

Australia's Obligations under the South Pacific Nuclear Free Zone Treaty and Uranium Sales to India

Executive Summary

Prime Minister Gillard has indicated a desire to modify Australian Labor Party (ALP) policy on the sale of uranium to India. This raises issues of international law for Australia under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and the 1985 South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga).

The NPT is the global international treaty regime places constraints on the proliferation of nuclear weapons. It does so by requiring States to commit to a range of obligations which are designed to limit proliferation. Differential obligations exist for the five recognised nuclear-weapon States as at 1 January 1967 (China, France, Russia, UK, USA), and all other States which are considered to be 'non-nuclear-weapon States'. While India is not a party to the NPT, it is considered for the purposes of international law as a 'non-nuclear-weapon State'. Here the NPT creates a form of legal fiction as it is widely recognised that India is nuclear-armed. Therefore in Australia's dealings with India any sales of uranium or nuclear materials must be undertaken on the basis that India is a 'non-nuclear-weapon State'. This is an Australian obligation under international law.

Australia is a founding State party to the Treaty of Rarotonga which in addition to creating a nuclear-weapon free zone in the South Pacific, in Article 4 also deals with peaceful nuclear activities such as the sale of uranium or other nuclear materials. Under Article 4 of the Treaty Australia has agreed to differential obligations with respect to the sale of uranium to 'non-nuclear-weapon States' and 'nuclear-weapon States'. Australia is obligated under the Treaty of Rarotonga to not provide India (a non-nuclear-weapon State) with nuclear materials until such time as India has concluded a fullscope safeguards agreement as per Article III.1 of the NPT. While India is not a party to the NPT, this does not preclude India from being subject to such safeguards consistently with the NPT requirements for 'non-nuclear-weapon States'. Currently India has no fullscope safeguard agreements in place, though it has committed to some IAEA safeguards. If India does not agree to Article III.1 NPT safeguards and Australia were to export uranium to India, Australia would be in violation of its Treaty of Rarotonga obligations. If Australia's action were in breach of the Treaty, Australia could be exposed to the complaints procedure of Annex 4 of the Treaty initiated by other state parties to the Treaty of Rarotonga.

Australia's Obligations under the South Pacific Nuclear Free Zone Treaty and Uranium Sales to India

1. Australia has been a strong supporter of nuclear disarmament and non-proliferation of nuclear weapons and materials. It is a party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),¹ and has been an active supporter of the NPT regime for the past 40 years. Australia was also a promoter and founding member of the 1985 South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga).² There has been strong bipartisan support in Australia for nuclear disarmament and non-proliferation. The most recent major initiative that Australia undertook in this field was the joint Australia-Japan International Commission on Nuclear Non-proliferation and Disarmament which in 2009 released a report titled *Eliminating Nuclear Threats: A Practical Guide for Global Policymakers*.³

2. A key issue for the international community in recent years, especially in the wake of the 2001 terrorist attacks upon the United States of America, has been nuclear security. As a result the non-proliferation of nuclear weapons has received even greater attention than in previous decades. In that regard it is notable that the International Commission on Nuclear Non-proliferation and Disarmament's 2009 Report focused on four nuclear threats and risks, one of which was 'New Nuclear Armed States'. The Report commented:

The Nuclear Non-Proliferation Treaty (NPT) system has been under severe strain in recent years, with the International Atomic Energy Agency (IAEA) struggling with verification, compliance and enforcement failures, and backward steps occurring in the world's most volatile regions. India and Pakistan joined the undeclared Israel as fully-fledged nuclear-armed states in 1998; North Korea is now likely to have some half dozen nuclear explosive devices; and Iran probably has weapon-making capability, with real potential for generating a regional proliferation surge should it choose to cross the weaponization red-line.⁴

3. In addition to making clear that India was a 'new' nuclear-armed state, the Commission, based on its best judgment derived from published estimates and compilations from a number of

¹ [1973] ATS 3.

² [1986] ATS 32.

