



## **S. 3709, United States-India Peaceful Atomic Energy Cooperation & United States Additional Protocol Implementation Act**

Calendar No. 527

*Ordered to be reported by the Foreign Relations Committee on June 29, 2006, by a vote of 16-2;  
S. Rpt. 109-288.*

### **Noteworthy**

- S. 3709 is the United States-India Peaceful Atomic Energy Cooperation and United States Additional Protocol Implementation Act.
- Title I makes the changes in law necessary to allow the United States to complete a peaceful nuclear cooperation agreement with India.
- Title II is the legislation necessary to bring the International Atomic Energy Agency (“IAEA”) Additional Protocol into force domestically.
- The House passed its version of the bill, which addresses the India agreement only, by a vote of 359-68 on July 26, 2006.
- For Senate consideration, a unanimous consent agreement has been entered into that limits the number of amendments to be considered to one Republican amendment and up to 18 Democrat amendments. See p. 17 for details.
- Moreover, the consent agreement provides for a Managers’ Amendment, which is to be considered as original text for the purposes of further amendment. This Legislative Notice reflects the text of the Managers’ Amendment.

# **Title I – United States-India Peaceful Atomic Energy Cooperation Act**

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## **Background**

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In reaction to India's 1974 nuclear test,<sup>1</sup> the United States terminated, by law, U.S. nuclear cooperation with India in 1980. Thus, the current domestic legal regime prohibits trade in nuclear materials and technology with India. Moreover, the international nonproliferation regime prohibits trade in nuclear materials and technology with India.

In a July 18, 2005 joint statement with Indian Prime Minister Manmohan Singh, President Bush pledged to work to make the necessary changes in U.S. law and in the international fora to allow full civilian nuclear energy cooperation with India. In return, the Prime Minister committed to assume the same responsibilities and practices of other leading countries with advanced nuclear technology.<sup>2</sup> Most notably, India agreed to identify and separate its civilian and military nuclear facilities and programs, declare the civil facilities to the IAEA, and place the civil facilities under IAEA safeguards in perpetuity.

The Senate Foreign Relations Committee reported out the United States-India Peaceful Atomic Energy Cooperation Act, Title I of S. 3709, which is a bill to authorize the changes in law necessary to allow the United States to complete a peaceful nuclear cooperation agreement with India. Congress then will still have to approve any such agreement the President completes by way of a joint resolution of approval.

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## **House Action**

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The House passed its version of the bill, the Henry J. Hyde United States and India Nuclear Cooperation Promotion Act of 2006, H.R. 5682, on July 26, 2006, by a vote of 359-68.

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## **Current State of the Law Concerning Peaceful Nuclear Cooperation**

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This section outlines the current state of the law governing international nuclear cooperation in order to recognize what changes are required to that body of law to allow for nuclear cooperation with India.

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<sup>1</sup> Indian Prime Minister Indira Gandhi insisted this test was a "peaceful nuclear explosive," George Perkovich, *India's Nuclear Bomb*, p. 2 (Univ. of CA Press, 1999); although the United States has never accepted this characterization of that test. Robert Joseph and Nicholas Burns, Responses to Question for the Record 5(b) by the Under Secretary of State for Arms Control and International Security and the Under Secretary of State for Political Affairs (the Department's third ranking official), reprinted in the Senate Report Accompanying the United States-India Peaceful Atomic Energy Implementation Act, S. 3709, S. Rpt. 109-288, p. 76.

<sup>2</sup> These reciprocal commitments are discussed in more detail in a separate RPC paper, "Overview of the India Civilian Nuclear Agreement," Nov. 15, 2006.

### **Atomic Energy Act Section 123: Conditions for an Agreement**

Section 123 of the Atomic Energy Act requires that an agreement for cooperation (commonly called a Peaceful Nuclear Cooperation Agreement or a Section 123 Agreement) be concluded with a particular country before the United States can assist that country in the nuclear field. That section then outlines the nine criteria such an agreement is expected to meet. The most relevant criterion to a potential agreement with India requires that IAEA safeguards be maintained in non-nuclear weapon states with respect to all nuclear materials in all peaceful nuclear activities, i.e. full-scope safeguards.<sup>3</sup> This differs from limited-scope safeguards, which are safeguards placed on, for example, individual plants or shipments of nuclear fuel.

The President may exempt a proposed nuclear cooperation agreement from any of the criteria if he determines that holding the country to the statutory criteria would be “seriously prejudicial to achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security.”<sup>4</sup> An exempt agreement cannot enter into force until Congress passes a joint resolution of approval.<sup>5</sup>

The Nonproliferation Treaty (“NPT”) defines a nuclear-weapon state as a state that “manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967;”<sup>6</sup> and U.S. law adopts the necessary converse that a non-nuclear weapon state is any state that is not a nuclear weapon state under the NPT.<sup>7</sup> Hence, India is a non-nuclear weapons state, and it does not have full-scope safeguards as is a prerequisite for nuclear cooperation with the United States. The Senate Foreign Relations Committee found that the President apparently cannot make the determination necessary to exempt India from the Section 123 requirements, and thus needs relief from this statutory demand in order to be able to conclude a peaceful nuclear cooperation agreement with India.<sup>8</sup>

### **Atomic Energy Act Section 128: Conditions for an Export License**

Section 128 of the Atomic Energy Act requires that a non-nuclear weapon state maintain IAEA safeguards on all peaceful nuclear activities, i.e. full-scope safeguards, as a condition of exporting sensitive nuclear technology to that state.<sup>9</sup> The President is authorized to waive this requirement, and the relevant agencies may authorize a license for export, if the President determines that failure to approve the export would be “seriously prejudicial to achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and

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<sup>3</sup> Atomic Energy Act § 123(a) (codified at 42 U.S.C. § 2153(a)). The Nuclear Nonproliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (Mar. 10, 1978), amended the Atomic Energy Act to add this requirement.

