



Australian Government

Australian Government response to the
Joint Standing Committee on Treaties report:

Report 151

Agreement between the Government of Australia and the
Government of India on Cooperation in the Peaceful
Uses of Nuclear Energy

NOVEMBER 2015

**Government Response to
Report 151 of the Joint Standing Committee on Treaties:
Australia-India Nuclear Cooperation Agreement**

The Government thanks the Committee for its consideration of the *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy*, done at New Delhi on 5 September 2014 (“the Nuclear Cooperation Agreement”), which was tabled on 28 October 2014, and gives the following responses to the Committee’s recommendations.

Recommendation 1

The Committee urges the Australian Government to commit significant diplomatic resources to encouraging India to become a party to the Comprehensive Test Ban Treaty, and to negotiate a fissile material cut-off treaty.

The Australian Government has consistently supported diplomatic and other practical efforts to promote entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and negotiation of a fissile material cut-off treaty (FMCT), and will continue to do so. India has been a key focus of these efforts, including through the annual senior officials-level Australia-India Non-Proliferation and Disarmament Dialogue, the next of which is scheduled for November 2015.

Australia makes frequent use of international forums to urge signature and ratification of the CTBT by countries which have yet to do so and highlights the importance of that call for countries whose ratification is required for the CTBT to enter into force, including India. On 29 September 2015 Foreign Minister Bishop spoke at the CTBT Article XIV Conference at the UN in New York, encouraging entry into force. Every two years Australia, with Japan and the Netherlands, hosts the “Friends of the Comprehensive Nuclear-Test-Ban Treaty (CTBT)” ministerial meeting in the margins of the United Nations General Assembly, aimed at building political momentum in support of bringing the Treaty into force.

Australia actively promotes efforts in the Conference on Disarmament (CD) to initiate negotiations on the FMCT, to verifiably ban the production of fissile material for use in nuclear weapons. India supports the same objective and officials coordinate regularly on this issue. While the CD has been unable so far to agree to the commencement of FMCT negotiations, both Australia and India continue to support additional efforts to promote work on a treaty.

Recommendation 2

The Committee recommends the Australian Government considers facilitating the negotiation of a nuclear arms limitation treaty for the Indian subcontinent region. Such a treaty could feasibly have an initial goal of preventing the development of thermonuclear weapons by India and Pakistan, and prevent the deployment of such weapons to the region by China.

Australia and India have established an annual dialogue on Non-Proliferation and Disarmament, at which we discuss issues including nuclear non-proliferation and

disarmament, nuclear doctrine and confidence building measures to reduce the risk of nuclear conflict in the region. Shared interests in nuclear safety and security are also part of this dialogue. These talks at senior officials' level are an important means for Australia to promote disarmament and non-proliferation on the subcontinent, thereby contributing to greater peace and security.

Only the states involved can decide to negotiate an arms limitation agreement, but Australia and other concerned states assign priority and diplomatic resources to encouraging reduction of tensions in South Asia, and for a rethink of approaches to nuclear arms, including through reducing the significance of nuclear weapons in military doctrines, and increased transparency as a confidence building measure. The CTBT and, prior to its entry into force, the continuation of moratoria on nuclear testing (including by India) helps to prevent the proliferation of thermonuclear weapons because the development of such weapons relies on explosive nuclear testing to prove and refine weapon design.

As a leading member of the Non-Proliferation and Disarmament Initiative (NPDI), Australia is also active in encouraging NPT nuclear weapon states, including China, to reduce their nuclear arsenals and prevent the proliferation (horizontal and vertical) of nuclear weapons to other regions.

