

Does the IAEA agreement hide us from the Hyde Act?

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A close analysis of the draft India-IAEA safeguards agreement, and the restricted document GOV/1621, reveals that if it comes to the crunch, it is the provisions of the Hyde Act that will prevail. This is what is inbuilt in the agreement, the government's spin notwithstanding.

Various commentators have argued that the draft IAEA Safeguards Agreement gives India considerable leeway, denied it under the Hyde Act, in taking corrective action in case fuel supplies are interrupted. To be fair, unlike government spokespersons, some of these analysts concede that all imported reactors will remain permanently under safeguards. But one of the claims adduced by these non-official defenders in support of the Agreement is that India can unilaterally withdraw from IAEA safeguards its indigenous reactors that are made subject to the Agreement, provided all the imported fuel is taken out.

This curious conclusion flows from a wholly untenable reading of Article 29 of the Agreement, which states: "The termination of safeguards on items subject to this Agreement shall be implemented taking into account the provisions of GOV/1621 (20 August 1973)." Since the latter is a restricted document of the IAEA's Board of Governors, these non-official analysts have speculated that with respect to termination of safeguards, the import of GOV/1621 into Article 29 has let non-supplied facilities off the hook, by requiring them to be under safeguards only as long as they use imported fuel! From this, they have jumped to the conclusion that therefore for such indigenous facilities, India does not even need to invoke its preambular 'right' to take "corrective measures."

Nowhere does GOV/1621 provide the remotest sanction for any such interpretation. I happen to have the text of this restricted 1973 document. It originated from the urging of "a substantial number of Governors ... that there should be a greater degree of standardisation than in the past with respect to the duration and termination of such agreements as may henceforth be concluded under the Agency's Safeguards System ... for the application of safeguards in connection with nuclear material, equipment, facilities or non-nuclear material supplied to States by third parties."

Two concepts are clearly laid out in the IAEA document for these future agreements: (a) "the duration of the agreement should be related to the period of actual use of the items in the recipient State"; and (b) "the provisions for terminating the agreement should be formulated in such a way that the rights and obligations of the parties continue to apply in connection with supplied nuclear material and with special fissionable material produced, processed or used in or in connection with supplied nuclear material, equipment, facilities or non-nuclear material, until such time as the Agency has terminated the application of safeguards thereto..."

Further, by way of exposition of these concepts, the Annex to the document makes it clear that after termination, *“the rights and obligations of the parties, as provided for in the agreement, would continue to apply in connection with any supplied material or items and with any special fissionable material produced, processed or used in or in connection with any supplied material or items which have been included in the inventory, until such material or items had been removed from the inventory”* (emphasis added). The only way such “items or non-nuclear material could be removed from the purview of the agreement” is “if they had been consumed, were no longer usable for any nuclear activity relevant from the point of view of safeguards, or had become practically irrecoverable.”

GOV/1621 ensures that all such materials “would be subject to safeguards until the Agency had terminated safeguards on that special fissionable and nuclear material in accordance with the provisions of the Agency’s Safeguards System. Thus, the actual termination of the operation of the provisions of the Agreement would take place only *when everything had been removed from the inventory”* (emphasis added).

The effect of GOV/1621, therefore, is to tighten and make more restrictive the application of IAEA safeguards to all *supplied* nuclear material, facilities, and items. But it is wholly fanciful to say that it empowers or even allows India to take *non-supplied facilities* made subject to the Agreement out of safeguards, if they no longer use supplied fuel.

For indigenous nuclear facilities that have been built without supplies from any third party, we have to consider two additional Articles of the Agreement. One is that “items” for safeguards are governed by Article 11(a), which defines items to include: “any facility listed in the Annex to this Agreement, as notified by India.” The second is Article 32, which explicitly states: “Safeguards shall be terminated on a facility listed in the Annex after India and the Agency have *jointly determined that the facility is no longer usable for any nuclear activity relevant from the point of view of safeguards”* (emphasis added).

