter of accepted fact, yet outside the NPT.

[1] The other term currently in use—"responsible State with advanced nuclear technology"—artfully avoids the weapons issue.

This old debate recalls two stories—one true and one fictional. The first story—the true one—concerns the US refusal, for over two decades, to recognize the People's Republic of China (PRC)[2] as the government of the Chinese state. This refusal, whether dictated initially merely by dislike compounded by the Korean War, or by a hope that the PRC's defeat of the Chinese Nationalist government might be reversed, allowed the US to deny the PRC certain advantages under its domestic law that would have followed on recognition, and to block it until the 1970s from taking the Chinese seat at the UN, including in the Security Council. Ultimately, however, the US found that the PRC was not going away, and would have to be dealt with, even if informally. The American refusal to recognize, however limited its ultimate political impact, nonetheless took on a symbolic importance, which could hamper not only the US and the PRC but also others trying to navigate between them. Ultimately, of course, a dialogue begun under President Nixon resulted in American recognition in 1978 (although with a continuation of the Taiwan anomaly). Now, the question of how to incorporate China constructively into the international system continues, but the mechanisms and approaches of exclusion have been replaced, in part at least, by mechanisms of inclusion.

The same problem is posed by India with respect to both the nuclear non-proliferation regime and the world political system. There are clear tensions between the political-technical-legal character of the first (and its peculiar discriminatory character) on the one hand and the political character of the second on the other. For the first, the nuclear non-proliferation regime, centered on the NPT, is based on a distinction between 5 designated NWSs, of which India is not one, and the remaining states, designated as NNWSs. While this regime is thus initially discriminatory between NWSs and NNWSs, negotiations to be undertaken in good faith under Article VI of the NPT are, in theory, to remove this discrimination at some unspecified future date. Within the NNWS category, the attendant safeguards system (INFCIRC/153) seeks to formally treat like actors in similar ways and on a technical-objective basis. This, of course, masks an initial political focus under a suitably technical-objective cover.[3] For the world political system, however, a cold-blooded view suggests that nuclear weapons are not going away

[2] The original "big empty spot" from which the title of this paper is derived.

[3] Initially, a primary concern for the NPT negotiators was with states with relatively strong nuclear-industrial capabilities, especially in Europe. The safeguards focus that developed was oriented to nuclear material, and thus to the larger nuclear-industrial states. This resulted in what many—including Canada—have complained is an unsuitable allocation of inspection efforts towards states, primarily Canada, Germany, and Japan, which present little or no actual proliferation threat.

anytime soon. Pending the Second Coming, or the Greek Kalends, it therefore makes a difference who has them. Politics is in part precisely about discriminating; for example, between those whom we might wish to include in the ranks of the great and good, and those whom we might wish to exclude even if we less formally acknowledge their influence. This is not a less principled or a more hypocritical undertaking than the first, merely one based on different principles. To think otherwise is similar to being shocked at finding gambling in Rick's *Café Américain*. The divorce between the non-proliferation discourse of non-discrimination, safeguards techniques applied on objective and technical criteria, and disarmament, and the political-strategic discourse of world order (for which non-proliferation concerns are only one factor), is a major difficulty both in analyzing the nuclear non-proliferation regime and in talking about it: certain things cannot be said in polite company.

The second, fictional, story is "The Monkey's Paw," the moral of which might be that we should be careful about what we wish for—we could get it in the worst possible way. In November 2004, a study prepared by the Canadian Department of Foreign Affairs for the Blix Commission suggested that efforts should be made to draw non-NPT states into "more comprehensive multilateral commitments and safeguards relating to their civilian nuclear cycles, including negotiation of a full-scope safeguards agreement and an Additional Protocol with the IAEA" (Foreign Affairs Canada 2004).

This, the study noted, would likely include separating civilian from military facilities, and would have to be done "in ways that did not imply acceptance of these countries as de facto nuclear weapons states" (Foreign Affairs Canada 2004). The proposal for US-India nuclear co-operation now presents this recommendation as a practical problem. Underlying this is the fundamental problem of how we are to categorize India, and how we are to approach it on the basis of that categorization. This leads us to the issue of recognition.

Recognition in International Law

Within the realm of international law, the theory and practice of recognition[4] may give us a means of thinking initially about both the nature of "recognition" of India's nuclear weapons status and some of its implications. In terms of this particular issue, of course, the question is more than simply legal. The political and symbolic aspects may be central, but still, legal aspects feed into these, and the conceptual vocabulary of the law might be of value even beyond the purely legal considerations.

