

National Interest Analysis [2010] ATNIA 25

with attachment on consultation

**Agreement between the Government of Australia and the Government of
the United States of America concerning Peaceful Uses of Nuclear Energy,
New York, 4 May 2010**

[2010] ATNIF 26

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and the Government of the United States of America concerning Peaceful Uses of Nuclear Energy, done at New York on 4 May 2010
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Nature and timing of proposed treaty action

1. It is proposed that Australia enter into a nuclear cooperation agreement (the proposed Agreement) with the United States of America. Under the terms of the proposed Agreement, upon entry into force it would terminate and succeed the *Agreement between the Government of Australia and the Government of the United States of America concerning Peaceful Uses of Nuclear Energy* (the 1979 Agreement) done on 5 July 1979 ([1981] ATS 4) which will expire on 15 January 2011. The proposed Agreement was signed by the Minister for Foreign Affairs and the United States Under-Secretary for Arms Control and International Security in New York on 4 May 2010.

2. Pursuant to Article 16 of the proposed Agreement, the proposed Agreement will enter into force on the date upon which the Parties exchange diplomatic notes informing each other that they have complied with all applicable requirements for its entry into force. It is anticipated that Australia will advise the United States of its readiness to ratify as soon as practicable after consideration of the proposed Agreement by the Joint Standing Committee on Treaties (JSCOT). It is proposed that an exchange of diplomatic notes will be arranged to coincide as closely as possible with, but before, expiry of the 1979 Agreement.

Overview and national interest summary

3. Nuclear cooperation agreements such as the proposed Agreement serve Australia's national interests by enhancing our commercial position as a supplier of an important energy resource commodity and by setting high international standards for its use through the application of strict conditions. All of Australia's bilateral nuclear agreements, including this proposed Agreement with the United States, provide stringent safeguards and security arrangements designed to ensure Australian uranium is used exclusively for peaceful purposes. By virtue of our extensive network of such agreements, Australia's strict conditions apply to a significant proportion of uranium in peaceful use worldwide, hence contributing to raising overall standards.

4. The proposed Agreement would govern cooperation in peaceful uses of nuclear energy between the Parties, including the transfer and use of and application of non-proliferation safeguards to, nuclear material supplied by the Parties. It retains most provisions contained in the 1979 Agreement and where necessary the provisions have been updated in accordance with Australia's current policies and practices concerning nuclear safeguards. The proposed Agreement is consistent with Australia's other bilateral nuclear agreements with nuclear-weapon states.

5. In addition to amendments to extend safeguards and security arrangements under the 1979 Agreement, the proposed Agreement: refines the scope for technical cooperation

between the Parties to more closely align with current activities; clarifies the prohibition on use for military purposes of material, equipment or components transferred pursuant to the proposed Agreement; and adds provisions for the protection of intellectual property and settlement of disputes.

Reasons for Australia to take the proposed treaty action

6. The purpose of the proposed Agreement is to replace the 1979 Agreement, which expires on 15 January 2011. In negotiating the proposed Agreement, Australian and United States officials reviewed the provisions of the 1979 Agreement and identified updates and revisions to improve their operation.

7. In addition to maintaining strict safeguards and security arrangements concerning nuclear material and equipment already transferred under the 1979 Agreement, the Government considers that continued cooperation with the United States under the proposed Agreement would provide clear economic benefits to Australia. The United States has a central place in Australia's network of nuclear cooperation agreements. Of Australia's total uranium exports, currently worth more than \$1 billion a year, Australia supplies 36 per cent to the United States. The United States is also a major processor of uranium that Australia supplies to other countries. Forecast growth in nuclear power in the United States and worldwide is likely to see further increases in the export of Australian uranium to the United States for use or processing, throughout the life of the proposed Agreement. The proposed Agreement will also strengthen the international legal framework supporting ongoing technical cooperation with United States agencies by the Australian Nuclear Science and Technology Organisation.

8. More broadly, the proposed Agreement adds to the strong joint commitment of Australia and the United States to nuclear non-proliferation and to nuclear security. The proposed Agreement refers explicitly to the International Atomic Energy Agency's (IAEA) Additional Protocol (AP) as part of the proposed Agreement's safeguards framework. This underscores the diplomatic efforts of both Australia and the United States to promote the AP as part of the internationally recognised safeguards standard.