Recommendation 3

Committee recommends that, should the Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy be ratified, uranium sales to India only commence when the following conditions are met:

- ***India has achieved the full separation of civil and military nuclear facilities as verified by the IAEA;***
- ***India has established an independent nuclear regulatory authority under law;***
- ***the Indian nuclear regulator's existing policies and arrangements have been reviewed to ensure its independence;***
- ***the frequency, quality and comprehensiveness of onsite inspections at nuclear facilities have been verified by the IAEA as being best practice standard; and***
- ***the lack of sufficient planning for the decommissioning of nuclear facilities has been rectified.***

The Government concurs with the Committee on the importance of the matters raised in this recommendation. The Nuclear Cooperation Agreement with India includes provisions that address the separation of India's civilian and military nuclear facilities and programmes, as well as commitments to achieve the highest standards of radiation and nuclear safety. Article II of the Agreement offers a basis for Australia and India to develop cooperation in areas related to peaceful uses of nuclear energy, including regulatory and technological advancements for the safe, secure, sustainable and safeguarded use of civil nuclear energy. Ahead of implementing the Agreement, Australia and India are discussing the establishment of such cooperation.

Separation of civil and military nuclear facilities

India agreed with the United States in 2006 to separate its civil and strategic nuclear programs. A clear demarcation between civilian and strategic facilities was a key objective for the United States when negotiating the plan with India, to ensure compliance with its obligation under Article I of the NPT to not assist, encourage, or induce nuclear weapons development, production, or proliferation. The 2006 separation plan specifies that facilities that are subject to safeguards in India are those that, “after separation, will no longer be engaged in activities of strategic significance”.

India’s separation plan is contained in IAEA document INFCIRC/731. It stipulates 22 nuclear facilities to be designated as civil and brought under IAEA safeguards. India has said that all newly constructed civil nuclear facilities will also be brought promptly under IAEA safeguards. India’s commitment to the separation plan forms part of the decision of the Nuclear Suppliers Group (NSG) in 2008 that provides a framework for countries such as Australia to develop nuclear cooperation with India. India has met, and continues to act in accordance with, commitments made in connection with the NSG decision.

The 2006 plan is the only agreed definition for separation for India’s civil and military nuclear activities. The IAEA has confirmed in its document INFCIRC/754/Add.7, dated 5 February 2015, that India has now designated all 22 civil facilities for the application of safeguards. On this basis, the Government is satisfied that the first element of the Committee’s recommendation is met.

Regulation of nuclear safety in India

India is already working to implement enhancements in its regulation in the area of nuclear safety based on recommendations from its own reviews and those made by the IAEA.

The second to fifth elements of the Committee’s recommendation are in alignment with recommendations made by an Integrated Regulatory Review Service (IRRS) mission conducted by the IAEA in March 2015 at India’s invitation. The IRRS mission provided an in-depth review of India’s performance against IAEA safety requirements. The international team of experts that conducted the IRRS mission concluded that there is a strong commitment to safety in India. The leader of the team commented also that India “continues to enhance its regulatory programme to face the current and future challenges in regulating nuclear safety, such as reinforcing the safety of existing nuclear facilities, monitoring ageing and decommissioning, as well as providing oversight of the construction, commissioning and operation of new nuclear power plants.” Following each IRRS mission, the IAEA and the host country develop an action plan for IRRS recommendations to be addressed, including potential timeframes. The Chairman of India’s Atomic Energy Regulatory Board has highlighted that organisation’s commitment to pursuing improvements suggested by the IRRS mission.

In a statement to the Australian Parliament on 28 October 2014, the Minister for Foreign Affairs said: “Australia expects India will follow international best practice to

ensure safety in its nuclear industry.” The Government stresses the importance of ongoing review and improvement of nuclear safety. However this does not warrant delaying, and potentially lessening, the benefits offered by nuclear cooperation. Accordingly, the Government does not accept the Committee’s recommendation that exports of uranium to India should be deferred.

Recommendation 4

The Committee recommends that the Australian Government outline the legal advice it has received regarding the consent to enrichment¹ provisions in Article VI of the proposed Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy.

