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Nobody wants to be held accountable for having killed something so important to the bilateral relationship

Ashley J Tellis

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

Dr Ashley J Tellis is considered one of the foremost strategic experts in the United States. As a senior adviser and then as consultant to Nicholas Burns, the US under secretary of state for political affairs, he has been intimately involved in the negotiations of the US-India civilian nuclear agreement.

Dr Tellis, who was born and raised in Mumbai, is currently a senior associate at the Carnegie Endowment for International Peace – one of the country's leading think tanks. He is an alumnus of the University of Bombay and the University of Chicago, from where he received his BA, two MAs, and PhD degrees.

Prior to his assignment with the State Department as Burns's senior adviser, he served in New Delhi as senior adviser to then Ambassador to India Robert D Blackwill, whom he has described as the 'father of the new US-India global partnership.' He was himself one of the people behind the scenes who catalyzed the envisaged US-India strategic partnership.

Between his New Delhi assignment and joining Carnegie, Dr Tellis for a brief period, was on the National Security Council staff, working as special assistant to the President and the senior director for strategic planning and Southwest Asia.

Before his stints with the government, Tellis was a senior policy analyst at the Rand Corporation and a professor of policy analysis at the Rand Graduate School. He is also the author of several books, including *India's Emerging Nuclear Posture*.

In an exclusive and wide-ranging interview with *India Abroad* on the eve of the visit of India's National Security Adviser M K Narayanan and Foreign Secretary Shiv Shankar Menon to Washington to continue negotiations on the bilateral civilian nuclear cooperation agreement, the 123 Agreement, which has remained in limbo for several months, Dr Tellis expressed optimism that this time around the talks would result in the accord being finally sealed to the satisfaction of both parties.

He disagreed with the view in many quarters in New Delhi that Washington had changed the rules, arguing that the 123 Agreement was complicated given the difficulty in finding the right legal language to express India's unique circumstances.

He said there was no question of the administration going back to Congress and seeking more amendments to address New Delhi's reservations on issues like reprocessing and testing.

However, he could not imagine the agreement failing, given the adverse effects it could have on the rapidly growing partnership between India and the United States.

Dr Tellis said it was a high-stakes gamble that the leaders of the two countries had taken.

"For both sides, it absolutely imperative that we not fail," he said.

Both India's National Security Adviser M K Narayanan and Foreign Secretary Shiv Shankar Menon are coming here next week. Both you and Ambassador [former US envoy to India, Robert] Blackwill gave me a flavor of the optimism you felt over the pending talks over the 123 Agreement. Are you confident that this time the 123 Agreement will be sealed finally?

I believe this is the last chance we'll have before we get into the problems with the calendar...

You mean the Congressional calendar?

That's right. Both sides are aware of the need to complete the agreement quickly. The fact that M K Narayanan him-

self is coming indicates a desire to reach an agreement and move on to the next step. As you know, there are still many things that need to be done before US-India nuclear cooperation 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 lawyers and so the precision that is required is really remarkable.

While one can understand the Manmohan Singh government's coalition allies but even Indian diplomat Dr S Jaishankar at the Carnegie nonproliferation conference last month alleged the US has moved the goalposts and warned that the deal would not be consummated if it is out of sync with the statement of July 18, 2005?

I don't believe there has been a moving of the goalposts because the goalposts were set in stone in the July 18 and the March 2 [2006] agreements. The issue is not about moving the goalposts, the issue is about how one takes the

commitments made in both these declarations and translates them into legal language in an extraordinary case like India. That has really been the challenge.

I don't think the US has moved the goalposts. We've been very careful about the two boundaries before us: These are the law – that is, the Atomic Energy Act and the Hyde Act on one hand – and our mutual commitments as expressed in the July 18 Joint Statement and the March 2 separation plan on the other hand. All negotiations that have taken place so far have occurred between these two parameters.

So, are you saying that in terms of the Hyde Act there has been no moving of the goalposts?

No. I don't think so.

This is essentially what seems to be India's concern over reprocessing and testing that the Hyde Act is not in sync with the July 18 statement.

The complaint here comes in two parts. One, in the Hyde Act, there are many things the Congress has said in the preambular section of the bill. These sections have no 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, but 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



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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. What Congress has done is interesting. 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 a legal constraint with respect to India. But, it has also done something important by way of compensation. 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 technology, or if India joins multinational programs like GNEP [*Global Nuclear Energy Partnership*], the Hyde Act actually provides the executive with 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 linkage 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 three completely different branches of government 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 concerned.

Ask the Chinese about their experience with the 'most favored nation status' in the trade talks. The executive may have a certain policy, but 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 involves changing US law, it is really not cast 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 the logjam for the 123 Agreement and moving to the next phase of the deal?

In fact, I suspect that will be the subject of discussions next week. I have seen what has appeared so far in the

