

The Value of Narratives

The India-USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalisation and Global Administrative Law

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Abstract

'Fragmentation', 'pluralism', 'constitutionalisation' and 'global administrative law' are among the most dominant narratives of international legal order at present. Each narrative makes a descriptive claim about the current state of the international legal order, and outlines a normative vision for this order. Yet we must not lose sight of the conflicts between, and the contingency of these, and other narratives. This article seeks to recover both conflicts and contingency by showing how each may be used to explain a given event: the inauguration of a bilateral civil nuclear cooperation between the United States and India, better known as the 'India-US nuclear deal'. I explain how the four narratives may be, and were, co-opted at different times to justify or critique the 'deal'. This exercise serves two purposes: the application of four narratives reveals the various facets of the deal, and by its example the deal illuminates the stakes attached to each of the four narratives. In a final section, I reflect on why these four narratives enjoy their influential status in international legal scholarship.

Keywords: India-US Nuclear Deal, Nuclear Energy Cooperation, Non-Proliferation Treaty, Fragmentation, Constitutionalisation, Pluralism, Global Administrative Law

1 The Stakes in Choosing Narratives

"To give a thing a name, a label, a handle...to pluck it out of the Place of Namelessness, in short to identify it -- well, that's a way of bringing the said thing into being."

Salman Rushdie, *Haroun and the Sea of Stories* (1993)

Writing about New York University's Global Administrative Law Project, Susan Marks observed that '[t]here

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is something about the act of naming that seems to work a kind of magic'.¹ In naming Global Administrative Law (GAL), the convenors of the Project

have invited us to think about how seemingly disparate issues, structures and processes may be connected – how they might currently be established, but also how more integrated global systems might be established in the future. With 'global administrative law' comes an agenda for conceptual reflection, empirical study and institutional redesign that gives shape and focus to an immense range of large and small questions about the control of legal decision making in the contemporary world.²

Marks's point that in naming GAL, the convenors of the GAL project have offered an organising vision to describe, aggregate, clarify and order the multi-farious processes of decision-making that we understand as 'global governance', and thus have opened a new programmatic terrain of evaluating, critiquing and reforming these processes, is true also of other such narratives of international legal order. And there are several. In addition to GAL, this special issue inquires into international law's 'fragmentation', 'constitutionalisation' and 'global legal pluralism'. These terms too *name* phenomena; they too, in doing so, provide aggregative descriptions and furnish criteria for critique.

Moreover, these narratives are simultaneous. Each is describing the proverbial elephant, calling attention to trunk, or tusk, or hide or ear.³ The creatures imagined on these bases do not necessarily exclude each other: sometimes two or more of the narratives are brought together to yield yet more fabulous creatures, such as 'constitutional pluralism'.

All, of course, assume that there *is* a beast to be described at all. This, Marks pointed out, is part of the 'magic of naming': it makes us lose sight of the assumption and take for granted that there *is* a grand narrative to be

1. S. Marks, 'Naming Global Administrative Law', 37 *NYU Journal of International Law and Politics*, at 995 (2005).

2. *Ibid.*

3. Those unacquainted with the tale of the wise men and the elephant may wish to read John Godfrey Saxe's 'The Blind Men and the Elephant', in *The Poems of John Godfrey Saxe, Complete in One Volume* (1868), at 259. Appropriately, this poem represents only one of the many folk narratives about these men, the elephant, and the moral of the tale.

offered about the international order and that it can take the form chosen:

Precisely a new noun phrase like global administrative law seems to create a thing. It seems to bring an object into being, with a solidity and even a monumentality that risk putting in the shade disputes over process, agency, and orientation. These reifying effects are not inevitable, but it does take conscious effort to keep conflict and contingency in view.⁴

The reifying effects may be felt at two levels: in choosing one narrative as *the* narrative of international legal order, and those that follow from that narrative's specific preoccupations and elisions. For example, let me note here those preoccupations and elisions that Marks has highlighted for GAL: its procedural focus, which obscures questions of distributive justice; amenability to uncritical linear narratives of progress; and the suggestion that it is best, for the time being, to bracket questions of democracy and focus on administrative-type reforms.⁵ Similarly do other narratives produce reifications and foreclosures.

This article seeks to recover the potential conflicts between, and contingency of, these narratives, by showing how each may be used to describe a given event, and examining the aspects that each foregrounds, ignores or assumes. The event that I examine is the announcement and operationalisation of a bilateral civil nuclear cooperation agreement between the United States of America and India, or as it is more popularly known, the India-USA Nuclear Deal. I will begin by deconstructing it as an example of fragmentation and then turn to pluralism, constitutionalisation and global administrative law – in that order – as three counter-narratives of the Deal. I hope this exercise will serve two purposes: the application of four narratives will reveal the various facets of the Deal, and the Deal will illuminate the stakes attached to each of the four narratives. Following this, I will discuss why, despite their contingencies and limitations, these narratives are widely successful (re)descriptions of the international legal order.

2. Narrating the India-US Nuclear Deal

2.1. A Preliminary

A central feature of this article is its several accounts of the India-USA Nuclear Deal. This will interest those who engage with issues of nuclear non-proliferation and energy cooperation, but others may find the inevitable repetitions more tedious reading. So let me earn some early interest by recalling a classic film that followed a similar approach – Akira Kurosawa's *Rashomon*.

In *Rashomon*, Kurosawa demonstrated the unreliability of narratives by recounting the same event through four different viewpoints. The event in focus was the death of a Japanese samurai preceded by a sexual act between his wife and a bandit; each viewpoint told a slightly different story of how this came to pass. The viewpoints were those of these three characters and a 'neutral' hidden observer. The differences between the narratives included those of perception: of the duel between the bandit and the samurai as fierce or pitiful, of the wife as unwilling or eventually seduced into the sexual act, etc. There were also differences on the facts: in one narrative the wife begged the bandit to kill the samurai, in another the samurai to kill the bandit; in one she was witness to the duel, in another she fainted, in a third she ran away before it took place; in one narrative there was no duel at all. Only a few facts were uncontested: the principal characters were indeed a samurai, his wife and a bandit; there was a sexual act between the woman and the bandit; the samurai did die. For the rest, the conflicts between the narratives precluded the possibility of arriving at the 'truth' of what happened. The same is true of many events – a few things may be established, but most is inference and representation.

Indeed, the very describing of a few assorted facts as an 'event' worth studying is a creative act. As Koskenniemi notes, "a situation or a case is never an 'event' or 'part of a pattern' in itself but always appears as one or the other as a result of language and argument", and such argument is always made for a particular purpose.⁶

I should, then, clarify my purpose in selecting the India-US nuclear deal as *the* event to examine here. One of the options, at the start of writing this article was to select an already well-discussed event, perhaps one that had been a visible component of one or more of the four narratives under discussion here. The *Mox Plant* litigation, one of the most-cited illustrations of international law's fragmentation,⁷ but also making a guest appearance in discussions on constitutionalisation,⁸ may have served. However, this would have only further reinforced the criticality of this particular 'event', rather than showing how almost any set of facts can be transmogrified into supporting a narrative of international legal order.

Of course, I did not select the India-USA Nuclear Deal merely out of the desire to make the insignificant interesting. Nuclear governance *is* a very important issue in our times, and the Deal offers excellent insight into the contradictions between its core concepts: non-proliferation, disarmament and energy cooperation. Moreover the Deal sits oddly with India's history of opposition to

4. Marks, *supra* n. 1, at 996 (2005).

5. *Ibid.*, 996-1001.

6. M. Koskenniemi, 'Foreword' in Fleur Johns *et al.*, *Events: The Force of International Law* (2011), at xix. See also J. Hohmann, 'Book Review of Events: The Force of International Law', 82 *British Yearbook of International Law* (2011).

7. See 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', *Report of the Study Group of the International Law Commission*, A/CN. 4/L.682, 13 April 2006.

8. E.U. Petersmann, 'Human Rights', *International Economic Law and Constitutional Justice*, 19 *EJIL* 4, at 769 (2008).

the nuclear governance regime as a whole and, unsurprisingly, this feature has been invoked to different ends by Iran, North Korea and Pakistan, three of the other so-called outliers of this regime. These contradictions, and institutional efforts to reconcile them during the conclusion and operationalisation of the Deal, offer basis for each of the four narratives of legal order.

A final preliminary point then, on storyboarding: even Kurosawa's highly skilled filmmaking could not stave off complaints that the film was repetitive and glacially paced, extending to feature length material only sufficient for a short.⁹ These are the minimal criticisms that may be applied to what follows. There will be some repetition, the same events will be refracted in different ways, with some new material added each time. To maintain comprehensibility, therefore, I begin with a linear 'short' – setting out some facts about the nuclear governance regime and the flutter created by the Deal.¹⁰ To clarify, the following sub-section is not intended to provide *the* authentic account of the Deal, as the standard against which all narratives are to be evaluated. Such an enterprise could only undercut the argument that follows in the rest of this article. The subsection merely offers an introduction to the Deal for those entirely unacquainted with it, acknowledging that this too may be vulnerable to charges of selectivity and subjectiveness.