<sup>4</sup> 42 U.S.C. § 2153(a). If the President concludes an agreement for cooperation that meets these nine criteria, and Congress does not enact a resolution of disapproval within 90 days of continuous session, then the agreement enters into force. 42 U.S.C. § 2153(d). Presumably, after *INS v. Chadha*, 462 U.S. 919 (1983), Congress would have to pass this resolution of disapproval over the President’s veto.

<sup>5</sup> 42 U.S.C. § 2153(d).

<sup>6</sup> Treaty on the Non-proliferation of Nuclear Weapons, art. 9(3), 21 U.S.T. 483, 729 U.N.T.S. 161 (opened for signature July 1, 1968, entered into force March 5, 1970) (“NPT”).

<sup>7</sup> *E.g.* 10 C.F.R. § 110.2.

<sup>8</sup> S. Rpt. 109-288, p. 24.

<sup>9</sup> Atomic Energy Act § 128(a)(1) (codified at 42 U.S.C. § 2157(a)(1)).

security.”<sup>10</sup> In this case of exemption, Congress can review the first export license to the subject country of each 12-month period, and can adopt a resolution of disapproval for that license request.<sup>11</sup> If Congress does adopt a resolution of disapproval, nuclear exports to that country shall be terminated for the remainder of that Congress.<sup>12</sup>

### **Atomic Energy Act Section 129: Termination of Cooperation**

Section 129 of the Atomic Energy Act, as added by the Nuclear Nonproliferation Act, provides that exports of sensitive nuclear technology under a peaceful nuclear cooperation agreement must be halted if a *non-nuclear weapon state* recipient at any time after March 10, 1978:

- detonates a nuclear device;
- violates an IAEA safeguards agreement; or
- engages in certain nuclear weapons-related activities.<sup>13</sup>

Section 129 further provides other circumstances under which such exports to *any* state must be halted, namely that the recipient materially violated a peaceful nuclear cooperation agreement.<sup>14</sup>

The President may waive the termination requirement if he determines that the “cessation of such exports would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security.”<sup>15</sup> Congress can enact a resolution of disapproval of this determination, presumably over the President’s veto.

### **International Law**

In order for the President’s nuclear energy cooperation proposal to be consistent with the international nonproliferation regime, the Guidelines of the Nuclear Suppliers Group (“NSG”) must be amended because the Guidelines currently prohibit nuclear trade with India. In 1993, the member-states of the NSG adopted a full-scope safeguards requirement as a condition for their individual transfers.<sup>16</sup> The NSG, formed in part as an initial reaction to India’s 1974 nuclear test, is a collection of states that voluntarily agree to coordinate their export controls governing transfers of civilian nuclear material, equipment, and technology to non-nuclear-weapon states, with the goal of preventing commercial and peaceful nuclear exports from being used to make nuclear weapons.<sup>17</sup> Toward this goal, the suppliers required that safeguards be

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<sup>10</sup> 42 U.S.C. § 2157(b)(1).

<sup>11</sup> Again, presumably, after *INS v. Chadha*, 462 U.S. 919 (1983), Congress would have to pass this resolution over the President’s veto.

<sup>12</sup> 42 U.S.C. § 2157(b)(2).

<sup>13</sup> Nuclear Nonproliferation Act of 1978, § 307, Pub. L. No. 95-242, 92 Stat. 120 (Mar. 10, 1978) (adding § 129 to the Atomic Energy Act, and which is codified at 42 U.S.C. § 2158).

<sup>14</sup> 42 U.S.C. § 2158(2)(A).

<sup>15</sup> 42 U.S.C. § 2158.

<sup>16</sup> For more detail regarding the NSG’s adoption of this conditionality requirement, especially the leadership of the United States in having the NSG adopt that requirement, see S. Rpt. 109-288, pp. 4-5.

<sup>17</sup> See George Perkovich, *India’s Nuclear Bomb*, p. 191 (Univ. of CA Press, 1999) (characterizing the major aim of this endeavor as an attempt to “plug loopholes such as those that had allowed India to produce its ‘peaceful’ nuclear explosive”).

placed on the transfer to non-nuclear weapon states of items that could be directly used to produce nuclear weapons, collectively referred to as the “Trigger List,”<sup>18</sup> as a condition for transfer of such items.<sup>19</sup>

## **Bill Provisions**

To allow the United States to engage in nuclear commerce with India, changes must be made to both the domestic legal regime and U.S. commitments under international export control regimes, most notably the NSG. The Bush Administration has made many changes with respect to U.S. policy towards India, but all the changes desired in this area that can be done unilaterally by the Executive have been executed.<sup>20</sup> The United States-India Peaceful Atomic Energy Cooperation Act, makes the remaining changes necessary to the governing statutory regime to allow for peaceful nuclear cooperation with India, as well as provides additional assurances not required to authorize such cooperation.