³ See <<http://www.icnnd.org/Reference/reports/ent/index.html>>

⁴ International Commission on Nuclear Non-proliferation and Disarmament, *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers – Synopsis*, available at <<http://www.icnnd.org/Reference/reports/ent/index.html>>

authoritative sources,⁵ estimated that India had between 60-70 deployed strategic nuclear warheads.⁶ India's nuclear arsenal was ranked seventh amongst the nine States with a nuclear weapon capacity.

4. While the NPT is at the cornerstone of global nuclear non-proliferation initiatives, India has consistently refused to become a party to the NPT. India's position in 2011 remains that it will not become a party to the NPT. At the core of India's objection to the NPT is the key distinction between a nuclear-weapon State and a non-nuclear-weapon State. As India had not manufactured and exploded a nuclear weapon or nuclear device prior to 1 January 1967, it is for the purposes of the NPT considered a non-nuclear-weapon State.⁷
5. As noted by India's Permanent Representative to the United Nations in September 2009:

"India cannot accept calls for universalisation of the NPT. As India's Prime Minister stated in Parliament on July 29, 2009, there is no question of India joining the NPT as a non-nuclear weapon state."⁸

International Legal Framework for Australian Uranium Sales to India

6. The major treaty and convention instruments outlining the basic international legal framework applicable to Australian uranium sales to India include:
 - 1945 United Nations Charter;⁹
 - 1968 Treaty on Non-Proliferation on Nuclear Weapons; and the
 - 1969 Vienna Convention on the Law of Treaties.¹⁰

In addition, there are specific treaties and conventions which address nuclear and international security issues, plus associated United Nations General Assembly (UNGA) and United Nations Security Council (UNSC) Resolutions. The 1996 *Legality of the Threat or Use of Nuclear Weapons* (Request for an Advisory Opinion by the General Assembly of the United Nations) Advisory

⁵ These included the Bulletin of Atomic Scientists, Carnegie Endowment for International Peace, and the Stockholm International Peace Research Institute.

⁶ International Commission on Nuclear Non-proliferation and Disarmament, Information Sheet No 1, available at <http://www.icnnd.org/Reference/reports/ent/factsheets.html>.

⁷ Article IX (3).

⁸ "India says no to NPT as non-nuclear weapon state" iGovernment (25 September 2009) available at www.igovernment.in/site/India-says-no-to-NPT-as-non-nuclear-weapon-state (accessed 20 November 2011).

⁹ [1945] ATS 1

¹⁰ [1974] ATS 2

Opinion of 8 July 1996 [Nuclear Weapons Advisory Opinion] ¹¹ also has considerable significance in this area of international law.

7. In addition to the ongoing efforts of the United Nations in this field, and in particular recent United Nations Security Council Resolutions seeking to limit the proliferation of nuclear materials [ie. UNSC Res 1540 (2004); UNSC Res 1673 (2006); UNSC Res 1810 (2008)], especially weapons of mass destruction, the core international instruments are:
- 1980 Convention on the Physical Protection of Nuclear Material; ¹²
 - 1963 Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water; ¹³
 - 1994 Convention on Nuclear Safety; ¹⁴
 - 1996 Comprehensive Nuclear Test Ban Treaty; ¹⁵
 - 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. ¹⁶

The Regional Legal Framework

8. In addition to these global instruments, there are also important regional instruments to which Australia has been a prominent party, which in addition to the Treaty of Rarotonga, include the 1959 Antarctic Treaty. ¹⁷ Both these instruments place significant limitations on the use and possession of nuclear weapons and related nuclear materials in Antarctica and the associated Southern Ocean, and within the Southwest Pacific.
9. Australia, along with New Zealand, has also been very proactive with respect to placing constraints on nuclear weapons testing within the region, most particularly with respect to French nuclear weapons testing in Polynesia in the 1970s and 1990s, culminating in joint litigation brought by both countries against France in 1973: *Nuclear Test Cases* (Australia & New Zealand v. France); ¹⁸ which New Zealand sought to re-open in 1995: *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case. ¹⁹ Whilst these cases ultimately proved unsuccessful in obtaining a clear judgment from the Court as to the legality of France's actions,

¹¹ [1996] ICJ Reps 226

¹² [1987] ATS 16

¹³ [1963] ATS 26

¹⁴ [1997] ATS 5

¹⁵ Not yet in force.

