



U.S. Enacts Legislation to Promote Nuclear Cooperation with India

SIGNALS A BROADER STRATEGY TO ENHANCE HIGH-TECHNOLOGY TRADE WITH INDIA WHILE MAINTAINING STRICT TECHNOLOGY CONTROLS

President George W. Bush has signed the U.S.-India Peaceful Atomic Energy Cooperation Act. The new law reflects the agreement reached between Indian Prime Minister Dr. Manmohan Singh and President Bush earlier in 2006. It removes some of the trade restrictions that the U.S. placed on India as a result of the 1974 and 1998 Indian atomic tests.

The signing of the legislation marks a dramatic strategic shift by the U.S. For decades, India sought to remain independent of both the U.S. and the Soviet Union, but in recent years has sought greater cooperation with the U.S. A number of U.S. laws that imposed sanctions on countries that were not members of the Nuclear Nonproliferation Treaty and had tested nuclear weapons frequently stood in the way of both enhanced military cooperation and high-technology trade with India. Although the new legislation is specifically focused on the nuclear industry, it heralds a deliberate attempt by the U.S. to enhance civil and military cooperation between the two countries. It mirrors the growing market for sophisticated and sensitive U.S. exports to India.

IMPACT ON U.S. EXPORTERS TO INDIA'S CIVIL NUCLEAR INDUSTRY

The Act will open up trade to U.S. exporters that has been closed for years. The trade will not be automatic; indeed, extensive licensing for nuclear-related exports similar to those imposed for transfers to other countries' civil nuclear programs will be required. This licensing will fall under the jurisdiction of the Department of Energy, the Department of Commerce and the Nuclear Regulatory Commission. For some exports, more than one agency could have jurisdiction. The regulatory changes will affect U.S. companies as well as companies outside the U.S. that seek to partner with or obtain nuclear-related technology from U.S. companies for sale into the Indian market.

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Washington, DC
+1 202.942.5000

New York
+1 212.715.1000

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 517 6600

Los Angeles
+1 213.243.4000

San Francisco
+1 415.356.3000

Northern Virginia
+1 703.720.7000

Denver
+1 303.863.1000

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BROADER IMPACT ON U.S. EXPORTS TO INDIA

The Act represents the culmination of a significant push by the U.S. to enhance high-technology trade with India. Previously, onerous licenses were required for large portions of trade with India. Now, a significant amount of trade can proceed license-free. There are, however, risks for U.S. exporters. Recent cases where exporters failed to obtain necessary licenses for sophisticated products and technology resulted in fines ranging from several hundred thousand dollars to more than a million dollars. Some involved criminal charges.

The Commerce Department reportedly is considering expanding the current draft Validated End-Users program so as to give preferential treatment to Indian companies that have demonstrated strong commitments to protecting goods and technology received from the U.S. This program, if implemented and extended to Indian companies, would require fewer export licenses to those Indian companies that have demonstrated their ability to the U.S. government to use controlled items in accordance with U.S. legal requirements and have agreed to periodic audits.

ENHANCED FOCUS ON TECHNOLOGY TRANSFERS WITHIN THE U.S. TO INDIAN AND OTHER FOREIGN NATIONALS

Even as the U.S. is encouraging expanded trade with India, it is also stepping up enforcement of laws that restrict the transfer of certain technology. Of particular concern is the transfer of technology that occurs to foreign nationals in the U.S. Under U.S. law, such transfers are controlled as if the transfer were made to the country where the foreign national is a citizen.

While the restrictions do not apply to foreign nationals who are U.S. permanent residents (often called “Green Card Holders”), they do apply to high-technology workers in the U.S. on valid visas. Frequently, licenses may be required for foreign nationals to work on certain proprietary technology in companies in the U.S., even though those same workers may have done their most important graduate work in U.S. universities where the research work would have been openly published and would not have required an export license for access by the foreign nationals.

U.S. companies, and non-U.S. companies that do business in the U.S., should carefully review technology transfers to ensure that they do not trigger license requirements, whether the technology transfer is across the desk or across the world.

OUTSOURCING AND JOINT TECHNOLOGY DEVELOPMENT—WATCH OUT FOR INADVERTENT EXPORT VIOLATIONS

India is a leader in providing outsourcing assistance. U.S. companies are also increasingly setting up joint technology development centers in India. In both cases, U.S. companies should carefully scrutinize transfers to make certain that they do not trigger license requirements.

More than one U.S. company has authorized access to its computer system from abroad or set up a “help desk” staffed from outside the U.S., inadvertently permitting foreign nationals’ access to technology that would trigger a license requirement. Access from abroad is just as much of an export under U.S. law as is sending technology to a foreign destination.

Similarly, any joint development work should be scrutinized carefully for export control requirements. Export control restrictions can apply even if the expertise or the nexus of the technology development is located abroad and most of the technology transfer is *to* the U.S. rather than *from* the U.S.

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For Export Control and Trade Sanctions Matters

John Barker

+1 202.942.5328

John.Barker@aporter.com

Ronald Lee

+1 202.942.5380

Ronald.Lee@aporter.com

Jeffrey Smith

+1 202.942.5115

Jeffrey.Smith@aporter.com

For General India-Related Matters

Murali Neelakantan

+44 (0)20 7786 6121

Murali@aporter.com

Clive Thorne

+44 (0)20 7786 6205

Clive.Thorne@aporter.com

Washington

Whitney Debevoise

+1 202.942.5042

Whitney.Debevoise@aporter.com

New York

Robert Wessely

+1 212.715.1125

Robert.Wessely@aporter.com

Los Angeles

Ronald Johnston

+1 213.243.4256

Ronald.Johnston@aporter.com

Thomas McLain

+1 213.243.4004

Thomas.McLain@aporter.com

Northern Virginia

Michael Raschid

+1 703.720.7036

Michael.Raschid@aporter.com