[4] For a basic introduction, see, Malanczuk, cited here.

Even within international law, recognition is best approached as a political act with legal consequences. That is, it reflects primarily political calculations, but may have an impact in both domestic and international law and tribunals. Actors (states, governments, and others), situations, claims, etc. may all be recognized in international law. As an act of policy, states may grant or withhold recognition on the basis of "objective" criteria, or on the basis of a policy objective: granting recognition may signal acceptance of a fact; withholding recognition may not in one sense deny the fact, but may be a device to try to change it, or at least to put pressure on another by withholding certain advantages or benefits that would flow from recognition. In international law, recognition is an act by an individual state, which is free to grant it or withhold it as it sees fit. No international organization as such can confer recognition on a state or government, for example, even by granting membership in that organization. In the case of the NPT, however, status as either an NWS or an NNWS was negotiated and confirmed in the treaty as a collective act, and while states are free to join the treaty as NNWS or to withdraw from it on their own, changing status from an NNWS to an NWS requires a second collective act—amending the treaty. This complicates the comparison but does not void it.

Three sets of distinctions are of interest to us here: between the constitutive and the declaratory theories of recognition; between recognition *de jure* and recognition *de facto*; and between express and implied recognition.

The constitutive theory of recognition argues that recognition is necessary to create a legal fact; thus, in the absence of recognition, a government or a state would not exist in law. This theory holds best on the domestic level, where, for example, refusal to recognize an actor may deny it standing to sue in the courts of the non-recognizing state: no proper party may be before the court. Or, the acts of a recognized government might be granted validity in the courts of the state recognizing it, but those of an unrecognized government would not be upheld, as the government in question would not be held to exist. On the international level, this theory would seem applicable primarily to occasions where a situation or an actor is created in breach of international law: recognition (more particularly, recognition *de jure*) cures that breach. The declaratory theory argues, in contrast, that recognition merely acknowledges the existence of a situation and applies the consequences of that acknowledgement—it does not actually create the situation. This approach may be more applicable in international tribunals, but is not really applicable generally in domestic courts.

A distinction is also drawn on occasion between recognition *de jure* and recognition *de facto*. Recognition *de jure* confers a sense of legality or legitimacy, and perhaps also permanency. A government recognized *de jure* is the lawful or legitimate government, while a claim-of-title recognized *de jure* is one accepted as lawful. A government-recognized *de facto* may simply be the current government. A defective claim to territory, recognized *de jure*, has that defect cured; a *de facto* recognition, on the other hand, might merely acknowledge that a state controls a territory for the time being, but its legal right to do so is still in question. So, for example, by refusing to recognize *de jure* South Africa's former claims to the territory that is now the independent state of Namibia, the world community indicated that in its opinion the future legal status of the territory was still an open question. One might refuse recognition of a state's claim to territory; for example, under the Stimson Doctrine (applied to Japan's activities in Manchuria in the inter-war period), precisely in order to deny that state the fruits of aggression, effectively limiting its claimed legal rights and standing with respect to that territory.

Recognition may be express or implied. In the former case, a clear statement of recognition, with a clear intent to recognize, removes all doubt as to the intent of the actor recognizing and as to the resulting status of the actor, situation, or claim so recognized. In the latter case, however, recognition is inferred by the activities of the supposedly recognizing actor toward the actor, situation, or claim involved: are these such that they imply or could only be based on such recognition? The difficulty with implied recognition is that it may be possible for a state to disavow any intent to recognize regardless of its behaviour. It is possible to conduct many interactions with another state or government, for example, yet not to recognize it: the US could exchange table-tennis teams with the PRC, receive pandas for temporary exhibit in its zoos, talk to representatives of the PRC, and even open a liaison office in Beijing, without recognizing the PRC as the government of China.

India as an SNW

How might these distinctions apply to India in the nuclear case? If India was to sign the NPT as an NNWS, it would agree to the express, *de jure* status of a state without nuclear weapons under that treaty. It would be legally constituted as an NNWS participant in the treaty, with consequent implications for the reorientation of its nuclear program and facilities and the application of full-scope safeguards under INFCIRC/153, if not also the Additional Protocol (INFCIRC/540). On the other hand, if India was to sign as an NWS, it would take on the express, *de jure* status of a nuclear

weapon state under the treaty: it would be legally constituted as an NWS under the terms of the treaty.