¹⁶ [2005] ATNIF 20; not yet in force.

¹⁷ [1961] ATS 12

¹⁸ [1973] ICJ Rep 32.

¹⁹ [1995] ICJ Rep 288.

they were extremely influential not only in establishing international legal precedent with respect to the constraints placed upon nuclear weapons in international law but also more generally with respect to the options available to States to challenge the legality of nuclear testing.

The Treaty of Rarotonga

10. The 1985 South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) was concluded in Rarotonga on 6 August 1985 and entered into force on 11 December 1986. Australia was an original party to the Treaty. The Hawke Government was a strong proponent of the Treaty and Australian representatives were closely involved with its negotiation. The Treaty was ratified by Australia, consistent with Article 14, without reservations.

11. The Treaty of Rarotonga principally sought to create a South Pacific Nuclear Free Zone which encompasses large parts of the South Pacific including the continent of Australia. In addition to each State party undertaking not to manufacture, acquire, possess, or to have control over any nuclear explosive device anywhere inside or outside of the South Pacific Nuclear Free Zone,²⁰ each State party also agrees to constraints on peaceful nuclear activities.

12. Of relevance for present purposes is Article 4, which provides:

Each party undertakes:

(a) to not provide source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material for peaceful purposes to:

(i) any non-nuclear-weapon State unless subject to special safeguards required by Article III.1 of the NPT, or

(ii) any nuclear-weapon State unless subject to applicable safeguards agreements with the International Atomic Energy Agency (IAEA).

Any such provision shall be in accordance with strict non-proliferation measures to provide assurance of exclusively peaceful non-explosive use.

(b) to support the continued effectiveness of the international non-proliferation system based on the NPT and the IAEA safeguards.

13. An important issue which arises in the interpretation of Article 4 of the Treaty of Rarotonga is the definition of 'non-nuclear-weapon State' and 'nuclear-weapon State'. Depending on which

²⁰ Article 3.

category a State falls into, Australia as a supplier of nuclear material for peaceful purposes to such a State will need to confirm the existence of certain safeguards.

14. The Treaty of Rarotonga does not define the terms 'non-nuclear-weapon State' and 'nuclear-weapon State'. As a result it is necessary to apply the rules of treaty interpretation to ascertain the meaning of those terms.

Vienna Convention on the Law of Treaties

15. The 1969 Vienna Convention on the Law of Treaties (VCLT) includes two sets of rules that address treaty interpretation: a general rule, and a supplementary rule.

16. The general rule of treaty interpretation is found in Article 31 which in para (1) states that:

A treaty shall be interpreted good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The context of the treaty includes in addition to the text, preamble and annexes, agreements made by the parties in connexion with the conclusion of the treaty.²¹ Also to be taken into account together with the context is any subsequent agreement, or subsequent practice in the application of the treaty, or relevant rules of international law applicable in the relations between the parties.²²

17. In the case of the Treaty of Rarotonga, the application of these rules of treaty interpretation mean that in addition to the text of the treaty itself, the subsequent practice of interpretation by the parties in the period 1986-2011 can also be considered.

18. As the Treaty of Rarotonga was concluded as a regional treaty under a framework consistent with Article VII of the NPT, and the Treaty makes express reference to the NPT not only in the Preamble but also in Article 4, it is relevant to give some further consideration to the NPT.

The NPT

19. The most significant initiative with respect to nuclear non-proliferation and nuclear disarmament is the NPT which currently has 190 State parties and is one of the most widely ratified nuclear and security treaties adopted by the international community. The Preamble to the NPT contains within it important statements identifying the goals and objectives of the parties to the Treaty. These include:

...

²¹ Article 31 (2).

²² Article 31 (3).

CONSIDERING the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

BELIEVING that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,

...

