

Jaipat's

India

Briefing

*An Occasional Commentary on
Law and Happenings in India*

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In July 2005, President Bush and Prime Minister Singh agreed to work towards resuming² civilian nuclear cooperation. In the U.S., the Atomic Energy Act of 1954, as amended ("AEA"),³ prohibits the President from engaging in nuclear cooperation with a country that is not a signatory to the Nuclear Non-Proliferation Treaty ("NPT"). India has refused to sign that treaty because it believes NPT discriminates in favor of the nuclear weapons states. In other words, unless U.S. Congress authorized the President to waive certain provisions of AEA, there could be no nuclear cooperation with India. In India, civil nuclear cooperation hinged on separating civilian and military nuclear reactors. In March 2006, India announced that it shall, in a phased manner, dedicate 14 of its 22 thermal power reactors to purely civilian use. That having been accomplished, U.S. Congress is now favorably considering two bills that seek to grant the authority the President needs to enter into a

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² Nuclear cooperation under the 1963 Indo-U.S. treaty was suspended by the U.S. following India's explosion of a nuclear device in 1974.

³ 42 U.S.C. Sec. 2011 *et seq.*

bilateral agreement with India to resume nuclear cooperation.⁴

Executive Power

U.S. Congress' control over policy issues does not have a parallel in India. India's Constitution empowers the Executive to enter into and perform under bilateral and multilateral treaties, agreements and conventions (collectively, "Treaties"). It also empowers the Parliament to make laws regulating entry of Treaties, a power that Parliament has never exercised. Further, it empowers Parliament to enact laws for the whole of India with a view to implement provisions of any Treaty that are in conflict with any existing federal or state law.⁵ In other words, to the extent there is no conflict between provisions of a Treaty entered into by the Executive and an existing domestic law, the provisions of that Treaty constitute the law of the land.⁶ To the consternation of an apparent majority of the Parliament,⁷ the nuclear deal and several other multilateral trade agreements break no existing federal or state law even when they constitute radical departures from India's

⁴ See House Bill 4974 and Senate Bill 2429 at <http://thomas.loc.gov/home/c109query.html>. The bills require that President make a determination that India (i) has provided to the U.S. and International Atomic Energy Agency ("IAEA") with a credible plan to separate civilian and military facilities, (ii) has accepted in perpetuity IAEA safeguards and monitoring of civilian facilities by IAEA, (iii) is working with IAEA on implementing IAEA Additional Protocol, (iv) is working with the U.S. for early entry into force of the Fissile Material Cutoff Treaty, (v) is supporting U.S. non-proliferation efforts, including with respect to Iran, (vi) is adhering to the Missile Technology Control Regime and the guidelines of the Nuclear Suppliers' Group, (vii) is adopting a variety of other controls on nuclear materials and technology, and (viii) has not detonated any nuclear device.

⁵ See, in particular, Articles 73 and 246, Entry 14 of List-I of Seventh Schedule, and Article 253.

⁶ Legislation is also required in certain other situations not applicable here.

⁷ The current minority-led government of Singh is supported by communist parties that oppose the nuclear deal. If the deal were subject to a vote in Parliament, it could potentially unravel.

long-standing policy positions.⁸ The current situation succinctly reflects the enormous power wielded by the Executive and progressively abdicated by the Legislature in India.

Galbraith

In the death of John Galbraith, India lost a dear friend. *The Affluent Society* was among the first non-fiction books I read. Galbraith seemed like a prophet who spoke simple truths. That he was fascinated with India must have helped. And ever since those momentous years (recall Bay of Pigs, India-China war, Indo-U.S. nuclear accord etc.) when he was U.S. ambassador, he set the gold standard in India for a model ambassador. No U.S. ambassador perhaps more decisively influenced policy in India.⁹ He did that with a special touch. "...Diplomats are paid," he wrote in *Ambassador's Journal*, "to get along with the people of the country to whom they are accredited."¹⁰

Iran Storm

Galbraith's counsel was timeless. Earlier this year, Ambassador David Mulford told a newswire service that if India wanted U.S. nuclear cooperation, it must reconsider its proposed gas pipeline with Iran and its vote on referring Iran's nuclear non-cooperation to the Security Council. His remarks were widely interpreted in India as dictating of foreign policy. Besides, the pipeline probably does not merit that heightened attention. As Frank

⁸ In the case of the nuclear deal, not merely political positions; at least two former top nuclear scientists have openly questioned the "merits" of the nuclear deal, and they are not alone.

⁹ "He has done a wonderful job during his tenure in India. He has tried to inspire the Indian people to work harder, grow more, and to industrialize the country. I thank him and the United States Government for their great help through these recent years." Nehru, in a speech in Punjab, July 1963; quoted on the jacket of *Ambassador's Journal*. India awarded Galbraith the *Padma Vibhushan* ("special decoration of the lotus"), its second highest civilian honor.

¹⁰ *Ambassador's Journal: A Personal Account of the Kennedy Years*, page xv.

Wisner, a distinguished former U.S. Ambassador to India noted earlier this year at an Asia Society event in New York City, the proposed pipeline was infeasible.¹¹ To begin with, he said, no U.S. insurance company would underwrite the proposed project.

Billionaires

Forbes noted that a record 27 Indians were billionaires. For a country with a history of stifling private enterprise, the news was an eloquent testimony to the enterprise of some and to the progress the country had made.

Little, however, came of my Internet research of what these men gave to philanthropic causes for the tens of millions of poor, illiterate, underfed or disadvantaged among them. For context, skip a continent and read that Wall Street Journal report that says: "While his decision to give to charity during his lifetime is new, Mr. Buffett's decision against bequeathing most of his wealth to his children isn't. He has long argued that children of wealthy parents can be sapped of motivation and spoiled if they inherit all of their family's riches."¹² Mr. Buffet follows a legion of American leaders that gave away their wealth to "fellow humans who have not been as lucky"¹³ as them.

Stock Rides

Foreign investors' rush to buy Indian stocks appears to have subsided after Bombay's Sensex peaked in May 2006.

Bush Was Here

President Bush, addressing young entrepreneurs at the Indian School of Business in Hyderabad, India: "You know, I said something really interesting, I thought interesting – otherwise I wouldn't have said it – the other day in a speech I gave in Washington." Never mind what he said.

¹¹ Comments made on March 1, 2006. Ambassador Wisner is now Vice Chairman of American International Group, Inc.

¹² Wall Street Journal, June 26, 2006.

¹³ Buffet's letter to Bill and Melinda Gates, June 26.