It is precisely the matter of NPT status that creates the basic problem of the India-US arrangement. Only five states qualify as NWS under the NPT: the US, the UK, the USSR (and Russia as its successor), France, and China. Article IX.3 defines a nuclear weapon state for the purposes of the NPT as one that manufactured and exploded a nuclear weapon or other nuclear explosive prior to January 1, 1967. All others are to be considered as NNWS, regardless of their actual or possible possession of nuclear weapons. Admitting additional states to the NWS category would require opening up the NPT to amendment, itself a dangerous and difficult process.[5]

It would also be seen as defeating the purpose of the treaty, sending the wrong signal to other states, and possibly undermining the broader nuclear non-proliferation regime. The fundamental argument here is over what considerations states would respond to in deciding to acquire or to continue to forego nuclear weapons. Some analysts contend that the impact would be limited, on the grounds that states make proliferation decisions based on local circumstances, not broader considerations. As against this, however, is the fear that current states outside the regime, or that may be developing weapons or a latent or breakout weapons capability within them, or other states within the regime that came in in good faith, could take special treatment of India as an insult, a model or a hope (du Preez and Duarte 2006; Huntley and Sasikumar 2006; Nunn 2006).

So, for example, on the breakup of the Soviet Union, considerable efforts were devoted to ensuring that the Ukraine was admitted to the NPT as an NNWS, and to getting it to give up what nuclear weapons remained on its soil. Italy referred explicitly to this limiting definition of an NWS in its statement attached to its signature of the NPT, declaring that "Any claim to belong to this category, and for any title, shall not be recognized by the Italian Government to other States, whether or not they have signed the Treaty." Japan noted that the NPT permits "only the present nuclear-

5 Amending the NPT, under the terms of Art. VIII.2, requires a majority of (a) all parties to the treaty, (b) including all the votes of the NWS party to the treaty, and (c) including the votes of all other parties to the treaty that are on the Board of Governors of the International Atomic Energy Agency as of the date of circulation of the proposed amendment.

weapon States to possess nuclear weapons," but linked this to future disarmament talks.[6]

However, even if states did not attach such statements to their signatures, they could still respond, if they believed that their interests were crucially challenged, by availing themselves of their right under Article X.1 to withdraw on three months' notice.

The enormous political, psychological, and legal consequences attending an explicit, *de jure,* and constitutive recognition of India as an NWS under the NPT effectively ensure that this will be most unlikely. It is worth noting, however, that an Indian signature of the NPT, whether or not as an NWS, would itself also be a singular reversal of a long-standing and fundamental Indian complaint about the treaty. Even during the negotiation of the NPT, India made it clear that it objected to the discrimination made explicit between the then-existing NWSs and NNWSs. Signing the NPT in *any* capacity would entail repudiating this principled objection—to India's disadvantage if as an NNWS, or to its advantage if as an NWS. Of course, if India adopts the NSG guidelines, which generally contain a full-scope safeguards requirement—though India would be exempted in this regard under US proposals—it would be required to apply full-scope safeguards to others while itself avoiding them. Thus, while India might succeed in dismantling that portion of the nuclear non-proliferation regime that it sees as unfairly discriminating against it, it would in return be accepting some degree of discrimination against others (Kimball 2006). India has no intention of signing the NPT as an NNWS, nor does it seek to join the treaty as an NWS. For its part, the US notes that it is not recognizing India as an NWS under the NPT (White House 2006).

The US tends to downplay the *de facto* and implicit aspect of its arrangement with India outside of the NPT. But whether or not one wishes to argue that *de facto* and at least implicit recognition has occurred in the legal sense, in the looser and in many ways more relevant political and psychological senses that conclusion is hard to avoid. The establishment of a separation plan prior to the development of a safeguards system for India's designated civilian nuclear sector makes sense only if India is being treated as possessing nuclear weapons. This implication is not avoided if the recognition is posed as *de facto* and implicit—and statements by the Indian Prime Minister make it clear that

[6] Declaration of January 28, 1969, para. 11. The list of parties to the NPT and their various statements upon signature, ratification, access, or adherence to the NPT are available at http://disarmament.un.org/TreatyStatus.nsf/.