The text of the Nuclear Cooperation Agreement was reviewed by DFAT legal advisers during its negotiation; however the Government did not seek or receive specific legal advice regarding the consent to enrichment provisions in Article VI of the Agreement. The Government is satisfied that the consent to enrichment provisions in Article VI of the Agreement are consistent with Australia’s longstanding uranium export policies.

In response to the fourth recommendation by The Hon Melissa Parke MP and Senator Sue Lines, an exchange of correspondence between Australian and Indian officials that negotiated the Nuclear Cooperation Agreement has reconfirmed mutual understandings in the following joint statement:

“The prior consent of the Supplier Party will be required if nuclear material subject to the Agreement is to be enriched to 20 percent or higher in the isotope U-235.”

Recommendation 5

The Committee recommends that the Australian Government outline the legal advice it has received concerning whether the proposed Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy breaches Australia’s obligations under the South Pacific Nuclear Weapons Free Zone Treaty.

In evidence to JSCOT, DFAT noted that multiple legal advices have been sought and obtained on this issue. It is not the practice of the Australian Government to disclose its legal advice.

Recommendation 6

Subject to the above recommendations, the Committee supports the Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy and recommends that binding treaty action be taken.

The Government welcomes the support of the Committee for binding treaty action and will take such action at an early opportunity.

¹ The JSCOT Secretariat informed DFAT on 18 September 2015 that the text of Recommendation 4 (as tabled on 8 September) contains an error, and that the recommendation relates to consent for enrichment, not reprocessing.

Response to additional recommendations from The Hon Melissa Parke MP and Senator Sue Lines:

The Government is satisfied that the provisions of the Nuclear Cooperation Agreement meet Australia's requirements and does not accept proposals to amend the Agreement. Clarification in relation to individual recommendations is set out below.

1. That the NCA not be ratified in its present form, but be amended, either directly or through an exchange of letters, to expressly state that Australia may require the return of AONM supplied under the NCA should India be found in-breach of the NCA or its broader non-proliferation undertakings with respect to India's Nuclear Suppliers Group exemption.

Among the various nuclear cooperation agreements that India has negotiated, only that with the US includes provision for return of nuclear material, and only if the agreement is terminated. US law requires such a provision. In order to obtain the right of return, the US had to agree to the provision of substantial compensation, covering not just the value of the fuel, but also the costs incurred as a consequence of the removal of fuel. The Director General of ASNO outlined additional considerations on this matter in submissions and evidence to the Committee.

2. That the NCA not be ratified in its present form, but be amended, either directly or through an exchange of letters, to expressly state that AONM can be used only in facilities that are under permanent IAEA safeguards, that is, facilities that are listed in the Annex to the IAEA agreement.

The use of AONM in India in facilities other than those under permanent IAEA safeguards is unlikely for a number of practical and technical reasons. Scenarios mentioned in evidence to JSCOT by non-government witnesses, where India might use AONM at a temporarily safeguarded facility in a manner that would assist its nuclear weapons program, would be contrary to the fundamental provisions of the Nuclear Cooperation Agreement, as well as India's safeguards agreement with the IAEA.

3. If the NCA is not amended in accordance with Recommendation 1, that supply of AONM for India be approved only for uranium that is enriched and fabricated into fuel assemblies in the United States and transferred to India under the US-India nuclear cooperation agreement.

The Government does not accept this recommendation, as an important intention of the nuclear cooperation agreement is to enable the use of Australian uranium in India's own fuel fabrication facilities.

4. That the NCA not be ratified in its present form without addressing concerns about the ambiguity of the consent provisions. Preferably this would be through amending the text, but at the least India should be asked to join in a clarifying

statement to put beyond doubt that the two parties do share a common understanding of the meaning of the text.

As mentioned in response to Recommendation 4 in the majority report of JSCOT, the Government is satisfied that Article VI (5) in the Nuclear Cooperation Agreement is consistent with Australia's longstanding uranium export policies.