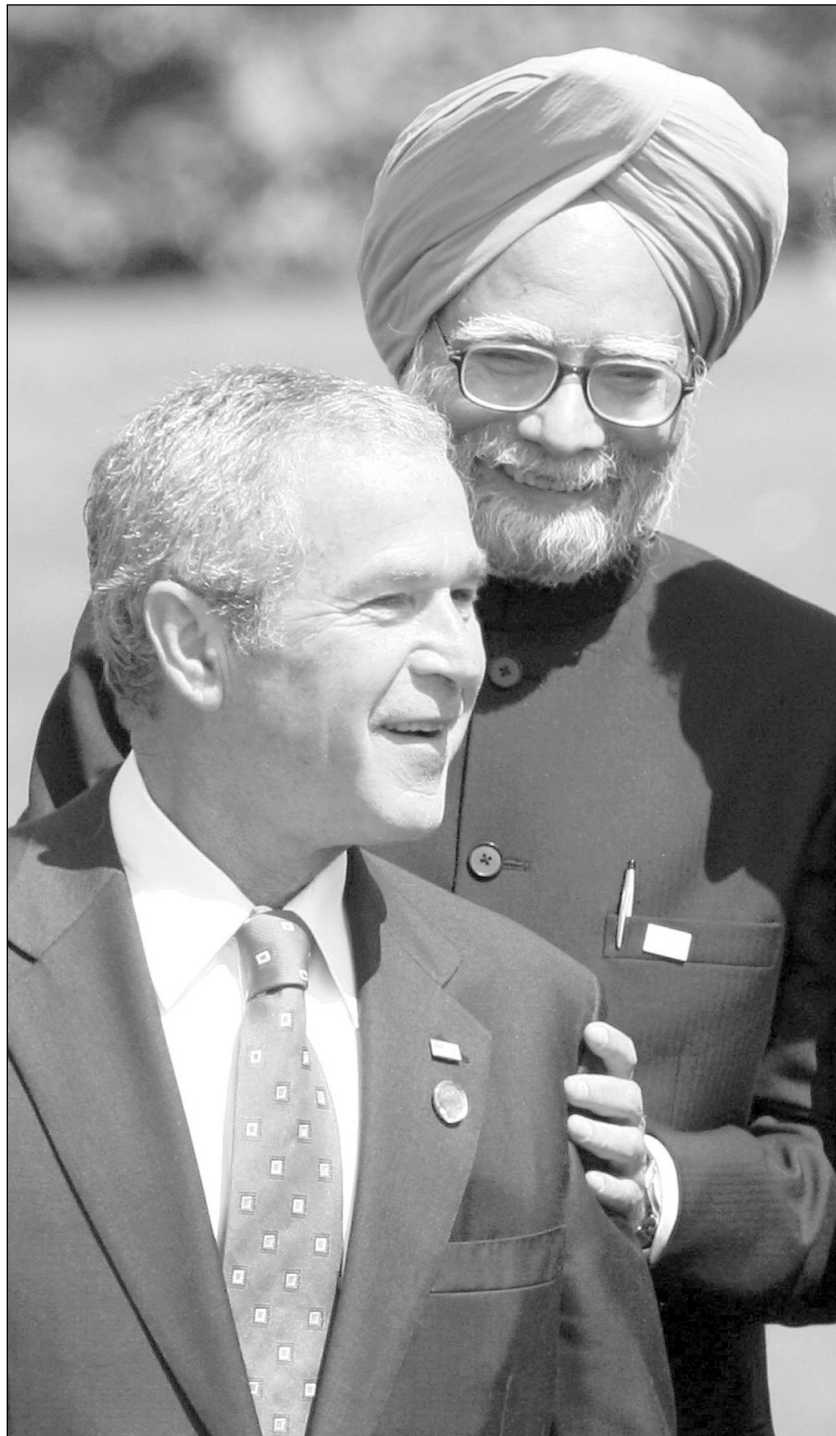
press—and it will be interesting to see what Narayanan and Menon, bringing in terms of specifics. I am sure the US side will be waiting for details on that.

Is this a tangible enough concession?

I think it could be an enormously helpful way forward....

You mean, in terms of showing good faith?

No, not merely 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 it's an on/off



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way they can again enter protracted negotiations to either dilute or change any aspect of the Hyde Act to alleviate India's concerns. Is it virtually impossible for the Administration to go back to Congress and ask for changes in the Hyde Act to meet India's concerns? Even if the administration convinces Congress to make these changes, would it necessarily call for brand-new legislation?

I believe your sense on this is absolutely right. What both Secretary [*of State Condoleezza*] Rice and [*Under Secretary of State for Political Affairs*] Nick Burns [*the chief US interlocutor of the deal*] have testified and 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 of 2006. So, I expect that there will be no question of actually going back to Congress and asking for further amendments. What is more important, however, is that existing US law 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 the deal but, when pressed, said it would have a devastating impact in the near term though not perhaps in the long term because, ultimately, 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 do something extraordinary for India alone. From the US perspective, this is a cutting of the Gordian knot of nuclear disagreement — the one thing that held the relationship 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 cannot 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 credibility, issues of commitment, and finally issues of confidence for the future of the relationship. So, for both sides, it's absolutely imperative that we not fail.

But with all respect to your optimism and confidence that it won't fail and that it can't fail, particularly 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 question about it — 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 NSG [*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, what leaves me with confidence are two things. One, that the support we have gotten for the agreement thus far has been bipartisan. Although it started out as a Republican initiative, or rather the initiative of a Republican president, it has now become fundamentally a national commitment, where members from both sides of the aisle have gathered together to make this work. The second element is straightforward politics: we are coming into an election year and members of Congress and others recognize that this is extremely important to the Indian American 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 President. And, so, people will be loathe to let this fail, if they can help it conclude successfully.

kind of arrangement.

Many people in Congress have concerns about whether this kind of arrangement is satisfactory from the point of view of preventing diversion. Now, if you do a thought experiment, where you have two kinds of arrangements, one which says there is going to be a safeguarded facility but only in campaign mode, and the other which says there will be a facility under full-time safeguards, obviously the second is preferable, from the point of view of preventing diversion, compared to the first. So, the fact that India is now willing to think about a dedicated facility is a very important step forward. It could assuage not only the US but the entire international community that whatever cooperation takes place with India and involves the use of a reprocessing facility, this facility will be under the certainty of a safeguards regime 24 hours a day, 365 days a year. So, in that sense, this is an important contribution.

Several lawmakers — including those who pushed the enabling legislation to facilitate the deal and their aides — have told me of the intense lobbying and horse-trading they had to do to convince some colleagues to support the deal— especially the Democrats to whom nonproliferation is virtually an article of faith. They say there is no