2.2. An Overview

The India-US Nuclear Deal was first announced in July 2005, in a joint statement issued by Prime Minister Manmohan Singh and President George Bush.¹¹ The full statement outlined plans for bilateral engagement on several issues such as the economy, energy and environment, democracy, development, non-proliferation, high technology, space exploration. Global attention however focused on the following sentences:

The President told the Prime Minister that he will work to achieve full civil nuclear energy cooperation with India as it realizes its goals of promoting nuclear power and achieving energy security. The President would also seek agreement from Congress to adjust US laws and policies, and the United States will work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India, including but not limited to expeditious consideration of fuel supplies for safeguarded nuclear reactors at Tarapur.

The Statement represented a remarkable change in attitude towards India's nuclear programme. A series of actions including a 'peaceful nuclear explosion' in 1974,

refusal to ratify the Nuclear Non Proliferation Treaty (NPT)¹² and the Comprehensive Test Ban Treaty (CTBT),¹³ nuclear tests in 1998, and accelerating production of nuclear warheads and missiles, had led to India's near-total exclusion from international civil nuclear trade. And though there were occasional suggestions of the need to 'engage India' on nuclear matters, the proposals advanced to this end usually envisaged fairly limited forms of assistance to India in return for its undertaking a huge array of non-proliferation and disarmament commitments.¹⁴

This stance, taken by the five nuclear powers (USA, UK, France, Russia and China) and other major nuclear suppliers, vis-à-vis, India, was not simply a matter of policy-preference. Arguably, it was also dictated by their existing legal commitments, under the NPT and related documents. The NPT recognises only the five powers as *de jure* nuclear weapons states (NWS). Its Article 4 provides for the inalienable right of all other states to develop only their peaceful nuclear programmes, and enjoins the NWS and states with advanced civil nuclear capabilities to assist especially developing non-nuclear-weapon states (NNWS) parties to NPT to this end. While this does not automatically exclude assistance to a non-NPT party like India, the language of Article 4¹⁵ suggests that any such venture must be conditioned on the non-party state's undertaking extensive non-proliferation commitments.

NPT Article 3 and subsequent decisions at NPT review conferences suggest that these commitments include the recipient state's acceptance of 'comprehensive' or 'full-scope' 'safeguards', *i.e.* International Atomic Energy Agency (IAEA) inspections and verification on all nuclear sites.¹⁶ While Article 3 distinguishes between the obligations of recipient NNWS party to the NPT and supplier states, requiring the former to accept safeguards on all nuclear sites, and the latter to ensure that all materials and technology supplied by them is for use at safeguarded sites (but not to ensure that all nuclear sites of the recipient are safeguarded), the distinction may have been eroded by subsequent interpretative

9. See G. Smith, 'Critical Reception of Rashomon in the West', 13 *Asian Cinema* 2, at 115 (2002).
10. For a more detailed account, see S. Ranganathan, 'Visions of International Law: Lessons from the 123 Agreement', Symposium on India, the 123 Agreement, and Nuclear Energy: Issues of International Law, 51 *Indian Journal of International Law* 2, at 146 (2011).
11. India-USA Joint Statement (July 18, 2005). <www.dae.gov.in/jtstmt.htm>.

12. 729 UNTS 161 (1968).

13. 35 ILM 1439 (1996).

14. For accounts of such proposals See S. Talbott, *Engaging India: Diplomacy, Democracy and the Bomb* (2006); G. Perkovich, *India's Nuclear Bomb, The Impact on Global Proliferation* (1999).

15. In particular, its express reference to Arts. 1 and 2 which set out obligations of horizontal non-proliferation of NWS and NNWS.

16. The details of the comprehensive safeguards scheme are spelt out in IAEA, 'The Structure and Content of Agreements between the Agency and States required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons', INF/CIRC/153 (corrected), reprinted, 1972. <www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf>. Some states have also adopted an Additional Protocol which gives the IAEA enhanced powers of inspection. For a crisp summary of the system of safeguards and additional protocols, see D. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009), at 19-23.

practice.¹⁷ For example, the document ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’ adopted by consensus by NPT parties at the 1995 NPT Review and Extension Conference provides, as Principle 12:

New supply arrangements for the transfer of [nuclear materials or technology] to non-nuclear-weapon States should require, as a necessary precondition, acceptance of IAEA full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices.¹⁸

Moreover, the Nuclear Suppliers Group (NSG), a network of the principal suppliers of nuclear materials and technology, has also adopted a requirement to condition all transfers on recipient states’ acceptance of comprehensive IAEA safeguards.¹⁹ This requirement is stated as a ‘guideline’ but is strictly observed by NSG members, so that any state in perceived violation is asked to explain its breach of its NSG commitments.²⁰ The position taken in the abovementioned Principle 12 and the NSG guidelines is also consonant with the disarmament obligation stated in NPT Article 6. Article 6 provides for all states’ obligations

to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

The scope of this obligation may seem ambiguous – does it entail an obligation of conduct, to pursue negotiations; or an obligation of result, to achieve disarmament – but the International Court of Justice has clarified that it entails an obligation of result.²¹ Of course, the result is far from being achieved, but the

obligation, at the very least, should exclude measures by NPT party states that encourage any state’s nuclear weapons ambitions.

And yet, despite the restraints imposed by the existing legal commitments of the United States (an NPT party and an NSG member), here it was, announcing ‘full civil nuclear cooperation’ with India. This, as fleshed out in the bilateral agreement subsequently negotiated by the two states,²² included transfer of nuclear materials and technology from the USA to India, cooperation in developing a strategic fuel reserve and other fuel supply guarantees including, as needed, in collaboration with the United Kingdom, France, Russia, rights to enrich (up to 20%) and reprocess nuclear fuel, and to carry out activities involving ‘controlled thermonuclear fusion’. Several provisions of the agreement moreover, offered pointed affirmation of India’s nuclear weapons programme.²³ This extended to omitting express reference to the possibility and consequences of further nuclear tests by India. Moreover, while Article 14 of the agreement implied that such a nuclear test might be a basis for cessation of cooperation, it also clarified that the various fuel supply guarantees stated in the agreement would not be affected.

Of course, India was asked to take some actions in order to ensure that the materials and technology supplied under this agreement did not contribute directly to its

17. As is provided for in Art. 31(3)(b) of the Vienna Convention on the Law of Treaties, (VCLT), 8 ILM 679 (1969). The provision states: Art. 31. General Rule of Interpretation... 3. There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

18. ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’, *NPT Review and Extension Conference 1995, Decision 2*, NPT/CONF.1995/32 (Part I) Annex. <www.un.org/disarmament/WMD/Nuclear/1995-NPT/pdf/NPT_CONF199501.pdf>. This argument is advanced in, amongst other works, Christer Ahlström, ‘Legal aspects of the Indian-US Civil Nuclear Cooperation Initiative’, *SIPRI Yearbook: Armaments, Disarmament and International Security* (2006).

19. NSG, ‘Guidelines for Nuclear Transfers’, INFCIRC/254/Rev.10 Part I, 2011. In addition to these ‘Part I’ guidelines on transfers of nuclear materials and technology, the NSG has also adopted a set of guidelines dealing with transfers of dual-use (i.e. nuclear and non-nuclear) materials and technology; these are set out in INFCIRC/254/Rev. 8 Part II, 2010.

20. See for instance the criticism of Russia for supplying nuclear fuel to India: Statement by Philip T. Reeker, Deputy Spokesman, US Department of State (February 16, 2001) at <www.fas.org/nuke/control/nsg/news/treaty-nsg-010216.htm>.

21. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, (1996) ICJ Reports 226, 264-265, paras 101-103.

22. Agreement for Cooperation between the Government of the United States of America and the Government of India concerning Peaceful Uses of Nuclear Energy, August 3, 2007 (‘India-USA Agreement’). The Agreement was concluded in March 2006 and ratified in October 2008; the 2007 date is commonly used because it was at this time that the terms of the agreement were made public.