AFFIRMING the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States,

CONVINCED that, in furtherance of this principle, all Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the applications of atomic energy for peaceful purposes,

DECLARING their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

URGING the co-operation of all States in the attainment of this objective,

RECALLING that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources,

Nuclear disarmament is clearly an important goal of the NPT and the Treaty seeks to promote disarmament in order to ensure international security.

20. These general goals and principles of the NPT are reflected in its principal operative provisions. Those relevant for current purposes include:

- Nuclear-weapon States undertake not to transfer nuclear weapons to any recipient, or to “in any way assist, encourage or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons” (Art I);
- Non-nuclear-weapon States agree to accept safeguards as concluded with the International Atomic Energy Agency (IAEA) (Art III);

- States retain a right to develop research, production and use of nuclear energy for peaceful purposes in conformity with Articles I and II of the NPT (Art IV).

The NPT therefore provides an overarching framework for the manner in which the State Parties are to conduct themselves with respect to a range of nuclear materials that may potentially be diverted for use in nuclear weapons. Particular obligations rest with the nuclear-weapon State Parties to the Treaty whilst there are also particular obligations resting with the non nuclear-weapon State Parties such as Australia.

21. A core distinction in the NPT exists between nuclear-weapon States and non-nuclear-weapon States. Different sets of obligations apply to each group of States under Articles I-III. The distinction between the two categories of States is made clear in Article IX (3) which relevantly provides:

For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967.

22. As at 1 January 1967 only five States had undertaken such an activity:

- China;
- France;
- Union of Soviet Socialist Republics (USSR);
- United Kingdom; and
- United States of America

These five States (with the Russian Federation having now succeeded the USSR) therefore remain for the purposes of the NPT a recognised 'nuclear-weapon State'.

23. As there has been no amendment to Article IX (3) of the NPT, all other States in the international community, irrespective of whether they have manufactured and exploded a nuclear weapon or other nuclear weapon explosive device since 1 January 1967 remain for the purposes of the NPT a 'non-nuclear-weapon State'. As such, Australia, a party to the NPT is considered to be a non-nuclear-weapon State. If India were to also join the NPT, it would be considered a non-nuclear-weapon State given the time-dependent criteria for recognition of a nuclear-weapon state.

Treaty of Rarotonga

24. The Treaty of Rarotonga is open for adoption by way of signature and ratification to Member States of the South Pacific Forum. Australia is a member of the Forum. The Treaty of Rarotonga also uniquely has attached to it three Protocols which were specifically designed to address the situation of certain nuclear powers who were non-South Pacific Forum members and who had

territories within the South Pacific. Protocol 1 is open for adoption by France, the United Kingdom, and the United States, while Protocols 2 and 3 are open for adoption by France, China, the Russian Federation,²³ the United Kingdom, and the United States. As India is neither a member of the South Pacific Forum, or expressly named in Protocols 1-3, it is not eligible to become a party to the Treaty of Rarotonga.

25. Australia is expressly bound by the provisions of the Treaty of Rarotonga, and in particular Article 4 as it applies to the sale of uranium by Australia to any State. Article 4 (a)(i) makes clear that in the case of the provision of “source or special fissionable material” to any non-nuclear weapon State that NPT Article III.I safeguards are required to be in place. In the case of the provision of such material to any nuclear-weapon State, IAEA safeguards are required to be in place. Therefore Australia can only permit the sale of uranium to States that either meet NPT or IAEA safeguards.

26. Acting consistently with the Treaty of Rarotonga, in recent years Australia has sought to conclude bilateral nuclear agreements with China and the Russian Federation which made express reference to applicable safeguards agreements consistent with the status of those States as nuclear-weapon States for the purposes of the Treaty and the NPT. Those agreements include :

- 1990 Agreement between the Government of the Australia and the Government of the Union of Soviet Socialist Republics concerning the Peaceful Uses of Nuclear Energy;²⁴
- 2006 Agreement between Australia and the Government of the People’s Republic of China on the Transfer of Nuclear Material;²⁵
- 2006 Agreement between Australia and the Government of the People’s Republic of China for Cooperation on the Peaceful Uses of Nuclear Energy;²⁶ and
- 2007 Agreement between the Government of Australia and the Government of the Russian Federation on Cooperation in the Use of Nuclear Energy for Peaceful Purposes.

