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The South Asia expert tells Managing Editor Aziz Haniffa why the US-India deal should not fail

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Agreement will be sealed finally? Are you confident that this time the 123 Agreement was complicated given the difficulty in Delhi that Washington had changed the rules, arguing that the agreement actually materializes. This is sort of the sense that I got from both administration and diplomatic sources – that since Narayanan is coming, evidently with authority from the prime minister there is strong likelihood that the 123 Agreement will finally be wrapped up?

Correct. I am optimistic about this.

But, in terms of the agreement itself, has the US moved the goalposts, which in India’s view is why this has remained in limbo for so long?

No. I don’t think so. What most people don’t realize about the 123 is that this is a very challenging agreement for both sides. All the 123 agreements we have concluded before have been done either with non-nuclear weapons States or with nuclear weapons States. There are standard templates that apply to each of these cases. India, in contrast, is in a very odd category all by itself: it is, formally speaking, a non-nuclear weapons State that happens to have nuclear weapons. So, coming up with language that addresses India’s unique circumstances is something that has taken longer than people expected initially. It’s this structural difficulty of finding legal language to express India’s unique circumstances that has been the most difficult part of this negotiation.

You mean putting agreed policy formulations into legalese?

Absolutely. Unlike a joint statement, which is a political declaration where one can afford to use loose formulations, the 123 is a document really drafted by lawyers for international law. What I think is not widely understood in India are two things: one, that a statement of policy expresses the sense of operational consequence, but India finds them grating anyway. These include, for example, references to the expectation that one day India will become a non-weapon State signatory to the NPT (Nuclear Nonproliferation Treaty) and that the US must seek to work with India to get rid of its nuclear weapons. There are such kinds of sentiments in the statements of policy in the act.

Which are non-binding?

Correct. A statement of policy expresses the sense of Congress. It is not an operative part of the law. Many Indians have complained that since these sections are not part of the July 18 agreement, they should not be in the Hyde Act as well. I can understand that sentiment, but what I think is not widely understood in India are two things: one, that Congress is a separate branch of government with the authority to legislate on any issue as it sees fit, irrespective of whether the executive agreed to those positions or not. In that sense, Congress can speak its mind independently. That is the most important fact that must be appreciated. The second fact is that all these complaints about the Hyde Act refer to sections that have no binding significance. The President’s signing statement acknowledges that and more. But this is not sufficiently appreciated.

When you take both these elements together, the Hyde...
Act does not diminish or minimize what was in the original July 18 agreement. Now, the one area, where the Hyde Act has put constraints is in the transfers of enrichment and reprocessing technology. Whatever Congress has done does interest. The US, as a matter of policy, does not transfer enrichment and reprocessing technology to any country. Whatever Congress has done does not change that basic fact.

What the Hyde Act has done, however, is to translate that policy into law with respect to India. But, it has also done something important by way of compensations. It has gone beyond the bounds of policy to establish in law, a very specific route by which these technologies can actually be transferred to India.

So, for example, if India is working with the international community to develop proliferation-resistant technologies for their nuclear industry, if any multilateral programs like GNEP [Global Nuclear Energy Partnership], the Hyde Act actually contains a provision that gives the statutory authority to transfer these technologies. In some sense, what Congress has taken away on one hand, it has also given back on the other. Again, this is a Congressional prerogative and we are bound to respect it.

But couldn’t India argue that this is indeed what its concern is—a shifting of the goalposts—and that notwithstanding the Congressional prerogatives, that it is something the executive and legislative have got to work out because it isn’t in keeping with the understanding of the July 18 US-India joint statement as India sees it?

People have made that argument, but one has to see it in context. The relevant context here is that whatever the executive agrees to, if it involves changes in matters of law, that commitment really does not become operative until Congress gives its assent. In that process, Congress may choose to do whatever it pleases, and there is nothing the executive can do about it. The executive can urge Congress to act in accordance with the spirit of its agreements, but whether the Congress does so is really Congress’ own prerogative. So, it is unfair to hold the executive in the United States to account for any changes when it is Congress that actually decides how an agreement should be modified if it involves amending the law. This goes to the peculiarity of the US government: unlike in other countries where sovereignty is essentially united, sovereignty in the United States is divided, with three equal branches of government. And, so, the executive may promise, the executive may make commitments, but if those commitments involve changes of law, then Congress is the final authority.

I guess there is that sense of misunderstanding of the processes and hence the view that the US is not being true to the July 18 joint statement.