23. Examples from the text of the bilateral agreement include: (i) *In the preamble*: *Wishing* to develop such cooperation on the basis of mutual respect for sovereignty, non-interference in each other’s internal affairs, equality, mutual benefit, reciprocity and with due respect for each other’s nuclear programmes;... *Affirming* that cooperation under this Agreement is between two States possessing advanced nuclear technology, both Parties having the same benefits and advantages.... (ii) *Art. 2. Scope of Cooperation*... 4. The Parties affirm that the purpose of this Agreement is to provide for peaceful nuclear cooperation and not to affect the unsafeguarded nuclear activities of either Party. Accordingly, nothing in this Agreement shall be interpreted as affecting the rights of the Parties to use for their own purposes nuclear material, non-nuclear material, equipment, components, information or technology produced, acquired or developed by them independent of any nuclear material, non-nuclear material, equipment, components, information or technology transferred to them pursuant to this Agreement. This Agreement shall be implemented in a manner so as not to hinder or otherwise interfere with any other activities involving the use of nuclear material, non-nuclear material, equipment, components, information or technology and military nuclear facilities produced, acquired or developed by them independent of this Agreement for their own purposes. (iii) *Art. 12. Implementation of the Agreement*. 1. This Agreement shall be implemented in a manner designed: (a) to avoid hampering or delaying the nuclear activities in the territory of either Party; (b) to avoid interference in such activities... (iv) *Art. 13. Consultations*. 1. The Parties undertake to consult at the request of either Party regarding the implementation of this Agreement and the development of further cooperation in the field of peaceful uses of nuclear energy on a stable, reliable and predictable basis. The Parties recognise that such consultations are between two States with advanced nuclear technology, which have agreed to assume the same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology.

nuclear weapons production. It was asked to draw up and execute a plan to separate its military and civil nuclear facilities and to put all of the latter type under IAEA safeguards. This, while ensuring non-diversion of the supplied materials, amounted to an exceptional concession for India. For, the type of safeguards it was subject to was more akin to those applied to NWS rather than NNWS in USA's bilateral agreements.²⁴ Moreover, this concession was also exceptional given the United States' own obligations under the NPT, NSG guidelines, and its domestic legal framework for international nuclear trade under section 123 of the 1954 Atomic Energy Act.²⁵ And the United States obviously recognised this from a fairly early stage. Its 2005 Joint Statement with India spoke of the need to 'work with friends and allies to adjust international regimes' as well as the USA's own domestic laws to enable this cooperation. The bilateral agreement spoke more specifically of the need to 'work with friends and allies to adjust the practices of the Nuclear Suppliers Group';²⁶ avoiding discussion of whether there would be need to 'adjust' also NPT provisions as modified by subsequent practice. The latter, naturally, would have been a much more complex proposition.

The process undertaken by the United States and India in persuading their friends and allies to condone the necessary adjustments amounted to this: India prepared a Separation Plan demarcating its civil and military nuclear programmes. Then, together with the IAEA it arrived at an 'India Specific Safeguards Agreement' (ISSA)²⁷ applicable to its civil nuclear facilities, that was approved by the IAEA Board of Governors. Finally, the NSG issued a waiver permitting nuclear trade with India, suspending its requirement for comprehensive safeguards vis-à-vis India. The Deal was also approved by the US Congress.

The process refined several features of the Deal, and also multilateralised it, opening the gate for other states too to enter into civil nuclear trade with India. It culminated in India and the United States' ratification of the bilateral agreement in October 2008. Nevertheless, the conditions governing nuclear trade with India have continued to evolve, shaped by India's conclusion of trade agreements with other states; as well as by multi-lateral decisions at the NSG, the 2010 NPT review conference, and at G-20 meetings.

With that brief account, I turn now to the four presentations of the Deal's passage through 2005-2008, in the narratives of fragmentation, pluralism, constitutionalisation and global administrative law.

3. The Deal as an Example of Fragmentation

The Deal, quite obviously, may serve as an example of the fragmentation of international law. For, the bilateral agreement between India and the United States establishes a *special framework* that falls outside the purview of the NPT-based regime, and possibly is contrary to USA's obligations under the regime.

The NPT provision (Art. 4) on nuclear assistance from nuclear powers to developing states is often described as one element of a 'bargain', under which all NPT parties except the five NWS gave up their liberty to pursue nuclear weapons programmes; in return, the NNWS were to be assisted in developing their civil nuclear programmes and protected against threats of nuclear attacks, and were promised that the NWS would also gradually disarm.²⁸ India, though a participant to the drafting process, did not accept this bargain and refused to sign the NPT; it remains one of three states that are not, and have never been, NPT parties. Therefore, if – given especially the numbers of its adherents – the NPT bargain is understood to provide the global legal framework for civil nuclear trade, India falls outside this framework's scope, but USA does not. The Deal then sets up an alternative that partially intersects with the existing framework, and *uses* the fact of India's non-party status as a justification for the application of a different set of standards, exemplified by the ISSA. This is, simply, a fragmentation of the legal framework for nuclear trade into differing general and specific schemes.

But the narrative of fragmentation extends beyond the creation of partially intersecting frameworks on the same issue, to the *attempt to disconnect and separately address issues that are closely-related*; here, the pursuit of nuclear energy and the production of nuclear weapons. The Deal was premised on the assumption that it was possible, and appropriate, to distinguish India's civil and military nuclear programmes – these could be segregated not just physically, by following a 'Separation Plan'; but also conceptually, so that providing nuclear materials to India's civil nuclear facilities could be justified as having no implications for the recognition or development of its nuclear weapons programme. For example, quite early on, the then Indian Foreign Secretary, Shyam Saran, stated:

...the important thing to remember here is that the July 18th joint statement is not about India's strategic program. It is an agreement about civil and nuclear energy cooperation between India and the US... whatever is coming as technology or cooperation

24. For a comparison of the India-US nuclear deal with bilateral agreements concluded by the United States with China, Japan, United Arab Emirates and Euratom, see Ranganathan, *Visions of International Law*, at 163-173.

25. PL 83-703.

26. Art. 5(6), India-USA Agreement.

27. Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities, INFCIRC/754, 2009.

28. See Ranganathan, *Visions of International Law*, at 178 (2011); Joyner, *Proliferation of Weapons of Mass Destruction*, at 39-40.

from its partners would not be diverted to India's strategic program...²⁹

Similarly, then US Secretary of State Condoleezza Rice's address to the US Senate Committee on Foreign Relations defined the issue as being primarily of India's quest for energy security, moreover a quest whose urgency had led to unsuitable international alliances:

India's a nation of over a billion people with an economy growing at approximately eight percent each year. It has a massive and rapidly growing appetite for energy. It is now the world's sixth largest consumer of energy. Diversifying India's energy sector will help it to meet its ever increasing needs and more importantly, ease its reliance on hydrocarbons and unstable sources like Iran. This is good for the United States.³⁰

This attempt to define the Deal as focused on India's energy needs and disconnected from its nuclear weapons programme overlooks several aspects. The first is the lesson from history. It is widely accepted, including by the United States, that India had conducted its first nuclear test in 1974 by diverting to this purpose plutonium produced by the Canada-supplied CIRUS nuclear reactor; indeed the NSG was first established as a direct consequence of this action.³¹ Second, the language of the India-USA bilateral agreement, with all the references to India's advanced nuclear capabilities and the USA's lack of desire to interfere with these, clearly shows that the disconnection between India's civil and military purposes was superficial; by implication at least the Deal was an affirmation of India's nuclear programme. Moreover, as a prominent architect of India's nuclear policy pointed out, the Deal also offered a practical boost to this programme – again not directly, but quite materially – by freeing up India's indigenous nuclear fuel resources, always in short supply, for weapons production.³² Third, and most significantly, the splintering of nuclear governance into separate categories of proliferation and energy cooperation is something that the United States (and its 'friends and allies') have consistently found themselves unable to do in case of other states, notably Iran.

Iran is an NPT party, and had accepted comprehensive safeguards way back in 1974. While it has maintained

several – later revealed – secret nuclear fuel enrichment facilities, IAEA inspectors have not found these to produce weapons-grade fuel, and have not detected any other evidence of a nuclear weapons programme.³³ Even so, in 2006, the IAEA Board of Governors voted to report to the Security Council that IAEA was unable to conclude that there were no undeclared nuclear materials or activities in Iran.³⁴ The Security Council has since repeatedly demanded that Iran suspend all enrichment activity, and – rejecting Iran's claim that it was merely exercising its NPT right to develop nuclear energy production – imposed sanctions. However the situation resolves itself, its prominent feature has been the unwillingness to accept Iran's defence that its fuel production has no link to nuclear weapons production. Given that this is almost exactly opposite to the stance taken towards India, Iran has obviously criticised the Deal as reflecting the USA's double standards.³⁵

More than double standards however, the Deal reflects the progression of a *deformalised approach*:³⁶ what is relevant is not the actions, but the actors; the standards applied to interpret actions differ based upon who is performing them. Thus, that which is possible for India, is out of the question for Iran.³⁷ This too was evident in Rice's justification:

It is simply not credible to compare India to North Korea or to Iran. While Iran and North Korea are violating their IAEA obligations, India is making new obligations by bringing the IAEA into the Indian program and seeking peaceful international cooperation. Iran and especially North Korea are, of course, closed non-democratic societies. India is a democracy. In fact, India is increasingly doing its part to support the international community's efforts to curb the dangerous nuclear ambitions of Iran.³⁸

Thus we see evidence of two further aspects of fragmentation: cabining of related matters (non-proliferation and nuclear energy that were intimately linked in the NPT) into different categories, to be addressed by separate sets of rules; and the use of non-formal criteria in determining the standards to be applied to various states.

The Deal can, however, be harnessed into the fragmentation narrative to an even greater extent, serving as evidence for what Benvenisti and Downs have called

29. S. Saran, 'Transforming U.S.-India Relations: Forging a Strategic Partnership', *Address at the Carnegie Endowment for International Peace*, 21 December 2005.