India regards the Joint Statement and its implementation as effectively providing it with such recognition (India Prime Minister's Office 2006b).

But in what capacity, then, has India been "recognized"? The NPT presents only two choices in the NWS-NNWS dichotomy created in the NPT. What is the status of this dichotomy, and particularly of the NNWS category, beyond the NPT? A fundamental rule of treaty law is that if a treaty creates a new rule, that rule is binding only on the signatories of that treaty, not on non-signatories. By that fundamental rule, NNWS status as a legal category applies only within the NPT, not beyond it. If member states seek, for example in domestic legislation or in export practices, to draw others into the NPT in the NNWS category, or to treat them in terms similar to NNWSs, that is an indication of their policy or of their desire, not an obligation binding on non-signatories. One might attempt to argue that the dichotomy and the broad application of NNWS status has now entered customary law, and could therefore be binding even on non-parties. If so, however, the fact that India objected to the distinction even as it was being negotiated, refused to sign the NPT on this basis, and has been consistent in its protest since, would seem to qualify it for the "persistent objector" exception (Malanczuk 1997). One might also attempt to argue that the NPT, being so widely adhered to, is now an "objective" law binding even on non-signatories, but that could also be debated (Malanczuk 1997).

How should India be treated? Should it receive the same treatment as an NWS (which some statements seem to indicate is what it expects[7])? What of the implications of this for the NPT and the wider regime? One alternative to this quandary would have been to constructively exploit the ambiguity possible in a situation short of recognition. The US-PRC case demonstrates that a lot can go on short of even implicit recognition. Such an approach would not seek to resolve the Indian anomaly, but rather would embrace and preserve it. But creative non-recognition no longer seems to be on the table as an alternative. The political argument within the US, and by extension the question both between the US and India and between any US-Indian arrangement on the one hand and the nuclear

[7] E.g., "[W]e have virtually got all the benefits that go with being a Nuclear Weapon State without having the *de jure* status of a Nuclear Weapon State." India, Prime Minister's Office, "PM's Reply to the Lok Sabha debate on his US visit, August 3, 2005," http://pmindia.nic.in/speech/content4print.asp?id=160. The psychological aspect of this should not be underestimated. One is struck in various statements of the Indian prime minister by the sense of wounded pride aroused by India's previous treatment in the nuclear area. This is itself part of a broader sense that India's real and potential status as a global player has not received its due, and that this arrangement with the US is part of a desired remedying of this situation.

non-proliferation regime on the other, will likely be defined and assessed overwhelmingly as one of getting as close as possible to one or the other of the two mutually exclusive categories of the NPT.

Some supporters of the current non-proliferation regime may want to push toward the NNWS side as much as they can. The problem is further complicated by the tremendous investment that has gone into creating and detailing the NPT dichotomy in both international practice and national legislation. Some of this effort, arguably, has gone beyond a strict reading of the NPT itself (which permits safeguarded exports to non-parties). Even so, if the treaty provisions are themselves now a floor—a set of minimum requirements—in some sense, the generally applicable rules in bodies such as the NSG and in much domestic export control legislation have moved above this floor. Further, after much effort, the NSG itself moved to accept full-scope safeguards as its export standard to NNWSs, and got this accepted by NPT parties at the 1995 Review Conference. It is now being called upon to alter this standard.

Others may be willing to treat India as an NWS for certain purposes (effectively taking it at its word, and perhaps more), but insist that India accept *all* of the attendant burdens as well as the benefits. However, it would seem desirable from a regime perspective to avoid too close a parallel with the treatment of NWSs under the NPT in order to avoid rousing the envy and resentment of some NNWSs party to the NPT. There is a problem here both for India on the one hand, and opponents of the deal on the other: the more India is treated as an NWS that falls outside the NPT, the more problematic the result would be for the nuclear non-proliferation regime more generally if NNWS in the NPT are to be mollified. There must be a meaningful distinction, with some disadvantages to India attached as well as possibly some advantages, if this is to be avoided. Treating India as falling outside the NWS-NNWS dichotomy—treating it as an SNW—might allow an approach less disruptive of the NPT's categories and more constructive for the nuclear non-proliferation regime as a whole. If India is not an NWS, neither is it an NNWS: it is a State with Nuclear Weapons (SNW).

Parameters for SNW Status

What, then, might it mean to be an SNW—a third category in (or rather, outside of) a dichotomy? We may look at elements of the US-India statement as a possible prototype for such a category, supposedly brought closer to the nuclear non-proliferation regime yet not within the NPT.

