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The UPA-Left committee's task can help shine a spotlight on troubling questions that suggest Indian diplomacy lost out in the 123 negotiations with the U.S.

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— Photo: Rajeev Bhatt

Some members of the UPA-Left committee after a meeting on the India-U.S. nuclear deal in New Delhi on Tuesday.

The United Progressive Alliance-Left committee has been tasked to examine America's new Hyde Act and the Indo-U.S. 123 Agreement. While the conditions-laden Hyde Act does not disguise its intent to regulate India's conduct in areas unrelated to civil nuclear cooperation, the 123 Agreement raises at least 15 troubling questions, which the Government ought to answer.

1. Despite America's enactment of a new domestic law in 1978 to retroactively rewrite its obligations with India over Tarapur, why has New Delhi allowed the primacy of "national laws" to be upheld in the new 123 Agreement? India has no national law governing cooperation with any nation, but the U.S. today has an India-specific internal law that expressly defines the limits and conditions of cooperation.

In particular, why did India agree to omit a standard provision in bilateral agreements that upholds a cardinal principle of international law by debarring either party from invoking domestic law to justify a breach of obligations? Article 2(1) of the Indo-U.S. Agreement is identical to Article 2(1) of the China-U.S. 123 Agreement except that the following qualifying final sentence has been dropped — "The parties recognise, with respect to the observance of this Agreement, the principle of international law that

provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

2. Why is there no provision for an arbitral tribunal in the 123 Agreement, even though America has agreed in 123 accords with other states to establish such a tribunal in case of a dispute? Why does the Agreement's Article 15, titled "Settlement of Disputes," in a departure from this practice, not provide for arbitration, the applicability of the principles of international law, or the setting up of a tribunal? The Japan-U.S. 123 Agreement, for example, protects Tokyo's interests through Article 14, which states: "If any dispute arising out of the interpretation or application of this Agreement is not settled by negotiation, mediation, conciliation or other similar procedure, the parties may agree to submit such dispute to an arbitral tribunal..."

3. Why has India, on issues of vital concern, settled merely for sugar-coated but worthless "consultations" (with no provision for arriving at a mutually acceptable outcome) even while implicitly granting the U.S. the right to take all final decisions? Why did New Delhi not heed the lesson from the 1963 Indo-U.S. 123 Agreement, which, despite providing for consultations and for taking into account the economic and other effects of any precipitate action, failed to stop the U.S. from unilaterally walking out of its obligations?

4. Why has India bent backwards to accept terms that go beyond even the requirements of any U.S. law? For example, why has India granted the U.S. an open-ended right to suspend or terminate cooperation at will, when American law itself sets limits on such action? The U.S. Atomic Energy Act (AEC), as amended in 1978, specifies precise triggers for cessation of exports: a nuclear test; or a material breach of international safeguards; contravention of the terms of a 123 accord; or proliferation-related transfers.

And doesn't the accord's Article 14(2) place India at the mercy of the supplier-state by stating that the "party seeking termination has the right to cease further cooperation under this Agreement if it determines that a mutually acceptable resolution of outstanding issues has not been possible or cannot be achieved through consultations"? Even though termination is to take effect at the end of a one-year notice period, the U.S. is empowered to suspend all cooperation forthwith, without having to institute an alternative supplier. The only requirement is that a "party giving notice of termination shall provide the reasons for seeking such termination." But with the reasons for termination not defined in the Agreement unlike, say, the Japan-U.S. accord, the cause can be any.

5. Similarly, why has New Delhi granted an unfettered and unfringeable right to the U.S. to demand the return of all exported items and materials if it were to hold India in breach of the stipulated conditions? Under Section 123(a)(4) of the AEC, America's "right of return" is limited to two

specific causes — "if the cooperating party detonates a nuclear-explosive device, or terminates or abrogates an agreement providing for IAEA safeguards." So, why has India charitably granted the U.S. carte blanche to cite any reason to demand a full return?

6. Why has India made concessions beyond its Separation Plan merely to obtain an empty conceptual entitlement to reprocess, instead of securing an operational right to reprocess, just as Japan had won through an implementing agreement accompanying its 123 accord with the U.S.?

7. Indeed, why has India agreed not only to build an expensive new reprocessing facility that meets U.S. design expectations, but also, as the Prime Minister admitted in Parliament on August 13, to route all "foreign nuclear material" through that plant? How could New Delhi grant Washington a say in where it reprocesses spent fuel generated from imports from countries other than the U.S.? Also, given the frequent outages and breakdowns in any reprocessing plant due to its handling of radioactive spent fuel, why has India limited its options by agreeing to route all foreign nuclear material through a single facility instead of also using the existing PREFRE plant under safeguards, as called for under the Separation Plan?