30. C. Rice, *Opening Remarks to the US Senate Committee on Foreign Relations*, 5 April 2006.

31. See NSG, 'The Nuclear Suppliers Group: Its Origins, Role and Activities', Background document, INFCIRC/539/Rev. 3 (30 May 2005). The document states that the NSG was formed 'following the explosion in 1974 of a nuclear device by a non-nuclear-weapon State, which demonstrated that nuclear technology transferred for peaceful purposes could be misused.' India, incidentally, has held to the position that this was a 'peaceful' nuclear explosion. For a detailed discussion, see Perkovich, *India's Nuclear Bomb*, Chapter 7.

32. K. Subrahmanyam, 'India and the Nuclear Deal', *Times of India*, 12 December 2005.

33. See 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran', *Report by the IAEA Director General to the Board of Governors*, GOV/2006/15, 27 February 2006.

34. Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, GOV/2006/14, 4 February 2006.

35. S. Varadarajan, 'As Pakistan hails "precedent," other IAEA members express doubts, fears,' *The Hindu*, 2 August 2008.

36. Something we see also in the pluralism narrative.

37. See D.E. Sanger, 'Reshaping Nuclear Rules', *New York Times*, 15 March 2005.

38. Rice, *supra* n. 30.

strategic fragmentation.³⁹ They argue that powerful states routinely use fragmentation as a deliberate strategy in order to maintain their relative hegemony over the international system. They do so in four ways. They create narrowly focused bilateral agreements rather than multilateral ones in order to reduce the opportunities for coalition building amongst other states. They pursue, where multilateral engagement cannot be avoided, decision-making in one-time settings to ones calling for more repeated interactions. They avoid establishing bureaucratic or judicial fora. And, the shifting interactions to congenial fora, including by withdrawing from existing agreements and creating new ones where necessary.⁴⁰ In these ways, the states are able to shape the international legal order to serve their interests. The authors cite two important examples of the use of these strategies. The World Trade Organisation (WTO) originated from a decision by USA and the European Union to withdraw from the Uruguay Round negotiations and conclude a bilateral ‘modified’ version of the 1947 General Agreement on Trade and Tariffs, that other states, including GATT 1947 members, were ‘invited’ to join – or risk losing access to US and EU markets. In the 1980s, eight ‘western’ states created an alternative sea-bed mining regime to that provided in the 1982 United Nations Convention on the Law of the Sea, forcing ultimately the negotiation of the more favourable – to them – 1994 Implementation Agreement.⁴¹

The Deal, it is easy to see, serves a similar purpose. To begin with it has an interesting back story.⁴² It has been suggested that the impetus for it came from the United Kingdom and France, who were keen to tap into India’s nuclear energy market but felt inhibited by their NPT commitments. They approached the United States to pilot the modification of the existing legal framework. The India-US nuclear deal was thus the product of the three states’ desire to recalibrate the nuclear governance regime to enable them to pursue their economic and commercial interests.

The approach taken by the United States to achieve this end was to focus on adjusting the NSG Guidelines; nuclear trade with India was thus delinked from USA’s NPT commitments. The NSG, while a multi-lateral organisation operating on the consensus principle, is an informal one and includes a higher concentration of USA’s friends and allies than does the NPT, making it a much easier matter to obtain a specific concession for India. Consider what this meant for the NSG’s position vis-à-vis the NPT. While in case of all other instances of civil nuclear trade, the NSG supplied enhanced condi-

tions additional to those provided in the NPT; in case of the India-US Deal, the NSG became a substitute for the NPT; a waiver from its safeguards requirements becoming the only relevant legal adjustment, to the exclusion of conditions under the NPT. Thus we see a crude substitution of a multilateral treaty by a more limited, informal, forum.

In this final presentation, fragmentation moves from being simply phenomenon to being a project, shared by a few states, of maintaining hegemonic control over the international system. As such, it immediately calls forth various counter-narratives that challenge the descriptive claim of the ends produced by strategic fragmentation, and offer a normative vision for the international system. The three other narratives addressed in this symposium may each be considered such a counter narrative.

4. Counter-Narratives of the Deal: Pluralism, Constitutionalism and Global Administrative Law

4.1. Global Legal Pluralism

Let us start with global legal pluralism. This is, in some ways, exactly the ‘other face’ of fragmentation; it is the glass half-full to fragmentation’s glass half-empty. If fragmentation describes the splintering of the international legal system into multiple, intersecting, issue-specific regimes, pluralism celebrates the decentralisation of power, away from a handful of treaties and institutions dominated by the most powerful states.

An example of pluralism’s descriptive challenge to the spectre raised by fragmentation can be seen in Laurence Helfer’s work on regime shifting in the field of intellectual property protection.⁴³ Helfer describes the developed states-led ‘folding’ of intellectual property rights protection into the WTO regime, in the form of the 1994 Trade-Related Intellectual Property Rights Agreement (‘TRIPS’) and the further additions TRIPS-plus standards; but he also describe the challenges to TRIPS, by developing states, NGOs and intergovernmental organisations. These latter challenges have been manifested in a series of efforts to shift intellectual property law-making to more congenial fora within regimes on biological diversity, public health, plant genetic resources and human rights. The resultant ‘existence of multiple, discrete regimes, any one of which may plausibly serve as a site for future policy development, leaves considerable room for manoeuvring by different clusters of states (or states and NGOs) seeking to maximise their respective interests.’⁴⁴

39. E. Benvenisti and G. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford Law Review*, at 595 (2007). See also N. Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, (2005) 16 *EJIL* 369.

40. Benvenisti and Downs, *supra* n. 39, 599, 610 et seq.

41. *Ibid.*, 615-616.

42. Narrated by an anonymous source from UK Foreign and Commonwealth Office.

43. L. Helfer, ‘Regime Shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Lawmaking’, 29 *Yale Journal of International Law* 1 (2004).

44. *Ibid.*, 8.

Building on this, we may say that the normative case for a pluralistic legal order rests on two bases: inclusion and contestation. The proponents of pluralism claim that an order characterised by a multiplicity of treaties and treaty-based regimes offers greater opportunities for representation of, and critical engagement between, different viewpoints. Writing on conflicts between treaty regimes relating to global fisheries, Margaret Young, for example, argues that we should engage with treaties, not merely as legal instruments, but as vehicles for ideas. A multiplicity of treaties, and the ensuing treaty conflict, is an opportunity for obtaining a richer diversity of perspectives, and for mutual learning and coordination between regimes.⁴⁵ Nico Krisch elaborates upon the greater accountability of actors that results from the continuous process of criticism and review implied in the contestations for authority in a pluralistic order.⁴⁶ This process, he claims, will in most cases produce 'pragmatic accommodation' between the contesting actors.⁴⁷

These descriptive and normative theses on pluralism are not advanced in an uncritical way. Even as Helfer relates the possibilities of representation of different perspectives in law-making and dispute settlement, bargaining and cooperation, generated by the existence of multiple, discrete regimes, he reminds us that regime shifting 'may also spawn inefficient rivalries among actors or attenuate mechanisms for holding international institutions accountable to affected constituencies. And it increases the likelihood of conflicting or incoherent legal obligations for states and private parties....'⁴⁸ Young notes the risks of 'managerialism', of deformalisation, inherent in adopting a coordinating approach in the name of taking into account a broader range of perspectives.⁴⁹ And Krisch accepts that pluralism remains challenged by two 'central difficulties': the lack of certainty caused by the process of continuous contestation between actors all of whom lack the final authority to pronounce upon an issue; and the more serious challenge that isolated counter-examples notwithstanding, pluralism may exacerbate power disparities.⁵⁰ The defense of pluralism, then, is maintained on two grounds: the absence of any other more plausible vision – apart from the difficulties of its realisation, is not a centralised legal order all the more likely to perpetuate these power disparities? – and a call for the adoption of substantive and procedural norms to frame the process of pluralistic contestation, coordination and accommodation. These may be principles of mutual recognition, toleration, coherence, or inclusiveness of political communication,⁵¹ or more broadly what Young describes as

a principle of good governance 'openness, transparency, review and participation'.⁵²

Let us consider whether the Deal may be narrated through the perspective of global legal pluralism. The short answer here is that it may be. Descriptively, the Deal is an example of pluralism in nuclear governance. It is a *connected but separate framework* that addresses India's specific circumstances: its non-NPT status, nuclear weapons, need for energy security, etc. Furthermore, aspects of the Deal may be relied upon to back the *claims of inclusion and contestation* that are attached to pluralism. The Deal may be represented as a challenge to an existing hegemony, maintained in an NPT-based nuclear governance regime that divides the world into nuclear-haves and have-nots and that – despite the rhetoric of disarmament – is complicit in the preservation of the former's nuclear weapons programmes. That the NPT bolstered an established structure of power is no revelation; the five *de jure* NWS are also the five permanent members of the UN Security Council. We may argue that Deal challenges this structure and provides for a more inclusive approach in at least the following ways:

First, India, which had resisted this classification of *de jure* NWS and NNWS, and was, at the time of the drafting of the NPT, a leader of the non-aligned movement and of the call for a New International Economic Order, had been cast into the role of a principal challenger to the NPT-supported hegemony; its 1974 'peaceful nuclear test', was popularly described as resistance, and its later 1998 tests a manifestation of the failure of the five nuclear weapons states to work towards disarmament.