Should the Indian case be treated as a one-of-a-kind exception—an anomaly to be resolved rather than welcomed—or as an instance of a

broader, rule-based category? Currently, the US is seeking modification of NSG rules on an India-only basis. It is feared that exceptional treatment for India will invite efforts by others to seek exceptions for their favoured candidates as well. The consensus basis of decision in the NSG could favour this possibility if states trade support for future considerations. The possibility of additional exceptions, however, is not closed off by the development of a rules-based approach—unless those rules achieve that highest form of the art, an agreed, effective, objective, and technical category that in fact permits only the one case.

The basis for a limited Indian case, whether or not posed in terms of "objective" rules, would have to reside not only in the specific actions that India has taken or proposes to take, as cited in the US draft proposals for the NSG, though these certainly are helpful in setting criteria (Kimball 2006). It would need to be argued as well that the small set of states not party to the NPT, including those that have or are thought to have nuclear weapons, really form a leftover category grouped merely by what they are not. This is an internally heterogeneous group, and therefore one member cannot reasonably be expected to be treated automatically like another simply on the basis of this common membership in a residual set. There is no injustice in treating unlike cases differently. *Sui generis* treatment, within certain broad sets of considerations, would thus be the norm. These considerations would themselves be useful in drawing relevant distinctions. They could include: previous illegal behaviour; previous membership in and subsequent withdrawal from the NPT; possession (overt or suspected) of non-possession of nuclear weapons; potential or actual contribution to proliferation and non-proliferation, etc. Thus, not all states outside of the NPT would be treated as SNWs. Nor would all states outside of the NPT that have nuclear weapons: in part, a point of using the SNW category would be precisely to link these states positively to the non-proliferation regime more generally, even if they do not fall within the NPT. Others, outside of the NPT, even with nuclear weapons, might still be subjected to pressures to disarm.

If the US draft proposals are accepted, other states would be free to provide items that the US might not be willing to sell (Kimball 2006). But NSG guidelines still act as a floor of sorts, and so this must be factored into consideration of this point. Further, while they set some conditions governing sales (conditions that include requirements to be placed on recipients), the guidelines do not require any state to sell to all comers. Nor would they prevent a supplier state, through its bilateral civilian nuclear co-operation requirements, from placing more stringent conditions on its sales, including safeguards, contagion, retransfers,

derived items, conditions for reprocessing or further enriching of fuel, and so on.

Among the various actions to be taken by India, as outlined in the Joint Statement and as noted in the US draft proposal to the NSG, some do not touch directly upon India's own status even as they bring it closer to the mainstream of desired practice *vis-à-vis* other states. These would seem to present clear gains for the non-proliferation regime in general, without raising the vexatious problem of recognition. Such measures include: supporting efforts to restrain the spread of sensitive nuclear technologies, such as enrichment and reprocessing; strengthening Indian export control legislation and mechanisms; observing Missile Technology Control Regime and NSG guidelines in India's own exports—this last, of course, having the peculiar effect noted above. Suggestions that India participate in the Proliferation Security Initiative have also been made. India has noted that it has certain concerns on this score (India Prime Minister's Office 2006a), but this need not preclude informal co-operation. Suggestions that India commit itself to supporting measures against Iran have aroused a strong response, as impinging on its foreign policy independence. Here again, however, informal co-operation may be possible, and India has in fact acted in conformity with the recent UN Security Council resolution sanctioning Iran (Anon 2007).

Among areas in which Indian action has been sought, promised, or forthcoming, however, there are those where the NWS-SNW distinction does come into question even though they are outside the NPT as such. The NWS have, with certain exceptions and variations, acted in these areas, so pressing India to conform to their broad standard raises the difficulty noted above. First, India has committed itself to continue its current unilateral moratorium on testing, but there are demands that it should sign the CTBT. India will resist pressure to sign the CTBT, and in light of US non-ratification the case to press it is less than overwhelming. (This could, in fact, be a device to put pressure for CTBT action on both India and the US.) Second, while India has committed itself to working with the US toward a Fissile Materials Cutoff Treaty—and the meaning of this seems fairly vague—some have demanded that India should end its fissile material production now, as the NWSs have done. Again, India has rejected this demand. The nature of its general grand scheme for nuclear energy, progressing toward a thorium cycle (India Prime Minister's Office 2005),[8] as well as any desire to increase the size of its nuclear arsenal, would seem to preclude such a shutdown.