### **Sections 101, 102 & 103: Title and statements of Congress**

Section 101 provides that this title of the bill may be cited as the United States-India Peaceful Atomic Energy Cooperation Act. Section 102 provides the sense of Congress on various matters related to this matter. Section 103 provides a declaration of policy concerning United States-India peaceful atomic energy cooperation. As was noted above, there are nine criteria that an agreement for nuclear cooperation must meet. Section 103(5) provides that it is the policy of the United States that the agreement with India meet all of the criteria but the criterion requiring full-scope safeguards in the country with whom the agreement is made. Additionally, the section declares it to be, among other things, the policy of the United States to:

- achieve a cessation of the production by India and Pakistan of fissile materials for nuclear weapons and other nuclear explosive devices;
- achieve India’s cooperation in the full range of international non-proliferation regimes and activities, including:
  - full participation in the Proliferation Security Initiative; and
  - conforming its export control laws with the Australia Group and the Wassenaar Arrangement<sup>21</sup>

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<sup>18</sup> It is referred to as a Trigger List because the transfer of items on the list is meant to trigger the safeguards regime as a condition of transfer.

<sup>19</sup> The NSG did not introduce the Trigger List or the concept of a safeguards conditionality for export. Nuclear supplier states had already recognized that materials and technologies used in peaceful nuclear programs could be diverted to develop nuclear weapons as well. In 1971, three years after the Nuclear Nonproliferation Treaty (“NPT”) came into force, the nuclear supplier states under the NPT formed the Zangger Committee, which required states outside the NPT to institute IAEA safeguards as a condition of receiving items that could be used both in military programs, i.e., trigger list items. One of the primary advancements of the NSG was to involve France, which was not a member of the NPT at the time, and would not sign the NPT until 1992.

<sup>20</sup> S. Rpt. 109-288, p. 4.

<sup>21</sup> The Australia Group and the Wassenaar Arrangement are nonproliferation regimes that respectively address chemical and biological weapons capabilities, and dual use technologies.

- ensure that any safeguards agreement or Additional Protocol to which India is a party can reliably safeguard any export to India of any nuclear materials and equipment;
- act in a manner fully consistent with the NSG Guidelines; and
- provide that exports of nuclear fuel to India should not contribute to increases in the production by India of fissile material for non-civilian purposes.

#### **Section 104: Atomic Energy Act Waivers**

Section 104 provides the waivers necessary to allow for peaceful nuclear cooperation with India. First, it waives the Atomic Energy Act Section 123(a)(2) requirement that a recipient state have full-scope safeguards in place in order to be eligible for peaceful nuclear cooperation.<sup>22</sup> Next, section 104 of the legislation waives the Atomic Energy Act Section 128 requirement that the first export license for nuclear technology each year be submitted to Congress for its review. The Committee found that this provided little in the way of true oversight.<sup>23</sup>

Finally, section 104 of the implementing legislation provides a partial waiver to Atomic Energy Act Section 129, where section 129 provides the circumstances under which nuclear cooperation must cease. It provides relief from the requirement that nuclear cooperation must not proceed if a state has continuing nuclear weapons activities, which India currently does; or if a state has detonated a nuclear device after March 10, 1978, which India did in May 1998. Section 104 only waives the section 129 requirements in part, however, as cooperation would have to end if India 1) materially violates its safeguards agreement, or 2) violates the cooperation agreement, although the President would have waiver authority in both cases.<sup>24</sup>

#### **Section 105: Conditioning the waiver authority**

In order for the President to be able to take advantage of the waiver authority provided in Section 104 of S. 3709, namely to waive the application of Sections 123, 128, and 129 of the Atomic Energy Act, he must be able to make the determinations outlined in Section 105 of the legislation. The determinations are essentially that India is adhering to each of the commitments it made in the Joint Statement.

Additionally, Section 105 of the bill requires the President to certify that the NSG has decided by consensus, as is the way it makes its decisions, to permit civil nuclear commerce with India; and that such an NSG decision does not permit nuclear commerce with any non-nuclear weapon state other than India that does not have full-scope safeguards. The NSG Guidelines currently do not allow for such trade, and the President pledged that he would work in that

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<sup>22</sup> The President would still have at his disposal the underlying waiver authority of Atomic Energy Act Section 123 if he could determine that holding India to the statutory criteria would be “seriously prejudicial to achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security.” S. Rpt. 109-288, p. 25 (noting that the waiver authority provided in Section 104 of the implementing legislation is “alternative waiver authority”).

<sup>23</sup> S. Rpt. 109-288, p. 26.