Second, by updating the geopolitical vision underlying the NPT. If we accept that it is appropriate for a non-proliferation treaty to take into account the type of concerns for which the NPT recognised some states' nuclear weapons – at its drafting conference, the US representative's statement (hinting at the Cold War), '[w]e all know why it is not possible to include in this treaty actual limitations on the nuclear arms of the nuclear-weapons States'⁵³, was sufficient to abort discussions on limiting nuclear weapons states from assisting the weapons programmes of other nuclear weapons states – the Deal amends the NPT's dated and limited outlook on which security concerns were important. After all, the Cold War context, which was used to justify the United States' assistance to the UK is long gone, but the geopolitics that underlay the arms race between India and Pakistan are still current.

Third, in favour of the act of disconnection, referred to earlier, it may be argued that the NPT unfairly couples states' opportunities for economic development through improved access to nuclear energy, with their adherence to a discriminatory global order that locks in the strate-

45. M. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law*, at 275-276 (2011).

46. N. Krisch, 'The Pluralism of Global Administrative Law', 17 *EJIL*, at 247 (2006).

47. *Ibid.*, 268.

48. Helfer, *supra* n. 43, at 82.

49. Young, *supra* n. 45, at 276.

50. Krisch, *supra* n. 46, at 275-276.

51. *Ibid.*, 276.

52. Young, *supra* n. 45, at 301. These are of course principles also embraced by GAL.

53. Statement of the US Representative, ENDC/PV. 369, 22 February 1968, para. 51.

gically superior status of some states. Whatever the rationale for this coupling – and I earlier described it as representing a ‘bargain’ – there is a disquieting ‘bite the cartridge’⁵⁴ flavour to its appearance in the NPT, which calls to mind many other highly criticised instances in which economic assistance has been tied to conditionalities. The Deal may thus be defended as representing a move to decouple strategic issues from nuclear energy assistance. Indeed, there are groups, such as the Left parties in India, which criticise it precisely for failing to do so in full measure (their claim is that the Deal is a means to align India’s foreign policy with the United States’).⁵⁵

The Deal may thus seem propagate ideas that differ from, and challenge, those engrained in the NPT. Is this, however, sufficient to justify the Deal on the platform of global legal pluralism? Many questions immediately arise. Which views should be included in an ‘inclusive’ regime? Can a challenge to an existing hegemonic consensus be distinguished from the attempt to establish a new consensus? Do the NPT’s efforts to limit the spread of nuclear weapons, flawed as they may be, deserve this type of challenge? Arguably, there is no current conception of pluralism that sets out the appropriate scope of ‘inclusion’ or ‘contestation’, such that it can guide us in answering such questions.

Let us examine other claims that form part of the case for pluralism. These are that it offers opportunities for mutual learning, and in most cases leads to a pragmatic accommodation, and that fears of confusion and entrenchment of power disparities can be met where principles of ‘good governance’ are followed.

Again, the Deal bolsters these claims to some extent. The United States and India both pointed to their fairly pluralistic approach taken towards the operationalisation of the Deal: the process included approval (of the ISSA) by the IAEA Board of Governors which seats about thirty IAEA member states; and the NSG, which has forty-five members, all principal nuclear suppliers. As I have detailed elsewhere,⁵⁶ the involvement of the IAEA and the NSG, led to its modification, from an act of pure US and Indian exceptionalism, to one more firmly tied to the principles and ends of nuclear non-proliferation. The ISSA in its final form did not quite match the scope of the comprehensive safeguards agreements concluded by non-nuclear weapons states party to the NPT, but, it expanded India’s commitments beyond those envisaged in the IAEA template for item-specific safeguards by allowing the IAEA to inspect not only the correctness but also the completeness of India’s declara-

tion of its peaceful nuclear activities. It also excluded the exceptional feature, *i.e.* provisions for ‘corrective measures’ that India might take to restore nuclear supplies, which had been mentioned in the 2007 bilateral agreement (only the preamble made a brief reference to them). Moreover it exterminated the possibility that India might use the Deal as a platform for a claim to be treated equivalent to *de jure* NWS – the ISSA is not in the mould of the NWS’s voluntary offer arrangements with the IAEA, though this is how India has initially described the agreement it was seeking to conclude.⁵⁷ All of this was further clarified during the process of the IAEA Board of Governors’ consideration for approval of the ISSA. Similarly, at the NSG, a particularly fraught process saw the addition of several conditions to the ‘clean waiver’ that the USA had promised to obtain for India; the NSG agreed to waive the requirement of comprehensive safeguards for India on the basis of several commitments, including that India would not conduct a nuclear test (a matter that had received no express mention in the 2007 bilateral agreement).⁵⁸

In addition to its accommodation to the NPT-based nuclear regime in these ways, the Deal also provided the impetus for a rejuvenation of the NPT’s non-proliferation and disarmament framework. Even though during 2005–2008, the Deal was given no mention at the NPT Preparatory Conferences – the United States’ documents and statements at these conferences made not even one reference to it, and NGO coalitions attempts to generate discussion on it remained on the sidelines – at the 2010 Review Conference the NPT ‘bargain’ was reaffirmed. This included the firm statement that nuclear energy assistance must be premised on comprehensive safeguards, calls for India (and Pakistan and Israel) to join the NPT, and a stronger statement on disarmament actions to be undertaken by NWS.⁵⁹ As such the 2010 conference was in marked contrast to the previous, 2005 Review Conference, which had demonstrated just how beleaguered the NPT had become.

Before I discuss the role of principles of good governance, and since this role will also be espoused in one version of the constitutionalisation narrative, let me briefly review how, in contrast to global legal pluralism, the Deal may also be presented as an example of the constitutionalisation of the nuclear governance regime.

4.2. Constitutionalisation

There is, of course, now much writing on the constitutionalisation of international law, including both descriptive claims that international law *is* constitutionalising, and normative claims, that this is the pathway to

54. The phrase goes back to the time of British colonisation of India; where in May 1857, Indian sepoy in the British army had to use Enfield rifles; this entailed having to bite cartridges greased with cow or pig fat (both abhorrent to the sepoy for religious reasons). Those who refused to bite the cartridges lost their jobs. This episode was one of the key triggers for the 1857 Indian mutiny against the British.

55. *Left Stand on the Nuclear Deal: Notes Exchanged in the UPA – Left Committee on India–US Civil Nuclear Cooperation* (2008), at 9–15.

56. S. Ranganathan, *International Law and Strategically Created Treaty Conflicts*, Ph.D. Thesis, Cambridge University, 31 January 2012, Chapter 6.

57. The Indian position is elaborately described in C. Rajamohan, *Impossible Allies: Nuclear India, United States and Global Order* (2006), 247–251.

58. NSG, Statement on Civil Nuclear Cooperation with India, 7 September 2008.

59. See Final Document, NPT Review Conference 2010, NPT/CONF.2010/50 (Vol. I). Indian strategic-affairs analysts had predicted that the Deal would trigger such discussions at the Review Conference. For example, Interview with Dr M. Sethi, Centre for Air Power Studies, New Delhi, 2 December 2009 (on file).

a more just global order. However, as Jan Klabbers notes, in all this writing, it is often not entirely clear what actually is ‘constitutionalisation’:

Many international lawyers talk about constitutionalization of international law but do not seem to step down from abstract heights: many claim that international law is going through a process of constitutionalization, but few work out what this means – or could mean.⁶⁰

This is of course a reflection of the contested nature of the concepts – of constitution, constitutionalism and constitutionalisation – themselves. After all, even in domestic contexts, it is only the formal declaration of a document as such that indicates to us that it is a ‘constitution’; and that with its adoption, the polity has been ‘constitutionalised’; thus we can say with some certainty that India, which became independent on 15 August, 1947 became a constitutional republic on 26 January, 1950, for its constitution was formally adopted on this day. What happens where no such single document exists, or declaration is made? For instance, what precisely is Britain’s constitution, and when did Britain become constitutionalised? Most importantly, how do we evaluate when precisely a document, or set of documents, has a sufficiently ‘constitutional’ character. There are no fixed criteria for this; features that are considered elemental or the basic structure of one constitution, may find no mention at all in another. Daniel Halberstam, for example, shows that it would be wrong to imagine constitutional systems as either ‘closed’, *i.e.* ignoring claims to legality from outside the system, or ‘fully-organised hierarchies’; this is not even true of the United States constitution, which is ‘open’ to legality claims based on international law, and fails to identify any one organ of government as having the final power to interpret the constitution.⁶¹ Specific features such as separation of powers, judicial review, protection of fundamental human rights, and so on appear to greater or lesser extents in different constitutions.