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27. These agreements were made against the backdrop of both China and the Russian Federation being parties to the NPT and recognised as a ‘nuclear-weapon State’, and both having accepted applicable IAEA safeguards agreements. As such, these agreements with China and the Russian Federation did not raise issues of Australian compliance with Article 4 of the Treaty of Rarotonga.

²³ As successor to the USSR.

²⁴ [1990] ATS 43.

²⁵ [2007] ATS 3

²⁶ [2007] ATS 4

²⁷ [2010] ATS 22.

India as a 'non-nuclear-weapon State'

28. A key issue for consideration in interpreting the Treaty of Rarotonga is whether India is considered for the purposes of that treaty to be a non-nuclear weapon State or a nuclear-weapon State for the purposes of Article 4. As the Treaty does not seek to identify those States which are or are not nuclear-weapon States, the rules of treaty interpretation must be applied.
29. The object and purpose of the Treaty of Rarotonga is to establish the South Pacific Nuclear Free Zone and to address the renunciation of and prevention of the use or testing of nuclear explosive devices within the proclaimed Zone. Article 4 of the Treaty is the only provision that directly addresses the use of peaceful nuclear activities and while not expressly prohibiting such activities, does seek to place constraints on those activities consistent with NPT and IAEA safeguards. In this regard, it is important to note that the operation of Article 4 is contingent on NPT safeguards.
30. The Preamble of the Treaty also makes clear that the States Parties were mindful of the international nuclear disarmament and regulatory regime context within which the Treaty was negotiated. Express reference is made in the Preamble to the following instruments:
 - the NPT
 - the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof;
 - the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.
31. Consistent with the object, purpose and context of the Treaty of Rarotonga, the term 'non-nuclear-weapon State' should be interpreted consistently with how that term is also interpreted in the NPT. Such an interpretation would reflect how that term was understood at the time of the negotiation of the Treaty in 1985, and it is also consistent with the overall non-proliferation objectives of the Treaty and the exceptions made for the five recognised nuclear-weapon States. This reflects the practice that has developed in international law of according the terms "nuclear-weapon State" and "non-nuclear-weapon State" an interpretation that accords with the NPT definition. It also reflects how equivalent regional instruments have used these terms, as reflected in Article 4 (3) of the 1995 Treaty on the Southeast Asia Nuclear Weapon Free-Zone which duplicates the requirements of Article 4 of the Treaty of Rarotonga.
32. Further understanding of how the distinction between nuclear-weapon and non-nuclear-weapon States was viewed under the Treaty of Rarotonga can be found in the Report of the Chair of the Working Group of a South Pacific Nuclear Free Zone (SPNFZ). That Report relevantly provides that:

It was judged desirable to define the conditions to apply to the transfer of nuclear items and to require that such transfers take place under IAEA safeguards and in accordance with strict non-proliferation conditions. Importantly, as a measure to strengthen the international non-proliferation regime, transfers to non-nuclear weapon States should be subject to safeguards modelled on those required of States members of the NPT – i.e. full scope safeguards.²⁸

33. This interpretation is also consistent with subsequent interpretations of the Treaty of Rarotonga. For example in 1985 the South Pacific Forum “expressed support for Australia’s initiative at the Review Conference [of the NPT] to require the application of fullscope International Atomic Energy Agency safeguards to all nuclear exports to non-nuclear weapon States and noted that the initiative was fully consistent with Article 4 of the SPNFZ Treaty.”²⁹
34. In 2005, the Declaration for the Conference of Nuclear-Weapon-Free Zones which included the parties to the Treaty of Rarotonga, reaffirmed that the “NPT constitutes an essential instrument of the nuclear disarmament and non-proliferation regime” and further reaffirmed “the importance of achieving the universality of the NPT and urge those States that are not parties thereto to accede to the Treaty without delay or conditions as non-nuclear-weapon States”.³⁰ At the time, India was not a party to the NPT and if it had proceeded to accession would have been recognised as a non-nuclear-weapon State.
35. In 2010, at the Second Conference of States Parties and Signatories of Treaties that Establish Nuclear-Weapon-Free Zones and Mongolia, a further call was made for acceptance of the NPT and the Conference ‘Outcome Document’ sought to “urge those States that are not parties thereto to accede to the Treaty without delay and conditions as non-nuclear-weapon States.”³¹
36. This interpretation of the Treaty of Rarotonga also accords with Australia’s interpretation. In 1996, Prime Minister Howard in acknowledging the signing of Treaty of Rarotonga Protocols by France, the United Kingdom and the United States of America, observed that:

