

2 February 2015

Australia-India Nuclear Cooperation Agreement

Treaty tabled on 28 October 2014

Supplementary Submission on Consent Rights - John Carlson

Reprocessing and enrichment can be used to produce material for nuclear weapons, hence consent rights over these processes are of fundamental importance to Australian safeguards policy. Australia's bilateral agreements should ensure that Australian-obligated nuclear material (AONM) cannot be reprocessed, or highly enriched¹, without prior written consent by Australia.

Given the importance of these consent rights, it is remarkable that the proposed agreement with India does not expressly state that these actions cannot be undertaken without Australia's prior consent. The implications are such as to warrant a separate Submission to highlight what are major issues with the agreement in its present form.

For ease of reference, the relevant texts of the proposed agreement, and texts from other Australian agreements, are given on page 3 of this Submission.

Consent rights for reprocessing

Article VI.1 gives India consent for reprocessing in accordance with the US-India reprocessing arrangements. Paragraph 2 of Article VI says that paragraph 1 applies only, *inter alia*, as long as modalities of the US-India arrangements apply. Paragraph 4 says the Parties shall consult on the implementation of Article VI, including if the provisions of paragraph 2(a) (i.e. the modalities of the US-India arrangements) no longer apply.

These provisions say nothing about any requirement for prior Australian consent. They do not explicitly exclude India from reprocessing AONM without Australia's prior consent in facilities other than those covered by the US-India arrangements.² An Indian obligation to obtain prior consent may be *inferred* from Article VI.1 but this is by no means clear.

If for whatever reason the modalities of the US-India arrangements do not apply, all Article VI requires is that the Parties shall consult. The Article is silent about the purpose of the consultations or what happens if the Parties are unable to reach agreement. It is completely uncertain what would happen if the Parties disagree about the interpretation of Article VI, especially in view of the agreement's weak dispute settlement provision (Article XII). If India takes the position that it does not require Australia's consent, how would this be resolved?

If the Indian negotiators were unwilling for the agreement to spell out the need for prior consent, at the very least the agreement should state that reprocessing as a consequence of consultations under Article VI.4 requires mutual agreement – this would at least preserve Australia's consent rights.

1. Highly enriched uranium is defined as comprising 20% or more of the isotope uranium-235.

2. The only clear requirement is that AONM is subject to the India-IAEA safeguards agreement (Article VII.4). As noted in my previous Submissions, the India-IAEA agreement allows reprocessing of safeguarded material in an *unsafeguarded* plant (i.e. a plant not subject to safeguards through the Annex to that agreement).

2.

As Article VI is currently drafted, one way it could be interpreted is that in fact India has been given prior consent to reprocess outside the US-India arrangements if for any reason these do not apply, and that the purpose of consultations under Article VI.4 is simply to settle the modalities. If this is the case – if there is a secret understanding (or at least an undisclosed one) that India can reprocess outside the US arrangements – JSCOT and the public should be told of this.

It is suggested that JSCOT ask DFAT/ASNO whether the explanation for the peculiar drafting of Article VI is that in the negotiation of the agreement India has already been given consent for reprocessing, or an assurance of consent, if the US-India arrangements do not apply.

Other issues with reprocessing

Article VI.3.(a) limits the information available to Australia on the IAEA's safeguards approaches for facilities covered by Article VI.1 to information not classified as "Safeguards Confidential". This is an example of the problems caused by the lack of any right to IAEA reports, discussed in my previous Submissions.

Another major issue with reprocessing relates to Australia's established practice of giving consent only on a programmatic basis. This is addressed in my previous Submissions.

Consent rights for high enrichment

The drafting of Article VI.5, second sentence, is very different to Australia's other nuclear agreements:

Enrichment of twenty percent and above in the isotope of uranium 235 shall be undertaken with prior consent of the Supplier Party.

Saying that *high enrichment shall be undertaken with the prior consent of the supplier party* is not the same as saying *high enrichment shall not be undertaken without the prior consent of the supplier party*. What is the significance of this difference? One interpretation is that the paragraph actually gives prior consent. The point is that the wording is unclear – and that is a serious problem for any agreement, especially one with an inadequate dispute settlement provision.

Other issues with enrichment

Article VI.5 notes that India may enrich at low levels.³ India does not have an enrichment plant that is subject to safeguards. The India-IAEA agreement allows safeguarded material to be enriched in a facility that is not subject to safeguards.

Some questions JSCOT may wish to pursue

- Why doesn't Article VI clearly state the requirement for Australia's prior written consent?
- How does Article VI prevent India from reprocessing outside the US-India arrangements?
- Is there a secret (or undisclosed) understanding with India that it can reprocess in facilities outside the US-India arrangements if for any reason these arrangements do not apply?
- Why is it acceptable for AONM to be reprocessed or enriched in facilities that are not subject to IAEA safeguards?

3. Under 20% U-235.

3.

- Is it acceptable that Australia has no right to the details of the IAEA's safeguards approaches for reprocessing facilities if these are "Safeguards Confidential"?

Conclusion

The problems outlined here with respect to the agreement's provisions on consent rights reinforce the need to improve the drafting of the agreement.

Comparison of texts

Australia's standard text on consent rights

Nuclear material subject to this Agreement shall not be:

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

without the prior written consent of the supplier Party.

(Article IX.2 of the Australia-China agreement)

Where prior consent to reprocessing is given by the agreement:

Nuclear material subject to this Agreement shall only be reprocessed according to the conditions agreed between the Contracting Parties as specified in Annex B of this Agreement.

(Article V.1.(b) of the Australia-Japan agreement, my underlining)⁴

Australia-India agreement - Article VI (*edited*)

1. ... Australia grants consent to ... India for reprocessing ... nuclear material subject to this Agreement in facilities dedicated to reprocessing safeguarded nuclear material under IAEA safeguards and modalities thereof described in the (*US-India reprocessing arrangements*).
2. The provisions of paragraph 1 shall only apply:
 - (a) as long as the modalities described in paragraph 1 of this Article continue to apply;
4. At the request of either Party, the Parties shall consult on the implementation of this Article. If the provisions of paragraph 2(a) no longer apply the Parties shall immediately enter into consultations on the implementation of this Article.
5. Enrichment of nuclear material subject to this agreement may be carried out to less than twenty percent in the isotope 235 of uranium. Enrichment of twenty percent and above in the isotope of uranium 235 shall be undertaken with prior consent of the Supplier Party.

4. The other case where reprocessing consent is given – Article VIII of the 2011 Australia-Euratom agreement – is not comparable as it is confirming a reprocessing program that has been operating for decades under the previous (1981) agreement with Euratom.