This naturally makes it harder (or much easier, depending on the way you look at it) to detect constitutionalisation at the international level. There have been suggestions that the international community as a whole has a constitution in the form of the UN Charter (and the UN is thus a form of ‘world government’),⁶² or that specific regimes, like the European Union or the WTO, are constitutional,⁶³ or at least constitutionalising orders. What makes them so? The EU and WTO have several

organs or institutions with defined powers and functions, some provision for judicial settlement of disputes, and the tendency to filter all other rules and standards through the prism of their own purposes and principles. Are these then, the *indicia* we should seek to identify in other regimes to determine if they too are constitutionalising?

Anne Peters offers the following as elements of constitutionalisation: the gradual replacement of ‘sovereignty’ with ‘humanity’ as the foundational principle, the at least partial replacement of state consent by majoritarian decision-making, agreement on values such as human rights protection, climate change, ‘maybe even free trade’, and legalised and juridified processes of dispute settlement.⁶⁴ She recognises that it may be possible to study each element and its role in global governance on its own merits, without aiming to link it to some concept of constitutionalism, but argues that it is the combination of these features that takes on the special normative significance we associate with constitutionalism.⁶⁵ In his recent book, Nico Krisch offers to clear up matters further by describing the three main positions in the global constitutional debate.⁶⁶ The first focuses on values acting as *checks* on global politics, both because of their own more entrenched acceptability, and because of the crystallisation of institutional mechanisms that reinforce them. The second is a *structural* approach that focuses on the global order as a whole and views in it, or seeks to achieve, a structure that ‘not only defines common values and processes but also the place of other institutions, namely the state, in the global order’.⁶⁷ The third is a *discursive* strand that emphasises constitutional pluralism, dialogue and (transparent, accountable, inclusive) process as a means to advancement in a never-ending quest towards universality.

In several ways, the India-USA Deal fits into all these positions within the constitutional narrative. To begin with, consider the Indian Foreign Secretary’s response to the observation that the Deal was contrary to the NPT:

[i]f we go by NPT concepts and objectives rather than this littler text, then it is difficult to make a case against the July 18 agreement. Bringing India into the fold is not only a gain for international nonproliferation efforts, but indispensable for the emergence of a new global consensus on nonproliferation in response to current challenges.⁶⁸

60. J. Klabbers, ‘Setting the Scene’, in J. Klabbers *et al.*, *The Constitutionalization of International Law* (2009), at 3-4.

61. D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance’, *University of Michigan Law School, Public Law and Legal Theory Working Paper Series, Working Paper No. 229*, November 2011.

62. B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

63. See the references in J. Klabbers, ‘Constitutionalism Lite’, 1 *International Organizations Law Review* (2004), at 31, 33-34; Halberstam, *Systems Pluralism and International Pluralism in Constitutional Law*.

64. A. Peters, ‘The Merits of Global Constitutionalism’, 16 *Indiana Journal of Global Legal Studies* 2, at 397, 398-400 (2009). To be clear, Peters claims these features are additional to those already discussed in the symposium of which this article forms part; but her reference to those other features, such as a constitutional process for solving value conflicts, ‘balancing’ as a constitutional principle, the constitutional function of responsibility may instead be read as the more specific examples of her four more general features.

65. *Ibid.*, 403.

66. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011), at 32-35.

67. *Ibid.*, 34.

68. Saran, *supra* n. 29.

This argument, that the Deal represented an opportunity for the consolidation of the nuclear governance regime, around values of non-proliferation and security, was a core element also in the US government and IAEA Director General's defence of the Deal. The latter, Mohammed ElBaradei, claimed the Deal should be welcomed because '[i]t would be a milestone, timely for ongoing efforts to consolidate the non-proliferation regime, combat nuclear terrorism and strengthen nuclear safety.'⁶⁹ His position was received with much consternation by scholars and advocates of non-proliferation, twelve of whom penned an open letter to him arguing:

... you have consistently argued for universal approaches to addressing the dangers posed by nuclear weapons and against perpetuating double standards governing nuclear weapon haves and have nots. Creating far-reaching exemptions to international rules for India betrays these two principles...⁷⁰

But, of course, the claim advanced on the basis of the constitutionalist narrative is that we should not view the Deal as perpetuating double standards; instead by tying the pursuit of nuclear energy to deeper values, such as security and non-proliferation, the Deal achieves *substantive*, and not merely *formal* equality. Indeed, the US Secretary of State's speech to the Senate Committee on Foreign Relations, as excerpted earlier,⁷¹ viewed the Deal as an opportunity to crystallise the link between the right to nuclear energy and another core value – democracy. This was after all, the basis on which she justified treating India differently from Iran or North Korea.

The constitutional narrative privileges a non-formal, substance-oriented approach to determining the relationship between rules.⁷² *Values*, not the black letter of other rules, act as checks; therefore to the extent that we can accept the justifications proffered by India, USA and the IAEA in favour of the Deal as being in tune with, and giving a boost to, specific and commonly held values, we can reasonably argue that it does reflect that the constitutionalisation of the nuclear governance regime is underway. Indeed in this sense it also supports an evolutionary interpretation of the NPT: no longer a 'bargain', but a constitutional instrument whose provisions must be interpreted in terms of whether and how they advance constitutional values of security and democracy. The flipside of the approach – its relativisation of rights to values – is apparent. Moreover, the approach elevates certain values above all others; it is unsurprising that in many cases, the values invoked, while described as commonly held, may be those best suited to the interests of the powerful actors. Their ele-

vation above rights and other values may simply legitimate the hegemony of those powerful actors.

The Deal also fits into the structural strand of the constitutional narrative. While, as Krisch notes, this strand tends to be less pronounced because of the near impossibility of its application to the global order as a whole, it may be argued that the Deal does serve to crystallise the place of various institutions as well as values. For instance, we might claim that it clarifies the role of the IAEA as the lynchpin of 'a' 'nuclear governance regime'. After all, the Deal was principally conditioned on India's conclusion of a suitable safeguards agreement with the IAEA; and it was the IAEA Director General's assessment⁷³ that the Agency had concluded an appropriate safeguards agreement that satisfied all the Agency's legal requirements, promoted all the relevant values, and offered the IAEA sufficient scope to inspect and verify India's peaceful nuclear facilities that provided impetus for other states' approval of the Deal. The IAEA's role here went beyond inspection and verification; it adopted the stance of an organ of the nuclear governance regime, and in doing so provided opportunity for this crystallisation of the NPT, the Deal, the NSG, etc., into such a regime. The Deal also provides impetus for aggregating the various institutions, fora and agreements relating to non-proliferation and nuclear trade into a multi-layered regime in a broader way: the IAEA as the lynchpin, the NSG as the executive arm of the NPT, and so forth. But these two bodies may also be seen as making outward linkages, with other regimes dealing with matters of global security (especially terrorism), development (for which energy production is key) and democracy, by reviewing the Deal according to these values. It is, of course, open to question whether this sort of constitutionalism advances 'global justice' in any way, or whether it unfairly exalts a commercial agreement destined to advance vested business interests in USA and India.⁷⁴

It may be that the normative defence for constitutionalism is best aligned to the third 'discursive' position. The Deal and the process of its operationalisation certainly offered several opportunities for deliberation over the principles of the nuclear governance regime, and moreover of the criteria that India would have to abide by in order to persuade other states to set aside the usual rules for its particular case. After all neither at the IAEA, nor at the NSG was there a suggestion that it sufficed for the Deal to satisfy prudential ends. As noted above in the reference to the IAEA Director General's speech, it was also reviewed for whether it was 'lawful' in a broad sense; and much thought was given to the appropriate course of action that would equally make sense of

69. 'IAEA Director General Welcomes US and India Nuclear Deal', *Press Release* 2006/05, 2 March.

70. D. Kimball *et al.*, 'An Open Letter to Mohammed ElBaradei from twelve nuclear experts', 24 July 2006.

71. *Supra* note 33 and the accompanying text.

72. Peters, *supra* n. 64, at 406.

73. *Introductory Statement to the Board of Governors by IAEA Director-General Dr. M ElBaradei*, Vienna, 1 August 2008; see also S. Varadarajan, 'As Pakistan hails "precedent," other IAEA members express doubts, fears', 2 August 2008.

74. S. Ghoshroy, 'The U.S.-India Nuclear Deal: Triumph of the Business Lobby', *The Audit of Conventional Wisdom*, MIT Center for International Studies, September 2006. <http://mit.edu/cis/pdf/Audit_09_14_Ghoshroy.pdf>.

India's distinctive position in the nuclear governance regime and the integrity of the regime itself. It could be said, in short, that attention was given to accommodating difference in the quest for universality (which was given no fixed – and therefore limited – meaning such as of universal ratification of the NPT), and this was in the course of deliberative processes through which both the IAEA Board of Governors and the NSG members (by consensus) were persuaded to give assent to the Deal. There do remain questions both about the outcome reached, and how to evaluate this discursive process. Was it deliberative enough? Transparent enough? Inclusive enough? What standards do we have to judge these things? How do we ensure that a 'discursive process' is not in fact one in which a few actors preach to the rest? To explore these issues further, let me turn, finally, to the fourth narrative: global administrative law.