Nuclear safeguards

9. Australian uranium and nuclear material derived from its use (such as plutonium) is termed Australian Obligated Nuclear Material (AONM). Australia's bilateral safeguards agreements provide assurance that AONM is used solely for peaceful purposes and is not diverted to nuclear weapons or other military uses. At present, Australia has 22 bilateral safeguards agreements in place, providing for the transfer of AONM to up to 39 countries, plus Taiwan. These agreements complement the IAEA's safeguards system in order to assure the peaceful and non-explosive use of AONM. The agreements also serve Australia's nuclear non-proliferation security interests by establishing a high standard of bilateral safeguards conditions and controls over a significant proportion of the world's uranium in peaceful use. These bilateral agreements require that AONM be subject to IAEA safeguards for the full life of the AONM.

10. The proposed Agreement includes all the essential elements of Australia's policy for the control of nuclear materials. These elements are:

- a) an assurance that AONM supplied to the United States will be used exclusively for peaceful purposes and will not be used for any military purpose (Article 8);
- b) assurance that AONM supplied to the United States will be subject to the *Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America*, signed on 18 November 1977 (the United States-IAEA Safeguards Agreement), for

the full life of the material (Article 9), or until the material is re-transferred in accordance with Article 5 of the proposed Agreement;

- c) the provision for fallback safeguards which will apply in the event that, for any reason, IAEA safeguards no longer apply (Article 9 and the Agreed Minute);
- d) the requirement for prior Australian consent before any transfer by the United States of AONM to a third party (Article 5) and for any enrichment to 20% or more in the isotope uranium-235, or reprocessing of AONM (Article 6);
- e) an assurance that adequate and effective physical protection measures which satisfy accepted international standards are applied to all AONM during use, storage and transport (Article 7);
- f) the rights for the supplier Party to cease further cooperation under the proposed Agreement including suspension or cancellation of further transfers of nuclear material and to require the return of material, equipment or components in the event of the receiver Party not complying with certain key provisions of the proposed Agreement, for example not complying with IAEA safeguards (Article 11);
- g) the provision for administrative arrangements to be established between the appropriate governmental authorities of the Parties to set out a system of accounting and control for material, equipment and components subject to the proposed Agreement (Article 13). Arrangements established under the 1979 Agreement between the Australian Safeguards and Non-Proliferation Office (ASNO) and the United States Department of Energy would continue; and
- h) the provision for consultation between the Parties on implementation of the proposed Agreement (Article 13).

11. The Australian Government regards these aspects of the proposed Agreement as integral elements of its broader policy against the proliferation of nuclear weapons. The maintenance of multilateral, regional and bilateral arrangements that operate to counter nuclear proliferation is a matter of high priority for Australia.

Obligations

12. Under Article 1, cooperation between the Parties in the peaceful uses of nuclear energy would be in accordance with the provisions of the proposed Agreement and other applicable treaties, national laws and regulations and subject to the application of safeguards in accordance with the Parties' respective agreements with the IAEA, being the United States-IAEA Safeguards Agreement and the *Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, signed on 10 July 1974 (the Australia-IAEA Safeguards Agreement).

13. Article 3 outlines the fields of cooperation under which information may be transferred pursuant to the proposed Agreement. Article 14 provides that such transfer of information may be carried out pursuant to written instruments that include provisions to protect intellectual property rights.

14. Article 4 of the proposed Agreement would oblige the Parties to limit the quantities

and types of nuclear material transferred between them to that necessary for peaceful purposes as specified in the Article. Such transfers would not include sensitive nuclear facilities or major critical components thereof unless provided for through separate treaty action. If excess quantities of high enriched uranium transferred under the Agreement exist in Australia, Australia would be obliged to cooperate with recovery by the United States of such excess on a commercial basis.

15. Article 5 would require Australia and the United States to store plutonium, uranium-233 or high enriched uranium transferred pursuant to the proposed Agreement, or used in or produced through the use of any material or equipment so transferred, only in facilities mutually determined by the Parties. Retransfer of nuclear material, equipment or components beyond the territorial jurisdiction of a Party would require the consent of both Parties.

16. Article 6 would require Australia and the United States to obtain consent from the other Party before: enriching uranium to 20% or greater in the isotope uranium-235; or reprocessing spent nuclear material for the separation of plutonium. These provisions are included in all of Australia's safeguards agreements to provide additional controls on these proliferation-sensitive activities.

17. Article 7 would oblige the Parties to apply physical protection measures, consistent with international standards, to nuclear material and equipment that is subject to the proposed Agreement within their jurisdiction. This includes the application of measures pursuant to the *Convention on the Physical Protection of Nuclear Material* and which meet levels not less than the recommendations of relevant IAEA guidelines.