In response to this recommendation, an exchange of correspondence between Australian and Indian officials that negotiated the Nuclear Cooperation Agreement has reconfirmed mutual understandings in the following joint statement:

“The prior consent of the Supplier Party will be required if nuclear material subject to the Agreement is to be enriched to 20 percent or higher in the isotope U-235.”

5. That the NCA be amended, directly or through an exchange of letters, to provide for Australian-obligated plutonium to be used only in accordance with a fuel cycle program mutually determined by India and Australia.

The tracking of AONM as it moves through India's nuclear fuel cycle, together with consultation processes under the Nuclear Cooperation Agreement, would be ways through which ASNO can gain assurance that the material is being used in accordance with the peaceful use requirements, as well as the specific commitment of India to use Australian obligated plutonium “only for the purpose of producing nuclear fuel for facilities in India under Agency safeguards to implement India's planned nuclear energy programme” (Article VI, para 2(c) of the Nuclear Cooperation Agreement).

6. That AONM not be supplied directly to India until Indian officials are following established international practice with regard to accounting for and tracking AONM.

7. Meanwhile, until Indian officials are following established international practice with regard to accounting for and tracking AONM, that supply of AONM for India be approved only for uranium that is enriched and fabricated into fuel assemblies in the US in accordance with Recommendation 2.

Arrangements to meet Australia's requirements for tracking of AONM have been negotiated by ASNO and India's Department of Atomic Energy as part of the Administrative Arrangement to the Nuclear Cooperation Agreement. The arrangements will allow the Director General of ASNO to determine the disposition of Australian obligated nuclear material in India and fulfil reporting obligations under the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

Accordingly, the Government sees no reason to accept recommendations 6 and 7 above.

8. That JSCOT Committee members be provided with access to the administrative arrangements in order to satisfy the legitimate public interest concerns around the adequacy of the accounting and monitoring mechanisms prior to any Treaty ratification.

It is Australian Government policy not to release less-than-treaty-status instruments that are confidential to the signatories.

9. That the NCA be amended, directly or through an exchange of letters, to give Australia the right to request the IAEA's safeguards findings or conclusions for India as they relate to AONM.

ASNO will monitor India's safeguards compliance through the accountancy provisions in the Administrative Arrangement and through direct engagement with India and the IAEA. For example, ASNO would have access to any standard or special reporting on safeguards compliance the IAEA provides to its Board of Governors.

10. That prior to effect being given to the NCA, clarification is received from India as to its willingness to comply with non-proliferation norms and the exercising of nuclear restraint. A positive example would be for India to sign the Comprehensive Nuclear-Test-Ban Treaty, with confirmation it will ratify soon after the United States and/or China. This does not place restrictions on India's nuclear weapons program unilaterally, while still providing assurance to Australia and the world that India will respond reciprocally to steps taken by other nuclear-armed states.

The commitments that India made in connection with the development of nuclear cooperation with the United States, as well as the 2008 decision of the Nuclear Suppliers Group to provide an exemption for civil nuclear cooperation with and transfers to India, have served to draw it more fully into the non-proliferation mainstream and are an important part of the framework under which Australia will export uranium to India. These commitments include the continuation of India's moratorium on nuclear testing. The Government makes frequent use of international forums to urge signature and ratification of the CTBT by countries which have yet to do so and highlights the importance of that call for countries whose ratification is required for the CTBT to enter into force, including India. Accordingly, the Government sees no reason to defer exports of uranium pending further commitments by India.

Response to additional recommendations from the Australian Greens:

Recommendation 1:

The Australia-India Nuclear Energy Cooperation Agreement not proceed.

The Government does not accept this recommendation.

Recommendation 2:

The Australian Government should make public in full its legal advice on the compliance of the Agreement with obligations under the Treaty of Rarotonga.

As mentioned in response to Recommendation 5 in the majority report of JSCOT, it is not the practice of the Australian Government to disclose its legal advice.