4.3. Global Administrative Law

The GAL project was inaugurated with the claim that '[e]merging patterns of global governance are being shaped by a little-noticed but important and growing body of global administrative law.'⁷⁵ The descriptive claim of the project is that 'much of global governance can be understood and analysed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory decision and management.'⁷⁶ And this action is to some extent constrained by 'mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality and by providing effective review of the rules and decisions they make.'⁷⁷ These global administrative bodies may be of various types: formal treaty bodies and international institutions; domestic administrative bodies performing functions that have transnational implications; informal and even private bodies that have assumed a regulatory role.

The claim of the GAL authors is not that there is already convergence upon the principles and practices that we may term global administrative law, or even that we see the same sorts of accountability-enhancing mechanisms already applied in all areas and fields of global governance. Rather it is that there are several emerging common currents in both respects, and these need to be recognised and analysed. The call of the project is two-fold. One, for scholars to study, analyse, compare and evaluate these developments, and in this way provide a more comprehensive account of the 'emergence of global administrative law'. Two, to bolster its advance by reflecting on the possible sources for global administrative law principles, the design of appropriate accountability mechanisms, and factors that contribute to the

75. B. Kingsbury, N. Krisch, R. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems*, at 15 (2005).

76. *Ibid.*, 17.

77. *Ibid.*

spread of these principles and mechanisms amongst global administrative bodies. This is of course based on the normative claim that more accountability is better. GAL does not ignore the questions that immediately arise. Accountability to whom? Might focusing on improvements of procedure impede, the substantial transformations – social and economic redistributions – required for a more just world (because the appearance of following appropriate administrative procedures may legitimise institutions and laws that are substantively unjust)?⁷⁸ However, proponents of GAL argue that casting global governance in administrative terms 'might also create a platform for critique.'⁷⁹ They point out that 'framing global regulation in traditional terms of administration and regulation exposes its character and extent more clearly than the use of vague terms such as governance'.⁸⁰ Thus, even if GAL is unable to respond to thorny issues relating to democracy and substantive redistribution, it might yet 'take pragmatic steps towards a stronger inclusion of affected social and economic interests through mechanisms of participation and review open to NGOs, business firms, and other civil society actors, as well as states and international organisations.'⁸¹ At the very least, it might serve in 'controlling the periphery to ensure the integral functioning of a regime, protecting rights, and building meaningful and effective measures of accountability to control abuses of power and secure rule-of-law values.'⁸² While its critics are not convinced that GAL can be anything more than '*a very limited tool of resistance and change*'⁸³ and this too under certain conditions,⁸⁴ they do recognise the advantages to re-describing global governance as administration. Koskenniemi, for instance, notes:

I totally approve of the political move to re-define the managerial world of international institutions through constitutional or administrative vocabularies ... for the critical challenge they pose to today's culture of a-political expert rule, and perhaps for the appeal of the (Kantian) perfectibility that they set up as a regulative goal for human institutions.⁸⁵

Let us then examine whether the Deal can be situated in the GAL narrative, and whether that narrative advances our understanding and critique of the event. The short answer, again, is: yes, both, to some extent.

The Deal and the process of its operationalisation can be analysed as *a series of decisions made in the 'global administrative space'*, i.e. somewhere below the level of formal

78. For example B.S. Chimni, 'Co-option and Resistance, Two Faces of Global Administrative Law', 37 *NYU Journal of International Law and Politics*, at 799, 2005; Marks, 'Naming Global Administrative Law'. See also supra notes 5-7, and the accompanying text.

79. Kingsbury et al., supra n. 75, at 27.

80. *Ibid.*

81. *Ibid.*, 50.

82. *Ibid.*

83. Chimni, supra n. 78, at 826.

84. *Ibid.*, 827.

85. M. Koskenniemi, 'The Politics of International Law – 20 Years Later', 20 *EJIL* 7, at 17 (2009).

inter-state agreement (though there was that too in the form of the India-USA bilateral agreement), but with implications across the boundaries of several states. These decisions include the understandings arrived at between the USA and India as to the steps necessary to win some degree of multilateral acceptance for the Deal, and those taken at the IAEA, the NSG and fora such as the 2009 G8 Summit in L'Aquila (where the G8 states decided not to supply enrichment and reprocessing technologies to states like India that were not parties to the NPT).⁸⁶

These various fora stressed upon the importance of criteria such as mutual openness, legality, participation, reason-giving and transparency; and can themselves also be examined on these bases. For example, in the discussion on the steps that India and USA needed to take to obtain multilateral acceptance for the Deal, US negotiators laid great emphasis on the credibility, transparency and defensibility of India's plan for separating its military and civil nuclear programmes.⁸⁷ The NSG stressed upon regular consultations between members and with India for implementation of the waiver.⁸⁸ The IAEA focused on the lawfulness of the safeguards agreement it concluded with India. As discussed above, the IAEA Director General was at pains to explain how various aspects of the ISSA were determined by international law.⁸⁹

More importantly, the process of decision-making, much emphasised by the United States, India and their allies, as consultative, transparent and accountable, may be examined in terms of the criteria associated with GAL. Let me focus here on the IAEA and the NSG.

At the IAEA, the ISSA was concluded by negotiation between the IAEA Secretariat and India and then presented for approval to the IAEA Board of Governors (BoG). The IAEA BoG comprises thirty-five states, elected annually by the IAEA General Conference. At the relevant meeting, it included a diverse group of states that included Asian nuclear powers Pakistan and China; two states most opposed to the Deal, Austria and Ireland; and Brazil and Argentina, states that, scholars had earlier claimed, were unhappy with concessions offered to India while they were expected to faithfully comply with intrusive safeguards regimes.⁹⁰ Thus its process may be seen as fairly inclusive. However, such an evaluation would still have to take into account that the criteria for BoG membership virtually guarantee permanent membership for NWS and for several western states.⁹¹ Moreover, a two-thirds majority voting rule

coupled with BoG's treatment of Iran suggests that the IAEA BoG's decision-making often lacks independence from Western foreign policy interests.

The BoG's approval of the ISSA was by consensus and followed a defence of its text by the director General and a discussion amongst the BoG members. In this process, the ISSA was reviewed for its effectiveness, legality and political acceptability.

While these are all positives, we should also keep in mind that the agenda of the IAEA Secretariat and Board was the more limited one of approving a safeguards agreement, not the Deal and all that it implied for India's nuclear programmes and/ or the NPT regime. Though the Deal may have provided the context, it received little mention in the course of their activities – and no mention at all in the Director-General's remarks to the Board. It is possible that the limited nature of the task led to a lower and more technical scrutiny; indeed it has been reported that several Board members, while expressing criticism, decided to reserve their opposition to the Deal itself for the NSG session.⁹² The NSG is an informal group of forty-five states that are the principal suppliers of nuclear materials and technology. It includes all five NWS, several European states, and middle-powers like Canada, Australia, Brazil, Argentina, Japan, South Korea and South Africa but none of the nuclear 'headaches' – India, Pakistan, Iran, North Korea or Israel. The European Commission and the Chairman of the Zangger Committee (another nuclear suppliers group, but more squarely tied to the NPT) participate as observers.

Though it does include most principal suppliers, the NSG is an exclusive club, and moreover one with opaque procedures – NSG deliberations happen behind closed doors and it is not clear that they follow a fixed format; though its participants have stressed that the NSG does take steps to improve both participation and transparency in its functioning.⁹³ In any event, despite its limitations, the NSG does have certain benefits: its process may not be fixed, but it is consultative and its decisions are made by consensus. This enables – in theory at least – effective participation of all states and indicates significant multi-lateral support for decisions made.

This is indeed illustrated by the Deal: while there were reports of USA and India's massive leveraging of political influence to secure the NSG waiver, the text finally adopted was quite different from the draft by the USA as early as in 2006,⁹⁴ and also from the first draft circulated in August 2008. Indeed, the meeting arranged for 21-23 August 2008 could not produce an outcome because there were deep disagreements between states

86. G8, 'Statement on Non-proliferation', para. 8, G8 Summit, L'Aquila, 8 July 2009, <www.g8italia2009.it/static/G8_Allegato/2_LAquila_Statent_on_Non_proliferation.pdf>.

87. See Rajamohan, *supra* n. 57, 231.

88. NSG Waiver, paras 3(e), 4 and 5.

89. IAEA Director General, Introductory Statement to the Board of Governors; Varadarajan, *As Pakistan Hails Precedent*; for a detailed discussion see Ranganathan, Thesis, Chapter 6.

90. H. Sokolski, 'Towards an NPT-restrained world that makes economic sense', 83 *International Affairs* 3, at 531, 543 (2007).

91. Art. VI(A), Statute of the International Atomic Energy Agency, 276 UNTS 3 (1956).

92. R. Ramachandran, 'Inching Closer', 25 *Frontline* 17, 16-29 August (2008).

93. *Report by the Representative of Italy, Ambassador Giuseppe Balboni Acqua on NSG Transparency*, 2000 NPT Review Conference, Main Committee III, New York 27 April. <www.nuclearsuppliersgroup.org/Leng/PDF/NPT_2000_Report_by_NSG_1.pdf>.

