

Joint Standing Committee on Treaties

Nuclear Cooperation Agreement with India

Treaty submitted on 28/10/14

Supplementary submission by Ron Walker, in the light of other submissions received by the Committee to date.

Summary

In terms of Australia's International relations this treaty needs to be evaluated at three levels.

Its specific purpose is to define the conditions under which Australian uranium can be exported to India. At another level, its purpose is to demonstrate to India the strength of the Australian government's commitment to developing a closer relationship with India, in commerce and in other fields. At an even higher level, it has to fit in Australia's overall strategic, political and economic environment.

The challenge for policy making is that the three levels interact. Deficiencies over technical, even arcane, specifics of the nuclear controls can easily spill over into Australia's bilateral relationships with third countries and even into the world order on which our security and prosperity depend.

Submissions from students of international law and knowledgeable former public servants assert that the treaty does not conform with important requirements of our established safeguards policy, notably with the terms we have required of the 5 nuclear weapon states recognised by the NPT. John Carlson, Australia's most authoritative custodian of knowledge about nuclear safeguards, sees several paths for our Uranium to end up in bombs. The former Assistant Director of the US Arms Control and Disarmament Agency urges amending the treaty for the sake of the global nuclear non-proliferation regime.

I am not the expert to help JSCOT assess how assured or weighty are the benefits of removing the safeguards obstacle to a transformation of Australia's relationship with India. I hope I can help it thorough the example set out at length below, see the potential for collateral damage to Australia's bilateral relations, to our national reputation and to the international non –proliferation regime which I think is important to our national security and to the wellbeing of our Uranium mining industry. Also I cannot imagine an innocent explanation for India to have sought and pressed for the departures from our standard conditions for Uranium supply.

One example of the consequences of a disparity in the text of the treaty as negotiated.

Here are the parallel articles of the treaties with China and India dealing with possible High Enrichment of the Uranium we supply (Highly Enriched Uranium is not used for normal civilian electricity generation but can be used in a special kind of reactor or to make bombs.) This particular discrepancy between the two texts has not been addressed in other submissions.

Agreement with China

ARTICLE IX

2. Nuclear material subject to this Agreement shall not be:

(a) enriched to 20% or greater in the isotope uranium 235;

without the prior written consent of the supplier Party.

This formulation states clearly that consent can be withheld by Australia.

Australia's agreements with other countries are similarly worded, in accordance with the "model agreement" on which they are based.

Agreement with India

Article VI

5. *Enrichment of twenty percent and above in the Isotope of Uranium 235 shall be undertaken with the prior consent of the Supplier Party.*

This formulation is ambiguous as to whether that consent has already been given. (If you say 'I will use my neighbour's mower with his consent', that suggests he has already given it – or maybe that you are sure he will). It may seem implicit that Australia's prior consent is a condition on the permissibility of high enrichment and that it can be withheld, but that is not stated with the crystal clarity expected in treaties.

Advisers of both the Indian and Australian governments would be well aware a different wording from that used in Australia's agreements with other countries can give rise to concerns on the part of third parties and cause them to ask questions or draw adverse inferences. Legally a difference in wording between two treaties does not necessarily indicate intent to convey a different meaning – but at the political level and in the context of the suite of Australia's safeguards agreements it would be noted and given weight. This treaty will not be brought before a court for juridical determination of exactly what it means. Should a dispute arise between India and Australia about the interpretation of any element in the treaty, there is no multilateral framework, no arbitration, just a consultation between the two parties, which inevitably takes place within the context of all important other aspects of their bilateral relationship at the time. And Australia has not even the (perhaps theoretical but politically and legally significant) right to demand the return of its uranium if the two cannot agree.

Why does this ambiguity matter?

The question of nuclear enrichment in India is particularly sensitive because, whereas the 5 nuclear weapon states recognised by the NPT (and Israel) have stopped producing nuclear material for their weapons programs, India has not and is still adding to its arsenal. It aims to "out gun" Pakistan and at least match China.

New units at the Indian Rare Metals Plant, near Mysore, are expected to come on line this year. The declared aim is to enrich uranium for use as fuel in India's projected fleet of nuclear powered submarines. But according to Matthew Clements, editor of IHS Jane's Intelligence Review, there is likely to be excess capacity which could be used to make fissile material for a Hydrogen bomb.