If we accept that Article 32 will come into play for taking facilities out of safeguards, there are three conditions that need to be fulfilled. First, both parties — India and the IAEA — need to agree to this; it is not a unilateral decision for India to make. Secondly, the facility must no longer be usable for any nuclear activity. Any facility that produces nuclear energy is obviously usable for nuclear activity. Lastly, the facility must be “relevant from the point of view of safeguards.” Any facility offered by India under Article 14 for safeguards continues to be relevant for safeguards. The issue of imported fuel is extraneous to any of these considerations.

Under the separation plan, India is offering several facilities for safeguards — not just reactors, but also heavy water plants, research and storage facilities. All these will be under safeguards if they are included in the Annex by India and will be governed by the Articles of the Agreement. Linking import of fuel with the duration of the safeguards on facilities is not relevant here. Research facilities, for example, do not even import fuel. Is it then possible that once we have offered them for safeguards, we can take them out any time we want?

Let us take the next contention that once corrective measures figure in the Agreement, it does not matter whether they are in the preamble or in the operative part of the Agreement. The issue is not whether the preamble is a part of an agreement or a treaty. The issue here is whether the scope of termination of safeguards, as defined in Articles 29-32, can be overridden by India having recourse to unspecified “corrective measures” mentioned in the preamble. Clearly, such a reading will be fanciful; else the operative part of the agreement will be rendered a nullity.

It is well established in international law that a preamble can be used to give a treaty context and help interpret its clauses. However, in no case can a preamble override explicit provisions in Articles of a treaty or be used to create new rights or obligations. If this were so, the Non-Proliferation Treaty would have led decades ago to nuclear disarmament, as this objective is set out in the preamble! It has not happened because Article 6 of the NPT merely asks the nuclear weapons states to negotiate disarmament in good faith. The operative part lacks the teeth to implement the lofty objective the preamble sets out.

The issue of fuel supply assurances and strategic fuel reserves is of little consequence in this Safeguards Agreement. The IAEA is not a body that deals with either. The preamble merely notes that the “essential basis” of India’s concurrence to the acceptance of IAEA safeguards is the conclusion of international arrangements for reliable and uninterrupted fuel supplies and support for building strategic fuel reserves. Whatever may be the basis of a country entering into an international agreement, the articles of the treaty do not get voided simply because this basis is no longer valid. The withdrawal and termination clauses govern the actual withdrawal or termination. It is pretty much like marriage: love may be the basis of a marriage but the demise of love for one party is not a sufficient legal ground for divorce.

Asked whether India could ever withdraw its reactors from safeguards, Dr R.B. Grover of the Department of Atomic Energy claimed (in a press conference on July 12) that India could first claim a material breach under Article 52(c) of the Agreement and then take whatever action it wanted under “the combination of [Articles] 29, 30(f), 10, 4, and the preamble.” Again, while Article 29 covers both facilities and material for the duration of safeguards for facilities, we have to read this provision along with Article 32. As explained earlier, Article 32 is quite explicit that once any facility is offered for safeguards, they will continue to apply in perpetuity. Article 30(f) is very much part of Article 30, which specifically pertains only to material. To claim specific rights over facilities using an Article that pertains to material will not help India in any way.

It is not in India’s interest to keep the provisions of the Agreement vague. The dispute settlement body in the IAEA is not a neutral umpire — it is the agency’s Board of Governors. Here, politics is the dominant issue in interpretation — not legalese. As the Iran case shows, despite that country having a legal right to the full nuclear fuel cycle, the IAEA Board of Governors referred it to the United Nations Security Council for sanctions at the insistence of the United States. The majority, including the Government of India, fell in line with the U.S., not because they were convinced of its legal case but because of its sheer muscle power.

Therefore to believe that the vague term “corrective measures” included in the preamble of the Safeguards Agreement will help India later to put on the term whatever interpretation it wishes to will simply not wash. If it comes to the crunch, the Hyde Act provisions will prevail. This is what is inbuilt in the India-IAEA Agreement, the government’s spin notwithstanding.

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