All five nuclear weapon states have now undertaken not to use or threaten to use nuclear explosive devices against any SPNFZ member and not to test nuclear explosives within the Treaty area.³²

²⁸ Report of the Chair of the Working Group of a South Pacific Nuclear Free Zone (SPNFZ) [29].

²⁹ Sixteenth South Pacific Forum, Rarotonga, Cook Islands, 5-6 August 1985, Forum Communiqué, [18].

³⁰ Declaration for the Conference of Nuclear-Weapon-Free Zones, CZLAN/CONF/5 (2005) [4-5].

³¹ Outcome Document, Second Conference of Nuclear-Weapon-Free Zones and Mongolia, New York, 30 April 2010 [10].

³² [1997] 18 *Australian Year Book of International Law* 445.

Prime Minister Howard was clearly in this context using the NPT term 'nuclear weapon states' and sought to apply that to the Treaty of Rarotonga, notwithstanding that at this time it was known that other States possessed nuclear weapons.

37. Also in 1996 Foreign Minister Downer stated in answer to a question on notice in the House of Representatives that:

Adherence to the NPT is approaching universality and is the most common way in which non-nuclear weapon states have expressed their internationally legally-binding commitments never to acquire nuclear weapons and to accept fullscope safeguards in order to verify this undertaking. Non-nuclear weapon States have expressed similar commitments in other international treaties such as the Treaty of Tlatelolco, which provides for a nuclear weapon free zone in Latin America and the South Pacific Nuclear Weapon Free Zone, or Treaty of Rarotonga, of which Australia is a signatory.³³

Again, this suggests an Australian interpretation that the term 'non-nuclear-weapon States' is read in the same manner as that term is understood in the NPT context and applies equally to the Treaty of Rarotonga.

38. These questions to Minister Downer in 1996 related to the issue of uranium sales to Taiwan. Minister Downer's answers are of particular relevance as Taiwan was not considered by Australia to be a party to the NPT, and hence its status under the NPT as a non-nuclear-weapon State is that same as that of India.

39. In answer to the question:

Does article 4 (a) of the South Pacific Nuclear Free Zone Treaty impose a formal legal obligation not to provide fissionable material to any non-weapon state unless subject to article III.1 of the NPT, which means full scope safeguards.³⁴

40. Mr Downer replied:

Article 4 (a) of the South Pacific Nuclear Free Zone Treaty imposes a legal obligation not to provide nuclear material unless subject to the safeguards required by Article III.1 of the NPT; that is fullscope safeguards.³⁵

41. An alternate argument with respect to the interpretation of Article 4 is that it only requires Article III.1 NPT safeguards to be applied to those non-nuclear-weapon States that are parties to the NPT. If that interpretation was correct, then this would suggest that Article 4 did not apply to

³³ House of Representatives, *Official Hansard*, Thursday, 31 October 1996, 6357.

³⁴ House of Representatives, *Official Hansard*, Thursday, 31 October 1996, 6357.