18. Article 8 would oblige the Parties not to use nuclear material, equipment or components subject to the proposed Agreement for any nuclear explosive device or for related research, or for any military purpose. Use for military nuclear propulsion and for munitions would be prohibited. Use in relation to supply of electricity to a military base, or supply of radioisotopes to a military hospital for medical purposes, would not be prohibited.

19. Article 9 would oblige the Parties to place all nuclear material subject to the proposed Agreement under their respective safeguards agreements with the IAEA. In the event that IAEA safeguards cease to apply in either Party's jurisdiction, the Parties would be required to arrange immediately for the application of alternative ('fallback') safeguards which conform to IAEA principles and procedures to provide reassurance equivalent to that of the IAEA safeguards system. Article 9 would further oblige the Parties to establish and maintain a system of accounting for and control of all nuclear material subject to the proposed Agreement.

20. Article 10 would oblige each Party to seek the consent of the other before consenting to the retransfer to, or reprocessing of nuclear material or enrichment to 20% or greater of uranium in the isotope 235 by, a third country where the consent applies to material subject to the proposed Agreement.

21. Article 13 would require each Party to consult, at the request of the other, on the implementation of the proposed Agreement. The appropriate governmental authorities would be required to establish administrative arrangements to ensure the effective implementation of the proposed Agreement. Article 13 also obliges each Party to protect proprietary or confidential information transferred under the proposed Agreement.

Implementation

22. The legislative framework already in place in relation to nuclear transfers will be sufficient to provide for the terms of the proposed Agreement. However, it will be necessary to promulgate regulations pursuant to the *Nuclear Non-Proliferation (Safeguards) Act 1987* to add the proposed Agreement to the list of ‘prescribed agreements’ under that Act and to take similar action under the *Australian Radiation Protection and Nuclear Safety Act 1998*. No changes to the existing roles of the Commonwealth or the States and Territories will arise as a consequence of implementing the proposed Agreement.

Costs

23. The costs associated with the proposed Agreement would be limited to travel to the United States by ASNO officers to facilitate proper operation of the nuclear material accounting system. ASNO expects to be able to manage these costs within its departmental allocation by the Department of Foreign Affairs and Trade.

Regulation Impact Statement

24. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

25. The proposed Agreement may be amended by agreement between the Parties. Such amendments would be subject to Australia’s domestic treaty-making processes, including tabling in Parliament and consideration by JSCOT.

26. No future legally binding instruments connected with the proposed Agreement are envisaged at this stage. As noted at paragraph 21 above, the proposed Agreement contains provision for the conclusion of administrative arrangements to deal with the details of implementing the proposed Agreement. This provision is standard Australian practice where bilateral safeguards agreements are in place.

Withdrawal or denunciation

27. Article 16 of the proposed Agreement provides that it will remain in force for an initial period of thirty years and will continue in force thereafter for additional periods of five years each. Either Party is able to terminate the proposed Agreement at the end of the initial 30 year period, or at the conclusion of any additional five year period, by six months advance written notification to the other Party. Any decision to terminate the proposed Agreement would be subject to Australia’s domestic treaty processes. Termination would not release either Party from obligations in respect of nuclear material transferred while the proposed Agreement was in force.

Contact details

Nuclear Accountancy and Control Section
Australian Safeguards and Non-Proliferation Office
Department of Foreign Affairs and Trade.

ATTACHMENT ON CONSULTATION

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CONSULTATION

28. The proposed Agreement would not have any general impact on businesses or Commonwealth Government agencies in Australia. There is a possibility that this proposed Agreement could result in an increase in the volume of uranium exported from Australia over time.
29. A pre-meeting briefing was provided to the States and Territories through the Commonwealth-State/Territory Standing Committee on Treaties for its meeting on 12 October 2009. No comments with respect to this proposed Agreement were registered by the Committee.
30. Commonwealth Government agencies consulted prior to and during the negotiations for the proposed Agreement (one formal round in December 2009) included the Attorney-General's Department, the Australian Nuclear Science and Technology Organisation, the Department of Prime Minister and Cabinet and the Department of Resources, Energy and Tourism. Other relevant Commonwealth Government agencies were also briefed through the Nuclear Agencies Consultative Committee meetings on 13 November 2009 and 19 February 2010. No objections to the proposed Agreement were raised.