<sup>24</sup> Compare Atomic Energy Act § 129 (providing that no nuclear cooperation may take place with countries that have materially violated an IAEA safeguards agreement or have materially violated an agreement for cooperation); with S. 3709, § 104(a)(3) (not waiving the requirement that cooperation must cease if these events take place).

multilateral forum to change the Guidelines to accommodate such trade. In this regard, this certification requires that the NSG change its guidelines to allow for nuclear trade with India before the United States can move forward with such trade.<sup>25</sup>

The bill also reiterates the current state of the law, by specifying that Congress still must approve, by joint resolution, the final negotiated peaceful nuclear cooperation agreement with India.<sup>26</sup>

### **Section 106: Prohibiting the export of enrichment or reprocessing technology**

Section 106 prohibits agencies from licensing for export to India any equipment or technology related to enrichment of uranium, the reprocessing of spent nuclear fuel, or the production of heavy water.<sup>27</sup> This is a restatement of current U.S. policy, as the United States does not provide enrichment or reprocessing equipment to any country.<sup>28</sup> At the same time, this provision may place U.S. suppliers at a commercial disadvantage. Although the United States will likely encourage other states not to export such technologies to India,<sup>29</sup> the NSG decision required to allow for nuclear trade with India will seemingly not prohibit other countries from exporting enrichment or reprocessing technology to India.<sup>30</sup>

### **Section 107: End-use monitoring program**

Section 107 directs the President to implement an end-use monitoring program to supplement the IAEA safeguards regime to ensure that U.S. exports of nuclear materials and technology to India are dedicated only to India's civilian program. The program would be directed at ensuring that the identified recipients of the nuclear technology are authorized to receive it, and that it is only used for peaceful, safeguarded nuclear activities. It would also ensure that the assurances and conditions attached to the licenses for export of such materials to India are being complied with.<sup>31</sup> This will provide confidence that U.S. actions under this cooperation agreement will be in compliance with NPT Article I, which requires the United States not to assist in any way any non-nuclear weapon State to manufacture nuclear weapons.

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<sup>25</sup> The Committee found that it is in the U.S. interest to abide by the NSG Guidelines and to maintain the consensus decision-making mechanism of the group. S. Rpt. 109-288, p. 22.

<sup>26</sup> S. 3709, § 104(b).

<sup>27</sup> This provision is not intended to prohibit the export of reactor fuel to India. S. Rpt. 109-288, p. 33.

<sup>28</sup> S. Rpt. 109-288, pp. 33-34 (quoting Robert Joseph, Responses to Question for the Record by the Under Secretary of State for Arms Control and International Security from a November 2, 2005 hearing). This statutory restatement may cause some concern for the domestic audience in India, as they may believe it applies a general policy to the specific case of India unnecessarily.

<sup>29</sup> See George W. Bush, Remarks by the President on Weapons of Mass Destruction Proliferation to the National Defense University, Feb. 11, 2004 (“[T]he Nuclear Suppliers Group should refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants.”); S. 3709 § 103(7) (making it the policy of the United States to work with members of the NSG to restrict transfers of enrichment, reprocessing, and heavy water production equipment, including to India).

<sup>30</sup> S. Rpt. 109-288, p. 38.

<sup>31</sup> S. Rpt. 109-288, p. 35. Once again, the domestic audience of India may register concerns that this type of provision indicates a sense of distrust on the part of the United States. This type of system is not without precedent, as it is applied as part of the United States-China nuclear cooperation agreement. S. Rpt. 109-288, p. 36.

## **Section 108: Reporting requirements**

Section 108 provides for reporting requirements on many aspects of the status of India's fulfillment of the commitments it made in the Joint Statement. First, it directs the President to keep Congress fully and currently informed of any material non-compliance by India with respect to its commitments under the Joint Statement. It also directs the President to inform the Congress of the construction of a nuclear facility in India, and significant changes in the production by India of nuclear weapons or in the types or amounts of fissile material produced.

Next, it directs the President to provide an annual report that provides a comprehensive recount of details surrounding the licenses the government issues for export of material implicated by this agreement. This report is designed to outline India's compliance with its commitments.

A particular aspect of this report, section 108(b)(3) of the bill, reports on whether other countries are approving exports to India that the United States would not have approved, i.e., exports of enrichment or reprocessing technology.<sup>32</sup> As was noted above, the U.S. initiative to seek a change in the NSG Guidelines to allow for trade with India will likely not prohibit other countries from exporting enrichment or reprocessing technology to India.

Finally, the bill requests the compliance report to assess progress with respect to the policies the bill outlines in Sections 102 and 103, such as Indian participation in various nonproliferation regimes.

## **Section 109: U.S. compliance with NPT obligations**

Section 109 provides that this bill shall not be deemed to constitute authority for any action in violation of any obligation of the United States under the Nuclear Non-Proliferation Treaty.

## **Section 110: Cessation of cooperation upon India nuclear test**

Section 110 provides that nuclear cooperation must be halted if India detonates a nuclear explosive device after the date of the enactment.

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<sup>32</sup> S. Rpt. 109-288, pp. 38-39.

## **Title II – United States Additional Protocol Implementation Act**

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### **Background**

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One of the fundamental objectives of the International Atomic Energy Agency is to promote the peaceful uses of atomic energy, and guard against its use to further any military purpose. It accomplishes this objective, in part, by enforcing a safeguards regime. Countries are to make declarations to the IAEA regarding their nuclear materials and activities; and safeguards are a set of technical measures by which the IAEA seeks to verify that a country is adhering to its international commitments not to use nuclear programs for nuclear weapons purposes, namely by verifying the correctness and completeness of these declarations.