[8] The plan would begin with the current power reactors, move to breeder reactors, and finally to a thorium-based fuel cycle, taking advantage of India's large thorium deposits.

There are, finally, those areas in which direct comparison with the treatment given to NWSs under the NPT and to NNWSs by nuclear exporters will be inevitable and unavoidable. Two major areas here are the separation plan and attendant safeguards by the IAEA, and some of the terms of any specific US-India nuclear co-operation agreement.

India has proposed a draft plan for the separation of civilian nuclear facilities from those in the non-civilian sector (India Department of Atomic Energy 2005). This terminology for the distinction is not adequate, however, given the peculiarities of that separation plan: provision of civilian nuclear power versus supply of a military sector is not the actual or sole basis of the division. It would be better to refer to an "open" sector that could receive foreign input and would be safeguarded, and a "reserved" or "closed" sector that would not be safeguarded.[9] The reserved sector in the Indian plan not only encompasses a military component but also seeks to protect from external influence its research and development activities and facilities deemed crucial for its long-term three-stage nuclear power plan. It may be feared regarding this last that, while external technology, etc. could be beneficial, the conditions and safeguards that would accompany it would be undesirable. The nature of this distinction, however, increases the size of the reserved sector, and feeds concerns (also found in the argument that India should agree to a cutoff in fissile materials production) that India could continue or even (through relieved pressure on its domestic uranium supplies) significantly increase its rate of production of fissile materials for weapons use (Mian et al. 2006; Tellis 2006).

The open sector would be subject to IAEA safeguards, including an Additional Protocol arrangement. (This last is seen as somewhat symbolic, given the separation plan and the non-full-scope safeguards resulting in the first place, but could at least give a window on the open sector.) Bits of information thus far available suggest that these would not simply be parallel, however, to those found in the voluntary arrangements between NWSs and the IAEA (India Department of Atomic Energy 2005). Taking the US-IAEA agreement as a point of comparison (US Department of State nd), under this agreement the US distinguishes between facilities eligible for the application of safeguards by the IAEA and those not eligible. Of the eligible set, the IAEA then chooses which it will actually apply safeguards to, though it can receive necessary design information and the like about the rest. The tremendous strain on IAEA resources

[9] The distinction then also raises the issue of the leakage of information and technology, if not of equipment and materials, from the open sector to the reserved sector.

that would flow from trying to safeguard all the eligible US facilities is a factor in this, but it also indicates the largely symbolic nature of the NWS safeguards. Crucially, the US retains the right to add facilities to, or withdraw them from, the eligible set.

A full parallel between the treatment given India and that given to NPT-NWS would lead us to expect a similar flexibility—something not to be desired. By comparison, it would appear that although India will (like the US) retain the right to determine which sector a facility falls into, it will accept safeguards in perpetuity on facilities in the open sector. A report in October 2006 suggests, however, that India may be "balking at the notion of permanent IAEA safeguards for its entire civilian nuclear sector" (Boese 2006). A later report indicates that India wants to avoid INFCIRC/66-type safeguards, under which "material imported or produced under safeguards" would remain under safeguards (Boese 2007).

Thus, any facilities initially declared in that set, and any subsequently added to it, will stay there. The result may be, depending on how the two sectors develop in the future, that a substantial portion of the Indian nuclear program comes under safeguard. While the addition of a significant number of additional facilities to the IAEA safeguards list may still strain its resources, it would also still be desirable to avoid the expedient adopted in the US case of having the agency merely choose a few from the eligible list. With sufficient additional agency resources, the entire set could be put under permanent safeguard. The combination of locked-in categories and full agency application of safeguards within the open sector would mark a significant practical and helpful distinction between India's treatment and that afforded to NWS. Further, if, for example, a contagion principle is applied to imported information, technology, equipment, and material, this would help to reinforce the Indian separation scheme. However, India has indicated a willingness to accept "campaign mode" safeguards at its Tarapur reprocessing facility for safeguarded material (India Department of Atomic Energy 2005).