Examples of consequences for our security and relations with third countries

Pakistan and China are particularly concerned about this possibility and can't be expected to take kindly to Australia relaxing in any way its restrictions. It would seem difficult to explain to our largest trading partner why we have agreed to a text apparently unmindful of their security interests.

It will in any case be difficult to explain to China and to all the other countries with which we have safeguards agreements why we ask more of them we do of India. It will be difficult to resist requests from them for derogations to our safeguards conditions.

Our network of nuclear safeguards agreements and our hitherto stringent policy on nuclear exports are significant elements of the global nuclear non-proliferation regime. That regime it is important to global security and specifically to Australia's – not only because the risk of nuclear war increases with the number of nuclear armed countries but also because moves towards acquisition of nuclear weapons tend to inflame conflict situations. In this way, any unravelling of our network of safeguards or perception that our export control requirements are being weakened, diminishes our own security and that of other countries as well. If some elements of the global non-proliferation regime and Australia's established safeguards policy are considered to be outdated, the remedy is to replace them with something better, not to abandon unilaterally and without explanation what exists today.

Etc

Examples of potential consequences for our international reputation

The high regard in which Australia is held by many countries including the United States for our methodical and consistent work over the decades in support of non-proliferation is a national asset that should be protected.

Whether or not it be a misrepresentation, if a perception develops that Australia is willing to facilitate a nuclear arms race between India and China, there is a risk of our being exposed to accusations of irresponsibility contrary to the security interest of all countries.

If we are seen as having conceded too much to India on the security front in the hope of commercial benefits, that would tend to lower the esteem in which Australia is held.

If we are seen as having been willing to compromise on policies we had long upheld as major national interests, other countries negotiating with us on any topic might expect us to give way on other policies and declared interests as well.

Etc

Significance for Australia's uranium industry

The Australian government's nuclear safeguards policy was developed in the 1970s in the face of widespread and vociferous public opposition to uranium mining and export. Arguably, that policy and the meticulous way in which it was implemented over the following decades played a considerable role in convincing much of elite and mainstream opinion that the issues were not only

manageable but being carefully and effectively managed by government. Today, public opposition to uranium mining and export is much less widespread. The uranium mining industry benefits from this changed atmosphere and has been highly supportive of the safeguards policy.

But although quiescent, the issue has not vanished. The global nuclear industry, including Australian uranium miners, know by bitter experience that their industry is highly vulnerable to potential nuclear accidents or nuclear testing – let alone, heaven forbid, other detonation, accidental or otherwise, of a nuclear weapon. Such events cause a strong public reaction against all things nuclear and may trigger drastic action by governments that disrupt contracts and markets. In addition to sharing normal human concerns about the possible misuse of nuclear material, Australian miners have a strong commercial interest in the reputation, integrity and effectiveness of nuclear safeguards and the whole international non-proliferation regime.

Although it would be contrary to the interests of the industry to draw public attention to any weaknesses in proposed nuclear safeguards arrangements, it is reasonable to expect that they would privately welcome the remedying of any deficiencies, in ways that do not impede normal peaceful industrial activities.

India's motivation

As it seems highly unlikely Australian negotiators proposed the language on High Enrichment, it must have been conceded in the face of Indian demands. As John Carlson asks in relation to other points, why did the Indians insist on these departures from our standard text which has proved acceptable to so many other countries and from safeguarding procedure that have been shown over the decades not to seriously impede peaceful nuclear industries? Indeed, why were they willing to enter into an agreement with such aberrations, knowing full well the importance for third countries of factors such as those outlined above and the long established principle that if one party to an international treaties is –or indeed third countries are - gravely disadvantaged by an agreement, that is likely to cause problems for both parties?

No reassuring explanation is obvious or has been given for the dozen or so serious discrepancies identified in submissions to JSCOT.

Conclusion

On the basis of what I know and if the government is not able to demonstrate that the proposed conditions under which we are willing to allow the export of Australian Uranium to India are equivalent to those we require of the five nuclear weapon states recognised by the NPT, my advice is that this treaty is too high a price to pay, even for the prospect of closer relations with India, however desirable that aspiration.