States considered nuclear weapon states under the Nuclear Nonproliferation Treaty are under no legal obligation to accept IAEA safeguards. President Lyndon Johnson, however, declared that the United States would accept the same obligations it asked others to accept, with the exception that it would not provide any information or access relating to its nuclear weapons program.<sup>33</sup> The argument is that the United States would show leadership on this issue by submitting all U.S. civil nuclear facilities to the same safeguards that non-nuclear weapon states were expected to place their civil facilities under, thereby demonstrating that adherence to the safeguards regime did not place other countries at a commercial disadvantage.<sup>34</sup> To this end, the United States made a “Voluntary Offer” to accept IAEA safeguards in 1980. The IAEA currently inspects certain facilities to monitor the declarations made under that Voluntary Offer.<sup>35</sup>

Following the Gulf War, the world was surprised to discover the extent and range of the nuclear weapons program Iraq developed while the country was under an IAEA safeguards regime. Nonproliferation regime supporters quickly learned that the IAEA inspection system needed to be strengthened to increase its capability to detect clandestine nuclear programs.<sup>36</sup> The effort to strengthen this regime resulted in the IAEA Model Additional Protocol.

The Model Protocol requires non-nuclear weapon states to provide broader declarations than they already provide to the IAEA about their nuclear programs and nuclear-related activities. Moreover, the Protocol expands the access rights of the IAEA to verify such broader declarations. President Bush has proposed that only states that have entered into the Additional Protocol with the IAEA be allowed to import equipment for their civilian nuclear programs.<sup>37</sup> Just like it did by its Voluntary Offer, the United States sought to demonstrate leadership on this issue once again, and accepted the provisions of the Model Protocol in full, subject to a national

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<sup>33</sup> Senate Report Accompanying the Protocol to the Agreement of the International Atomic Energy Agency Regarding Safeguards in the United States (Treaty Doc. 107-7), S. Exec. Rpt. 108-12, p. 4 (March 26, 2004).

<sup>34</sup> S. Exec. Rpt. 108-12, p. 4.

<sup>35</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 3 (Apr. 3, 2006).

<sup>36</sup> S. Exec. Rpt. 108-12, p. 5.

<sup>37</sup> George W. Bush, President Announces New Measures to Counter the Threat of WMD, Speech at the National Defense University, Feb. 11, 2004, 40 Weekly Comp. Pres. Doc. 216 (Feb. 16, 2004).

security exception and provisions to manage IAEA access during IAEA inspections.<sup>38</sup> Thus, when the United States fully implements the Protocol, it will declare a selection of its nuclear activities to the IAEA, supplementing the declaration it has made under its Voluntary Offer, and the IAEA would have the right to monitor and verify that declaration.<sup>39</sup> The United States is the only nuclear weapon state to accept the entire Model Additional Protocol,<sup>40</sup> and the Protocol the United States signed is much more intrusive than the Protocols signed by Russia and China.<sup>41</sup> As of October 2006, over 110 countries have signed the Additional Protocol.<sup>42</sup>

The United States signed its Additional Protocol agreement with the IAEA on June 12, 1998. President Bush submitted the Protocol to the Senate for its advice and consent on May 9, 2002. The United States has ratified the Protocol in the domestic sense, but it has not ratified it in the international sense. It is the policy of the United States not to ratify the Protocol internationally, that is, communicate its consent to the agreement to its treaty partners,<sup>43</sup> until the legislation and regulations required to implement the Protocol domestically are in force.<sup>44</sup> Under U.S. law, it is the Executive Branch that exchanges the instrument of ratification with foreign treaty partners, and officially commits the United States to a treaty under international law.<sup>45</sup> This, of course, may only take place after at least two-thirds of the Senate has approved a resolution of ratification, which the Senate provided for the Protocol by division vote on March 31, 2004.

The United States Additional Protocol Implementation Act is the domestic legislation to bring the Protocol into force domestically. In December 2003, Senator Lugar introduced S. 1987 to implement the Additional Protocol once it was ratified, but the bill was not acted upon in the 108<sup>th</sup> Congress. Senator Lugar introduced a similar bill in the 109<sup>th</sup> Congress, S. 2489. S. 2489 was approved by the Senate Foreign Relations Committee by voice vote on March 14, 2006, and reported to the Senate on April 3, 2006. At its business meeting on June 29, 2006 to consider the United States-India Peaceful Atomic Energy Cooperation Act, the Committee attached the United States Additional Protocol Implementation Act as Title II to the India bill.<sup>46</sup> The Committee then reported out S. 3709, the United States-India Peaceful Atomic Energy Cooperation and United States Additional Protocol Implementation Act, by a vote of 16-2 on

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<sup>38</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 2 (Apr. 3, 2006).

<sup>39</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 3 (Apr. 3, 2006) (“Once the Additional Protocol enters into force, the United States will be required to provide to the IAEA a declaration of nuclear fuel cycle-related activities and, if necessary, to provide complementary access to the IAEA to allow that agency to verify the completeness of the U.S. declaration.”).