94. NSG Draft 2006. <www.armscontrolwonk.com/1009/us-nsg-india-proposal>.

as to the scope of the waiver to be granted to India. Reportedly New Zealand, Ireland, Austria, and the Netherlands had introduced nearly fifty amendments to the three-page draft circulated by the United States.⁹⁵ After the failure of this round, a follow-up meeting was scheduled from 5–7 September 2008. In the interim, the United States worked with India and other states to reframe some of these proposed conditions in terms that were mutually acceptable to all; leading to the inclusion of many key elements of the final text.⁹⁶ However, even with a modified draft it took two intensive days of negotiations at the September meeting to secure the waiver.⁹⁷ Finally, consensus was achieved also on the basis of a side-agreement between NSG members, not to ‘sell sensitive technologies to India in the “foreseeable future”’.⁹⁸ The outcome document (the waiver) then proceeded to set out reasons for, and conditions governing, the exception made for India. All of this provides some sense of the deliberative – almost ‘tiresomely deliberative’⁹⁹ – nature of the NSG’s process. The GAL criteria enable us to engage with institutional activity in a meaningful way: we may discuss whether and to whom these institutions are accountable and comment on participation, deliberation, transparency, review etc. entailed in their procedures. But they provide no ready answers as to the merits of the decisions made by the institutions, or the choice made to route the Deal through these institutions only (and not, say, an NPT Conference of Parties). This limitation is built into the choice of the GAL narrative.

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95. See S. Varadarajan, ‘NSG critics focus on non-proliferation benchmarks’, *The Hindu*, 22 August 2008; S. Varadarajan, ‘Conditions mooted for Indian nuclear waiver’, *The Hindu*, 23 August 2008; S. Varadarajan, ‘India, US agree on amended NSG draft waiver’, *The Hindu*, 31 August 2008; P.D. Samanta, ‘To US draft, NSG sceptics want to add fine print’, *Indian Express*, 21 August 2008.
96. S. Varadarajan, ‘India, US agree on amended NSG draft waiver’, *The Hindu*, 31 August 2008; P.D. Samanta, ‘India agrees to more tweaks in NSG draft’, *Indian Express*, 2 September 2008.
97. For an account of the NSG deliberations during the September meeting, see: S. Varadarajan, ‘As NSG members mull new US draft, fate of India deal hangs in balance’, *The Hindu*, 3 September 2008; S. Varadarajan, ‘New NSG draft has small but significant changes’, *The Hindu*, 5 September 2008; S. Varadarajan, ‘NSG hopeful of consensus soon’, *The Hindu*, 5 September 2008; S. Varadarajan, ‘As NSG members take ‘political’ call, differences narrow’, *The Hindu*, 5 September 2008; S. Varadarajan, ‘Individual governments should decide’, *The Hindu*, 5 September 2008; S. Varadarajan, ‘Nuclear deal staring at NSG dead-end’, *The Hindu*, 6 September 2008; S. Varadarajan, ‘Last-ditch talks on to avert NSG dead-end’, *The Hindu*, 6 September 2008; V. Kumar, ‘“India will not be a source of proliferation”, says Pranab’, *The Hindu*, 6 September 2008; S. Varadarajan, ‘NSG lifts sanctions on India’, *The Hindu*, 7 September 2008; S. Varadarajan, ‘Waiver enables member states to provide India full civil nuclear cooperation’, *The Hindu*, 7 September 2008. See also P.D. Samanta, ‘Beijing says why the hurry as Vienna moves closer to a deal’, *Indian Express*, 4 September 2008.
98. ‘NSG agreed not to sell sensitive technologies to India’, *The Hindu*, 12 September 2008; ‘NSG not to sell sensitive technologies to India’, *Indian Express*, 11 September 2008.
99. In the assessment of Dr. S. Varadarajan, Editor of *The Hindu*, and award-winning journalist who had personally ‘covered’ the entire passage of the India-US Nuclear Deal. Personal Interview, 9 December 2009, on file with the author.

5. The Point of These Narratives

The brief review above shows that descriptively, each narrative provides a plausible account of the Deal vis-à-vis the international legal order. Different elements of the Deal or the process of its finalisation, as well as different interpretations of the same elements of both, can be taken as evidence in support of arguments that the international legal order is indeed fragmenting, or constitutionalising or moving towards pluralism, or administrative rule by international institutions. Moreover each narrative helps us make sense of *some* of the decisions taken by the various actors involved in the Deal’s process, against a broader contextual background. Thus, descriptively, each goes *some* way in illuminating the Deal. But of course, none suggests itself as the natural or necessary narrative. The light cast on the Deal by each may be challenged or complicated by the perspectives afforded by the others. The review indeed reveals that versions of all these narratives were leveraged by various actors in support of particular outcomes, or processes to be followed in concluding, finalising and justifying the Deal.

It is worth reflecting on why these four narratives seem to draw our attention more than perhaps any others (and are indeed the narratives selected for this issue of ELR). My suggestion is that while the four are in many ways dissimilar, they are all easily received because individually and collectively, they conceive the possibility of a political *and* legitimate international legal order. This sets them apart from critical, realist, and doctrinal narratives of international law.

Critical narratives focus our attention on the ways that international law is political and illegitimate. These critical narratives reveal to us the embedded structural biases of international institutions, which serve the reproduction and exacerbation of existing disparities.¹⁰⁰ They expose the imperial foundations of international law, its continuing complicity in neo-imperial projects,¹⁰¹ and the exclusions, of ideas, subjects, and perspectives, that are embedded in it.¹⁰² Most biting are narratives that suggest that inevitably, the legal form is allied to the production of disadvantage.¹⁰³ On the contrary, the narratives under consideration either see the international law that exists as legitimate – only challenged by fragmentation; or undergoing transformations that will enhance its legitimacy. None seeks a radical reconstruction of international law, but at the most the addition of a few elements (such as ‘values’ or ‘hierarchy’) to its conception. Equally, none considers that the founda-

100. M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), Epilogue.
101. A. Anghie, *Imperialism, Imperialism, Sovereignty and the Making of International Law* (2005).
102. H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).
103. C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005).

tions of international law may be too rotten to support any legitimate conception of the international legal order.

Thus these narratives offer bases for faith in the possibility of legitimate international law and legal order. But there is more to them than that: it is not possible to dismiss them in the terms that ‘realist’ or ‘rational choice’ narratives use to describe international law scholarship: ‘an improbable combination of doctrinalism and idealism’, which ‘has made little progress in explaining how international law works in practice: how it originates and changes; how it affects behaviour among very different endowed states; when and why states act consistently with it; and why it plays such an important role in the rhetoric of international relations.’¹⁰⁴ Rational choice scholars claim that they, on the other hand, do answer these questions ‘by integrating the study of international law with the realities of international politics.’¹⁰⁵

But these four narratives also recognise the politics of international law. Accounts of fragmentation, constitutionalisation, pluralism, or global administrative law are first of all thick – if partial and subjective – descriptions of the ways in which different actors: states, institutions and others interact, illuminating the ways in which international law originates, changes, develops, is invoked, or challenged. Moreover, they score over rational choice accounts by not positing any single explanation, such as state interest, for what drives these interactions. Indeed, positing explanations for why international law works is not their primary aim; the four narratives also score over rational choice narratives by offering normative visions for the directions in which international legal order *should* develop. As opposed to merely viewing international law as ‘epiphenomenal’ to politics, the narratives embrace the role of politics in international law more squarely by advancing their own distinctly political visions of international law. One sort of vision is procedural: the legitimacy of international law is linked to criteria of transparency, participation, deliberation, reason-giving, accountability in decision-making etc., and thus all state and institutional activity is evaluated according to these criteria. The other vision is more substantive: narratives, such as constitutionalism, and certain forms of pluralism and even global administrative law, connect the legitimacy of international law to the promotion of values. We might disagree with the specific values taken up by the various proponents of these projects (why ‘free trade’ and not ‘substantive economic justice’ for instance) but the call for fresh engagement on the values that the international legal order *should* promote, that is generated through these narratives of international law, is understandably welcome.

The narratives then offer basis for a rich debate on international law – on what it is, how it is changing, and the direction in which it should develop; without ever

straying from the belief it is worthy of our respect and support. It is undeniable that they do avoid, even exclude by their own logic, some uncomfortable questions. But, compare the debate *they* spawn with one in which the poles are simply that ‘international law is epiphenomenal to state interests’ and that ‘it is rules, or decisions of international courts’ – a sort of ‘yes it is/ no it isn’t’ debate on the normative weakness of international law. Those sorts of positions fail to appreciate the relative autonomy of international law itself, how *its* foundational principles, practices, processes, value predilections etc. structure interactions. These four narratives by contrast offer entire visions built around these features of international law, and so together, serve as the sometimes contradictory, sometimes parasitical, often shifting, but ultimately the few plausible accounts of the possibility of international legal order. They thus operate, and are valuable as, contesting starting points from which to describe, and prescribe for, its reform and development.

104. J. Goldsmith and E. Posner, *The Limits of International Law* (2005), at 3.

105. *Ibid.*