8. Having agreed to build this special reprocessing facility just to meet the U.S. demand, why has India placed itself in an unenviable position on the plant by settling for less than the "full cooperation" that the original deal promised — it will bear the construction costs but will not have the right to import any components for the safeguarded facility? Contrary to the Prime Minister's August 13 statement in Parliament that the U.S. has a "longstanding policy" not to make civil reprocessing and enrichment transfers, hasn't Washington exported reprocessing equipment to Japan under the permissible terms of its 123 Agreement with Tokyo? And doesn't the U.S. have ongoing laser enrichment cooperation with Australia?

9. With only two of the deal's five contemplated stages completed, why has New Delhi agreed, through the 123 Agreement, to a sixth phase to be added — a separate agreement on reprocessing-related "arrangements and procedures" under Section 131 of the AEC? By arming the U.S. with an effective veto on reprocessing until such time New Delhi has satisfied it first by building a new "state-of-the-art" facility and then by working out the subsequent arrangements, doesn't India risk getting into a bigger mess than over Tarapur, whose spent fuel has been accumulating for 38 years?

10. After expending considerable resources of its own to lobby members of the U.S. Congress to pass the enabling legislation on the deal (the Hyde Act), has India factored in the foreign-policy implications of having now to wage two more campaigns on Capitol Hill — securing congressional approval first of the 123 agreement and then of a special 131 agreement? Won't these battles subject Indian foreign policy to congressional scrutiny and demands over an extended time?

11. Why has the Government, in breach of its assurances to Parliament, agreed to terms that provide for no enforceable link between perpetual fuel supply and perpetual international inspections? When the Prime Minister, in agreeing to permanent external inspections, went back on his original pledge to accept only "the same responsibilities and obligations as the United States," he assured Parliament in March 2006 that the perpetual safeguards would be tied to perpetual fuel supply. But does not the 123 Agreement explicitly exclude such a link and amount to another breach of promise? The Agreement not only denies India any such linkage, but also mandates that New Delhi's safeguards obligations are irreversible to the extent that they would survive even if the accord were unilaterally terminated.

Furthermore, the Agreement renders the reference to "corrective measures" entirely cosmetic by blocking India from ever undertaking real correction — the ending of outside inspections in response to a fuel supply cut-off. Why has New Delhi gone along with this?

12. In addition to international inspections, doesn't the Agreement permit U.S. end-use verification by requiring in its Article 12(3) that where cooperation "requires visits of experts, the parties shall facilitate entry of the experts to their territory and their stay therein consistent with national laws, regulations and practices"? In doing so, doesn't it meet the Hyde Act's Section 104(d)(5)(B)(i) stipulation for "end-use monitoring," which — along with the Act's Section 109 requirement for an access-gaining programme "with scientists" in India — is intended to facilitate collection and submission of detailed information on Indian nuclear activities to the U.S. Congress on a yearly basis?

13. Why has New Delhi accepted a provision that makes the Agreement indefinite in nature? The U.S. currently has in force 23 bilateral agreements with other states under Section 123, but most stipulate expiry in 30 years. But Article 16(2) of the Agreement with India specifies that the agreement is for an initial term of 40 years but is to continue in force ad infinitum in 10-year intervals until either party elects to end the accord. The Agreement also lacks a safety measure built into the Japan-U.S. accord, which provides that at the request of either party, the accord can by mutual consent be replaced "with a new agreement." In contrast, if international circumstances change, India can seek only an amendment to the Agreement.

14. Is it judicious for Indian officials to suggest, even if obliquely, that the 123 Agreement would override the grating India-specific terms and conditions of the Hyde Act? How can a 123 Agreement — a requirement only under American law — supersede U.S. law? Haven't U.S. officials publicly made clear that the 123 Agreement merely codifies technical rules of nuclear commerce and cannot supplant the Hyde Act's provisions?

Isn't New Delhi aware of America's consistent legal position that a 123 Agreement with any nation carries no force under the 1969 Vienna Convention on the Law of Treaties? Or has New Delhi forgotten the legal stance the U.S.

took in the 1970s — to India's acute discomfiture — that such an accord is liable to change in response to the evolution of American law?

15. Why has New Delhi, in spite of the Hyde Act's clear-cut stipulations, concluded an ambiguously formulated 123 Agreement? The U.S. can easily live with this Agreement for two reasons — the ambiguities relate only to issues of concern to India, and the accord confers enforceable rights only on the supplier-state.

Given that India will assume everlasting, legally immutable obligations once the Agreement enters into force, these 15 questions need to be addressed, including, if necessary, through renegotiation of the text.

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