<sup>40</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 2 (Apr. 3, 2006).

<sup>41</sup> Administration Response to Question for the Record 42, reprinted at S. Exec. Rpt. 108-12, pp. 116-17.

<sup>42</sup> [http://www.iaea.org/OurWork/SV/Safeguards/sir\\_table.pdf](http://www.iaea.org/OurWork/SV/Safeguards/sir_table.pdf).

<sup>43</sup> Edward T. Swaine, *Unsigning*, 55 Stan. L. Rev. 2061, 2066 n.21 (2003).

<sup>44</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 2 (Apr. 3, 2006).

<sup>45</sup> *Treaties and Other International Agreements: The Role of the United States Senate*, pp. 147-49, S. Prt. 106-71, 106th Cong., 2d Sess. (2001).

<sup>46</sup> Senate Report Accompanying the United States-India Peaceful Atomic Energy Implementation Act and United States Additional Protocol Implementation Act, S. 3709, S. Rpt. 109-288, p. 15.

June 29, 2006. The bill was placed on the Senate legislative calendar under general orders as calendar item number 527 on July 20, 2006.

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## **House Action**

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The House has not at this time introduced a bill addressing the Additional Protocol.

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## **Bill Provisions**

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### **Introductory Sections**

#### **Sections 201-204: Title, Findings, Definitions, Severability**

Section 201 provides that the title of this Act may be cited as the U.S. Additional Protocol Implementation Act.

Section 202 provides for various Congressional findings, including:

- On June 12, 1998, the United States, as a nuclear-weapon State Party, signed an Additional Protocol based on the Model Additional Protocol, but which also contains measures that protect its right to exclude the applications of IAEA safeguards to locations and activities with direct national security significance or to locations or information associated with such activities.
- U.S. Implementation of the Protocol can encourage other NPT parties, especially non-nuclear-weapon State Parties, to conclude Additional Protocols; thereby strengthening the safeguards system.
- U.S. Implementation of the Additional Protocol is not required, given its status as a nuclear weapons State Party, but the United States has acceded to the protocol to demonstrate its commitment to the nuclear non-proliferation regime and to make U.S. civil nuclear activities available to the same IAEA inspections as are applied in non-nuclear weapons State Parties.
- In accordance with the National Security Exclusion of its Additional Protocol, the United States will not allow any inspection activities with respect to locations, information, and activities of direct national security significance to the United States; nor make any declaration of any information concerning the same.
- Implementation of the Additional Protocol will conform to the principles set forth in the Brill letter. The Brill letter was incorporated as an understanding in the Senate's resolution of ratification of the Additional Protocol.<sup>47</sup>

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<sup>47</sup> Resolution of Ratification to the Protocol Additional to the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, § 3(1) Treaty Doc. 107-7, reprinted at 150 Cong. Rec. S3511 (March 31, 2004).

The Brill letter is a letter dated April 30, 2002, from Kenneth Brill, the United States Permanent Representative to the International Atomic Energy Agency and the Vienna Office of the United Nations, to Mohamed ElBaradei, IAEA Director General.<sup>48</sup> In that letter, Ambassador Brill explains that the United States adopted the Model Protocol in its entirety, while also including several provisions that are unique to its status as a nuclear weapon state. The two main provisions in this respect are the national security exclusion and managed access provision; which authorize the United States, respectively, to exclude the application of the Protocol to locations or information with direct national security significance to the United States, and to manage IAEA access to locations and information with direct national security significance. These provisions stem from the fact that the United States, as an NPT nuclear weapon state, has, and will continue to have, undeclared nuclear activities. The Brill letter explains that some of these activities may occur at locations that are part of the U.S. civil nuclear program, and hence may be excluded from the Protocol's declaration and access provisions. The Brill letter explicitly provides that "the United States will make full and repeated use of these provisions" as necessary; and that "the use of these provisions are a unilateral prerogative of the United States," not subject to challenge by any other party.

At the outset of the letter, Ambassador Brill outlines that one of the purposes behind U.S. implementation of the Additional Protocol is for the United States to provide the IAEA with information and access to certain locations in the United States in order to assist the IAEA in developing procedures, tools, and techniques that will strengthen its capacity to detect undeclared nuclear activities in non-nuclear weapon states. One of the tools available for monitoring nuclear activity is environmental sampling, both wide-area and site-specific. For various reasons, however, the IAEA currently does not use wide-area sampling as a safeguards verification tool.<sup>49</sup> The Brill letter explains that the United States does not foresee circumstances under which the IAEA would need to conduct wide-area environmental sampling in the United States; and informs the IAEA that the United States, under the national security exclusion, will not allow location specific environmental sampling at sites of national security significance. In this regard, though, the Brill letter does not categorically deny the IAEA access to conduct wide-area sampling in the United States.<sup>50</sup>

Section 203 provides the definitions relevant to the bill, and section 204 is the severability provision of the bill, providing that, if any provision of the Act is held invalid, the remainder of the Act shall not be held invalid.

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<sup>48</sup> Reprinted at Message from the President of the United States Transmitting the Protocol Additional to the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, with Annexes, Signed at Vienna June 12, 1998, p. 1.

