

Proposed Nuclear Cooperation Agreement with India.

RA Walker submission 28 April 2015

Explanation

This submission should be read with my submission in response to DFAT and the miners. It suggests not a cure for all that is wrong with the proposed agreement, but a bandage to limit the damage.

If I were still advising the Australian government on nuclear matters, I could not responsibly recommend ratification of this proposed agreement on the merits of its text. The only way the proposed treaty text could theoretically be brought into conformity with established Australian policy, our proclaimed support for the nuclear non-proliferation regime and the wider Australian international relations interests to which I and others have alluded to in other submissions, as well as the interests of Australian uranium exporters, would be for a complete re-negotiation to produce either a new treaty text or a set of treaty-level agreed interpretations (“side letters”). It is however highly unlikely either the Australian or the Indian government would be willing to enter into such a process or that it would result in agreement. It is also relevant that for Australia not to ratify this signed agreement would be a major setback to the aim of closer relations with India, which has been a bi-partisan aim of successive Australian governments for several decades.

There is another legal device that could add to the proposed treaty in ways that do not redress all the egregious faults I and other witnesses have identified, but could reduce the damage.

Under the Vienna Convention on the Law of Treaties, 1969¹, section 31.2 (a), it is open to either party to a treaty, and thus in this case to Australia, to append a unilateral statement of interpretation to its instrument of ratification and unless the other party raises objections that statement becomes part of the agreed interpretation of the treaty.

The dynamics within the Indian government could be more favourable to acceptance of Australia’s requirements in this context than they have been in the protracted negotiations between officials. That is conjecture; but the assured advantage of this option is that it would involve no additional delay and would establish very quickly whether the Indian interpretation of some essential points conforms to Australia’s.

It would be routine operating procedure for Australian officials to show the text to Indian officials before it was issued and to seek their reaction. The Australian government would then know before lodging its instrument of ratification whether or not the Indian government shares its understanding of the meaning of key aspects of the proposed agreement. It could inform JSCOT of the Indian reaction.

The terms of this Australian statement of interpretation would be based on what DFAT has told JSCOT it believes to be the case (except the first and last sentences which come from the thrust of other government statements). It would have 3 paragraphs².

- 1. The purpose of the Australian government in entering into this agreement is to demonstrate its willingness to facilitate the sale of uranium to India for peaceful nuclear**

¹ India is not a party to the Convention but the Convention, in this provision, codifies customary international law, i.e. “evidence of a general practice accepted as law” (ICJ Statute Art 38.1 b).

² The terms suggested below were drafted with the benefit of advice two from international lawyers.

energy. The text of the agreement responds to India's particular situation and does not establish precedents applicable to other countries. It differs in some respects from the text of Australia's other nuclear cooperation agreements but the intent is the same. That intent is to support the nuclear non-proliferation regime and to provide the same level of assurance as do Australia's nuclear cooperation agreements with other countries, that nuclear material exported from Australia or produced from it will not be used for or contribute to any military or explosive purpose.

This is a statement of Australia's intent, but its inclusion in a statement of interpretation appended to the instrument of ratification makes clear that that it is relevant to Australia's interpretation of the agreement. As such it would go some way towards countering undesirable interpretations other governments may place on the agreement.

- 2. The Australian government attaches importance to the responsibility of the Director General of ASNO to discharge his responsibilities under Australian law to report to Parliament on the disposition of uranium exported from Australia and the nuclear material derived from it. The Australian government can authorise the export of uranium only through mechanisms that comply with Australian law. The Australian government therefore interprets Article III.4 of the agreement to mean that the Administrative Arrangement should ensure that ASNO receives information of the same standard as that available under Australia's nuclear cooperation agreements with other countries and Article VII.4 to mean that nuclear material subject to this agreement will be used only in facilities permanently under IAEA safeguards³.**

This interpretation gives JSCOT some reassurance about the eventual content of the yet-to-be concluded Administrative Arrangement, which DFAT has rightly said is key to the effectiveness of the proposed agreement. It strengthens the hand of ASNO in negotiation of the Administrative Arrangement by putting Indian negotiators on notice that the Australian government cannot capitulate on essential elements. It does not ensure that India will cooperate fully – it may for example choose to make available only the information concerning fuel assemblies fabricated in the United States – but it makes clear to all stakeholders that any such limitations placed on the supply of uranium from Australia would derive from a decision by the Indian government, as to the extent to which it is, or is not, willing to provide the cooperation needed to meet Australian legal requirements.

- 3. The Australian government interprets Article VI of the agreement to mean that Australia's consent is a precondition for reprocessing or high enrichment of nuclear material subject to this agreement. Art VI.1 specifies the only conditions under which Australia has given consent in advance.**

Australian negotiators have told JSCOT that they are confident that the Indian side interprets the article in the same sense.

³ Mr Carlson has explained in his submissions why tracking is not the only essential requirement; another is to prevent some of the scenarios possible because of specifics of the IAEA-India safeguards agreement. The proposed interpretation of Art VII.4 addresses the most serious of these. The DFAT submission suggests this interpretation should not be a problem for the Indians.

The three paragraphs have been drafted with the aim of giving India no grounds for objection. If, contrary to expectations, the Indians were to react negatively to these points or if the Australian government were unwilling to put them in a statement of interpretation under the Vienna Convention on the Law of Treaties, that would show that the situation is not as Australian officials believe it to be and have reported to JSCOT. The government and JSCOT would face a new situation.