Problematically, India has demanded (based on its experience with the Tarapur power reactor[10]) assurances from the US of a fuel supply, even if the US for some reason might itself cease supply, and the right to build up a fuel reserve to protect against supply disruptions. While this has an obvious impact on the terms of any US-India nuclear co-operation agreement, it is also linked to the broader safeguards issue. India's prime

[10] This reactor was, under the terms of the 1963 agreement with the US, to be supplied with US fuel only. Following the termination of US-India nuclear co-operation after the 1974 test, alternative fuel supplies—first from France and then from the USSR—had to be arranged and agreed upon between the US and India.

minister has stated that the offer of perpetual safeguards for the open sector is contingent on securing an international supply of fuel for these facilities for their lifetime (India Prime Minister's Office 2006a). The basic concern here would be whether such an assurance of supply would hold in the event of another Indian nuclear test. If the assurance was in the form of a sizeable stockpile held in India, the problem is obvious. It should be noted that current broadly phrased proposals for fuel supply assurances (in return for states foregoing reprocessing or enrichment) cover only commercial disruptions, not interruptions based on non-proliferation concerns. Even if India avoids being formally bound by a legal commitment not to conduct further testing, can it reasonably expect to be given essentially a free hand?

Finally, there are the terms of any specific US-India nuclear co-operation agreement. The US administration has committed itself to modify legislation—above all the requirement for full-scope safeguards—that would hinder nuclear trade with India, and has sought with some success to block proposed amendments to legislation enabling the Joint Statement, which would potentially kill such an agreement. But which US controls and rights, standard in its other co-operation agreements, will be applied and which might not? The fuel supply issue raises a problem in this regard, as the US typically reserves the right to cancel or suspend deliveries if a nuclear test occurs. As well, the US typically retains a right of consent not only to transfers of supplied and derived items to third parties, but also to any reprocessing or enrichment (or further enrichment) of supplied fuel. This might present the possibility of a significant impact on future Indian nuclear plans. India is reportedly seeking pre-approval treatment for reprocessing similar to that the US gives to Europe and Japan (Boese 2007). Failure to obtain such an assurance, in turn, presents an incentive to India to preserve a significant non-military but still reserved sector in which it might more freely produce fissile material.

Whether in its multilateral or its bilateral requirements, carrying out the Joint Statement will also present significant sequencing problems, as each side will want to ensure that vital commitments are carried out by the other before it performs key actions itself. For example, India would want to have all restrictions on it lifted before its designated facilities come under safeguards (India Prime Minister's Office 2005).

NWS-SNW: A Dime's Worth of Difference?

While the US correctly notes that it has not recognized India as an NWS under the terms of the NPT, and India has not sought this status, the US-

India agreement, if it goes through in its multilateral as well as its bilateral aspects, would nonetheless seem to be *de facto* and implicit recognition of India in a nuclear capacity. The separation plan requirement otherwise makes no sense. But what sort of capacity is this? It is suggested here that, rather than confining ourselves to thinking simply in terms of the binary and mutually exhaustive NWS-NNWS categories offered under the NPT, it might be useful to create a third category—the SNW. The implications of this include that the NWS-NNWS dichotomy would be reserved purely to states party to the NPT. As well, although now full-scope safeguards are accepted as the standard applied to NNWSs both within and outside the NPT, the new category would challenge this. The NPT requires safeguards on exports, including to states outside the treaty, and full-scope safeguards on exports to NNWSs within it. While the full-scope requirement continues within the NPT, it would no longer apply of necessity to states on the outside. That would be a matter of agreement among suppliers. (In this case, however, it would require positive agreement among NSG members to reduce the requirements for a non-party.)

Not all states outside the NPT would be SNWs, even those that actually have nuclear weapons. The category would be intended to provide a legal framework for a positive relationship between a specified state and the broader non-proliferation regime, outside of NPT membership. It would not imply that all non-NPT states would fall under its terms, nor would it preclude efforts to get at least some of these to enter the NPT as NNWSs. The key problem is whether a meaningful and acceptable distinction can be drawn between an SNW so intended and those states categorized under the NPT as NWSs. If this can be done, the nuclear non-proliferation regime might well emerge extended and strengthened in practical terms. If, however, the distinction is not convincingly made to the satisfaction, especially of some NNWSs currently under the NPT, considerable damage to the nuclear non-proliferation regime might well result without sufficient compensating gain. The technical terms of the distinction will not be settled until the safeguards and the nuclear co-operation agreements are signed. The response to these arrangements will be governed largely by political and psychological considerations, but their technical character may still be a factor in influencing how states respond.