<sup>49</sup> S. Rpt. 109-226, p. 10 ("The IAEA Board of Governors has not taken a decision to approve the use of wide-area environmental sampling techniques for use in its verification activities, and may not do so for quite some time, if ever, because the technology associated with such sampling has not yet fully developed for use in an accurate and cost-effective manner in those activities.").

<sup>50</sup> S. Rpt. 109-226, p. 11 ("The Brill letter does not state a definitive U.S. position regarding wide-area sampling.").

## **Subtitle A – General Provisions**

### **Section 211: Authority to implement Additional Protocol**

Section 211 authorizes the President to implement the Additional Protocol by issuing or amending the regulations necessary to do so, namely to declare to the IAEA certain civil nuclear and nuclear-related activities.

## **Subtitle B – Complementary Access**

Complementary access refers to the IAEA’s right under the Protocol to access the sites and review the information the United States declares, in order to verify the completeness of that declaration; and the activities the IAEA may undertake in exercise of that right.

### **Section 221: Prerequisite for IAEA access**

Section 221 provides the IAEA may only execute such access pursuant to an authorization of the U.S. government and in accordance with the strictures of this Act. Section 221 further provides that the number of U.S. representatives accompanying IAEA inspectors shall be kept to the minimum necessary; and that the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Mine Safety and Health Administration may not participate in activities when the IAEA is executing its complementary access. As the Committee noted in its report accompanying the bill, “these agencies are excluded because their employees may detect violations of laws and regulations unrelated to the Additional Protocol.”<sup>51</sup>

### **Section 222: Parameters of IAEA access**

Section 222 provides the procedures for IAEA access to facilities, such as the requirement for written notice, and the timing and content of that notice. Section 222 (d)(1) states that IAEA inspectors may conduct the monitoring activities they normally do under the Additional Protocol, subject to the rights of the United States to limit such access. As the Committee stated in its report, reflecting the Brill letter, these rights to limit access “are unilateral and absolute; they are not subject to challenge by or negotiation with the IAEA.”<sup>52</sup> Moreover, this section of the bill lists certain items specifically excluded from IAEA access, such as financial or pricing data. This restriction is mainly directed at protecting business information, but the restriction may not be enforced if the Protocol requires disclosure of such information.<sup>53</sup>

### **Section 223: Procedures for IAEA access**

Section 223 provides the legal framework for IAEA inspectors to gain access to U.S. locations, either by consent or, in the absence of consent by the owner or operator, an

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<sup>51</sup> Senate Report Accompanying the United States Additional Protocol Implementation Act, S. 2489, S. Rpt. 109-226, p. 5 (Apr. 3, 2006).

<sup>52</sup> S. Rpt. 109-226, p. 6.

<sup>53</sup> S. Rpt. 109-226, p. 6.

administrative search warrant. This section directs a judge to issue an administrative search warrant authorizing IAEA access to a facility if the United States government submits an affidavit making various findings. This section also provides the process for those cases in which expedited access is necessary, where neither consent nor an administrative search warrant is required.

### **Section 224: Prohibiting disruption of authorized IAEA access**

Section 224 provides that it shall be unlawful for any person willfully to impede authorized IAEA access.

## **Subtitle C – Confidentiality of Information**

This subtitle, Section 231, exempts from Freedom of Information Act disclosure information that is acquired by the U.S. government pursuant to the Act or the Additional Protocol.

## **Subtitle D – Enforcement**

This subtitle makes it illegal for entities to fail to report information required by regulations pursuant to the Act, and provides for criminal and civil penalties for such violations. Additionally, Section 243 provides for the equitable remedy of specific enforcement either to restrain conduct in violation of this Act or compel the taking of an action required by the Act; and invests jurisdiction in the federal district courts to hear such actions.

## **Subtitle E – Environmental Sampling**

This subtitle sets forth congressional notification and presidential determination requirements regarding environmental sampling. Environmental sampling in the United States raises particularly acute national security concerns. On the one hand, the IAEA uses location-specific environmental sampling “to detect the presence of undeclared nuclear activities at a location.”<sup>54</sup> (Again, the IAEA does not currently employ wide-area environmental sampling). In this regard, in the United States, location-specific environmental sampling could potentially reveal information of direct national security significance if conducted at certain locations.<sup>55</sup> On the other hand, the Committee sought to balance this concern with the need to demonstrate leadership on this issue, by demonstrating U.S. willingness to incorporate environmental sampling into the U.S. compliance regime under the Additional Protocol, under appropriate measures. It is in the interest of the United States to support this IAEA verification technique for

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<sup>54</sup> Administration Response to Question for the Record 15, reprinted at S. Rpt. 109-226, p. 14.

<sup>55</sup> Administration Response to Question for the Record 15, reprinted at S. Rpt. 109-226, p. 14. *See also* id. (noting that environmental sampling can potentially provide information pertaining to, among other things, the material present at a given location from current and past operations; material isotopic ratios; whether, and to a certain extent how, a facility is processing or enriching uranium, producing/separating plutonium, or producing other actinides, tritium, or other materials).

potential use in non-nuclear weapon states, as it is essential to the success of the IAEA in its safeguards mission to detect and discover undeclared activity in non-nuclear weapon states.<sup>56</sup>

### **Section 251: Notification to Congress of IAEA approval of wide-area environmental sampling**

Section 251 provides that the President shall notify Congress if the IAEA approves of wide-area environmental sampling for use as a safeguards verification tool. This notification shall also include a statement of whether such sampling may be conducted in the United States under the Additional Protocol; and an assessment of the ability of the technique to detect, identify, and determine the conduct, type, and nature of nuclear activities.