You’ve put your finger on the heart of the problem. In India, Parliament essentially has an organic linkage with the executive because the prime minister, the people who serve and work for him in his cabinet, are drawn from the legislative branch. So Parliament has an umbilical link to the executive. What the executive promises, Parliament, almost by definition, must approve. Because if it chooses not to, then the government will fall.

In the United States, however, you have are three completely separate institutions that don’t necessarily see eye to eye on every issue. Now, this is the first time that India has had to face this experience of divided American government, but there have been other countries, the [erstwhile] Soviet Union, for example, that have had to cope with this system for 30 years where arms control negotiations were conducted, and the Chinese were always in the room.

Ask the Chinese about their experience with the ‘most favored nation status’ in the trade talks. The executive may have one view, the Congress could have a different view. And, so, even though a foreign government may make an agreement with the president of the United States that negotiations were conducted, it may not be accepted in stone until Congress approves it.

To resolve the impasse, there are reports of India having offered to put a dedicated facility under safeguards. Does this have the potential to clear having offered to put a dedicated facility under safeguards? Does this have the potential to clear the goalpost for the 123 Agreement and moving to the next phase of the deal?

In fact, I suspect it will be the subject of discussions next week. I have seen what has appeared so far in the press—and it will be interesting to see what Narayanan and Meenon, bringing in terms of specifics. I am sure the US side will be waiting for details on that.

Is this a tangible enough concession?

I think it could be an enormously helpful way forward…. You mean, in terms of showing good faith, [but] in addressing Congress’ concerns. You remember the March 2 separation plan? In that plan, India offered to put one reprocessing facility under safeguards, but only in campaign mode. What campaign mode means is that when safeguarded fuel is introduced into the facility, safeguards will kick in. When the safeguarded fuel is completely processed, that facility comes out of safeguards. That’s essentially what campaign mode means. So if it’s an on/off way they can again enter protracted negotiations to either dilute or change any aspect of the Hyde Act to meet India’s concerns. Is it actually impossible for the Administration to go back to Congress and ask for changes in the Hyde Act to meet India’s concerns? I believe both Secretary [of State Condoleezza] Rice and [Under Secretary of State for Political Affairs] Nick Burns [the chief US negotiator] have publicly said that whatever agreements we reach with India will be within the parameters of the law. This means that any nuclear cooperation agreement with India (or for that matter with any other country) must comport with the Atomic Energy Act and all previous modifications of that Act, and in India’s case, the Hyde Act. For India, there will be no question of actually going back to Congress and asking for further amendments. What matters is that the US already gives the Administration enough latitude to reach a satisfactory agreement with India, without the need for requesting Congress for further amendments.

At the Heritage Foundation symposium recently on the US-India partnership where you were among the panelists—you first refused to consider a possible failure of this process. You said, it would have a devastating impact in the near term though not perhaps in the long term because US-India relations are irreversible and would endure. But isn’t the deal symbolically extremely important for the relationship at this juncture?

Absolutely. I believe it is extremely important. It is the centerpiece of everything that the two countries are trying to do for the simple reason that it goes fundamentally to the President’s and the prime minister’s efforts to build a new sense of trust.

Think about it from India’s perspective: this agreement really symbolizes the fact that the US is willing to extraordinary for India alone. From the US perspective, this is a cutting of the Gordian knot of nuclear disagreement—the commitment back for 30 years. So this is a very high-stakes gamble the President and the prime minister have undertaken. In my view, this is the ultimate reason why it must not fail, why it must not fail, because both leaders have staked a lot in trying to do something really important—something that implicates issues of commitment, and finally issues of confidence for the future of the relationship. So, for both sides, it’s absolutely not fail.

But with all respect to your optimism and confidence that it won’t fail and that it can’t fail, considering the commitment of both leaders, there is this sense of timing isn’t there—that the clock could run out on this administration—as you yourself acknowledged.

There is. Let me say, I wish this was completed earlier — no one is saying anything. But because India still has to complete the safeguards agreement with the IAEA (the International Atomic Energy Agency). Once that is completed, then we have to go to the NSC (Nuclear Suppliers Group) and create a consensus in favor of exceptional treatment for India. So, there’s still work to be done. But, at least at the US end, we are not putting forward that that the support we have gotten for the agreement thus far has been bipartisan. Although it started out as a Republican initiative, it’s become a bipartisan effort. What we need is that this is extraordinary important confidence for this community and particularly for this new relationship with India.

My own expectation is that people on the Hill will do their best to try and make this work out because of the electoral consequences for both parties. Nobody wants to be held accountable for having killed something so important to the bilateral relationship. But, there is also the judgment before the bar of history: you don’t get these opportunities every year — you don’t get these opportunities even once every two years. It is very important to let this fail, if they can help it conclude successfully.