### **Section 252 & 253: Applying national security exclusion to environmental sampling, both wide-area and location-specific**

Sections 252 and 253, respectively, provide that the United States may not permit any wide-area or location-specific environmental sampling in the United States unless the President has determined and reported to Congress, among other things, that:

- the proposed use of environmental sampling is necessary to increase the IAEA's capability to detect undeclared nuclear activities in a non-nuclear weapons state; and
- the proposed use of environmental sampling will not result in access by the IAEA to locations, activities, or information of direct national security significance.

These sections, according to the Committee, are included “for the unlikely circumstance in which the President did not apply the [national security] exclusion to environmental sampling.”<sup>57</sup> They “require[] reporting and certain certifications to Congress *prior to the use* in the United States of wide-area or location-specific environmental sampling.”<sup>58</sup>

Section 254 provides a rule of construction for the term “necessary to increase the IAEA's capability to detect undeclared nuclear activities in a non-nuclear weapons state,” in that the term shall not be construed to encompass proposed uses of environmental sampling that might assist the IAEA in detecting undeclared nuclear activities in a non-nuclear weapons state by setting a good example of cooperation in the conduct of such sampling, or by facilitating the formation of a political consensus or political support for such sampling in non-nuclear weapons states.

## **Subtitle F – Protection of National Security Information & Activities**

### **Section 261: Protection of certain information**

Section 261 provides that certain locations or information will not be declared to the IAEA to be subject to inspection or review; namely current or former Department of Defense or

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<sup>56</sup> Administration Response to Question for the Record 15, reprinted at S. Rpt. 109-226, p. 14.

<sup>57</sup> S. Rpt. 109-226, p. 11.

<sup>58</sup> S. Rpt. 109-226, p. 11 (emphasis added).

Department of Energy locations, sites, or facilities of direct national security significance, or information of direct national security significance regarding such locations.

### **Section 262: IAEA inspections and visits**

Section 262 provides that no national from a state sponsor of terrorism shall be permitted to be part of an IAEA team carrying out activities under the Voluntary Offer or Additional Protocol. It also provides that IAEA inspectors are to be accompanied at all times by U.S. government personnel during inspections. Finally, it provides that vulnerability and counterintelligence assessments are to be conducted every five years to ensure that national security-related information remains protected at all United States activities, locations, and sites that could be subject to IAEA inspections.

## **Subtitle G – Reporting Requirements**

This subtitle provides for the various reports required of the President by this Act, such as:

- list of locations the United States intends to declare to the IAEA as part of the initial U.S. declaration to the IAEA pursuant to the Additional Protocol, to be submitted to Congress not less than 60 days prior to the submission to the IAEA of that initial declaration;
- list of locations the United States intends to add to or remove from this initial declaration, to be submitted to Congress not less than 60 days prior to the submission to the IAEA of those revisions to the U.S. declaration;
- a certification that all locations declared have been examined by all agencies with national security equities and that appropriate measures have been taken at such locations to ensure that information of direct national security significance will not be compromised in the course of an IAEA inspection; and
- measures taken to achieve the adoption of Additional Protocols in non-nuclear weapon states, U.S. assistance to the IAEA to promote the effective implementation of such Additional Protocols, and the verification of compliance with such signed Protocols.

## **Subtitle H – Authorization of Appropriations**

Section 281 authorizes the appropriation of funds to carry out the Act.

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### **Administration Position**

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A Statement of Administration Policy was not available at the time of publication.

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## **Cost**

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CBO estimates that the India portion of the bill “would have no significant impact on the federal budget.”<sup>59</sup> CBO estimates that implementing the Additional Protocol would cost \$17 million in 2007 and \$72 million over the 2007-2011 period.<sup>60</sup>

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## **Other Views**

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No additional views were filed with the Committee report.

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## **Possible Amendments**

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For Senate consideration, a unanimous consent agreement has been entered into that limits the number of amendments to be considered to one Republican amendment and up to 18 Democrat amendments. Those amendments are by the following Senators:

- Bingaman (up to 7)
- Boxer
- Dodd
- Dorgan (2)
- Ensign—inspection (to be considered in closed session)
- Feingold
- Feinstein
- Harkin
- Kennedy
- Levin
- Obama
- Reed

Moreover, the consent agreement provides that all amendments except the amendment offered by Senator Feingold shall be subject to relevant second degree amendments; and that all amendments be related to the subject matter of the bill. Finally, the consent agreement provides for a Managers’ Amendment, S. Amdt. 5168, which is to be considered as original text for the purposes of further amendment.

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<sup>59</sup> Congressional Budget Office Cost Estimate of S. 3709, p. 4, Aug. 10, 2006.

<sup>60</sup> Congressional Budget Office Cost Estimate of S. 3709, pp. 2-3, Aug. 10, 2006.