³⁵ *Ibid.*

that category of States who were properly classified as non-nuclear-weapon States and were not parties to the NPT. Such an interpretation would defeat the object and purpose of Article 4 as it would effectively create a third category of states under which Treaty of Rarotonga parties were under no obligations towards in relation to the supply of nuclear materials. The result of such an interpretation of Article 4 would be absurd and unreasonable. As noted by a leading publicist on the law of treaties, Anthony Aust:

Even if the words of the treaty are clear, if applying them would lead to a result which was manifestly absurd or unreasonable (to adopt the phrase in Article 32 (b)) the parties must seek another interpretation.³⁶

42. On the basis of the above interpretations and practice, it is clear that the terms 'non-nuclear weapon State' and 'nuclear-weapon State' as they appear in Article 4 of the Treaty of Rarotonga should be interpreted in the same way as they are interpreted and have been interpreted under the NPT.

India and the IAEA

43. While India is not a party to the NPT, this does not bar India from having a relationship with the IAEA. The IAEA 'Safeguards Current Status' document lists India as being a party to a total of 6 Safeguards agreements with the IAEA, the most recent being dated 11 May 2009.³⁷

44. However, India is not a party to the Safeguards Additional Protocol which provides for contemporary standards for comprehensive safeguards. India signed the Additional Protocol on 15 May 2009, but has yet to ratify that instrument.³⁸

45. India has therefore yet to become subject to a comprehensive safeguards regime with the IAEA.

Australia, India and the Treaty of Rarotonga

46. Any move by Australia to supply uranium to India would trigger for Australia an obligation to comply with its obligations under the Treaty of Rarotonga. As India is a 'non-nuclear-weapon State' for the purposes of both the NPT and the Treaty of Rarotonga, Australia can only supply uranium to India "subject to the safeguards required by Article III.1 of the NPT".

47. The Australian Department of Foreign Affairs and Trade notes that:

In the case of non-nuclear-weapon states, they must be subject to IAEA fullscope safeguards (i.e IAEA safeguards apply to all existing and future nuclear activities).³⁹

³⁶ Anthony Aust, *Modern Treaty Law and Practice* 2nd (2007) 234.

³⁷ Status List: Conclusion of safeguards agreements, additional protocols and small quantities protocols (dated 31 October 2011), available at http://www.iaea.org/OurWork/SV/Safeguards/documents/sir_table.pdf.

³⁸ See IAEA, Conclusion of Additional Protocols (status as of 31 Oct 2011), available at http://www.iaea.org/OurWork/SV/Safeguards/documents/AP_status_list.pdf.

The Joint Standing Committee on Treaties has interpreted the IAEA safeguards regime as it applies to non-nuclear-weapon states as follows:

NNWS [non-nuclear-weapon States] must accept safeguards in the form of accounting and auditing procedures and on-site monitoring, for all nuclear activities and materials to verify they are not being used for nuclear weapons.⁴⁰

48. More recently, in 2007 a series of questions were asked in the Senate that directly addressed the potential sale of uranium from Australia to India. In answer to questions put by Senator Allison (Democrats: Victoria), Senator Coonan representing the Minister for Foreign Affairs stated as follows:

Question

(1) Considering obligations under the Nuclear Non-Proliferation Treaty, how does the Australian Government reconcile selling uranium to India

Answer

(1) The supply of uranium to India would not contravene Australia's international legal obligations under the Nuclear Non-Proliferation Treaty (NPT) provided the uranium is covered by IAEA safeguards. As the Prime Minister announced on 16 August 2007, conclusion of a bilateral safeguards agreement with India is conditional on a number of other steps, including India concluding a suitable safeguards agreement with the International Atomic Energy Agency (IAEA) covering all designated civil nuclear facilities.⁴¹

49. In a further questions put by Senator Allison (Democrats: Victoria), Senator Coonan representing the Minister for Foreign Affairs stated as follows:

Question

(5) Does the sale of uranium to India compromise Australia's obligations under the Treaty of Rarotonga

Answer

(5) No.⁴²

³⁹ DFAT, *Nuclear Non-Proliferation, Trade and Security*, available at www.dfat.gov.au/security/nuclear_safeguards.html

⁴⁰ Joint Standing Committee on Treaties, Report 94 (September 2008) 2.26.

⁴¹ The Senate, Questions on Notice, Uranium Exports, Question 3433, Tuesday, 18 September 2007.

⁴² Ibid.

However this answer is immediately qualified by a further question on United States - India negotiations regarding nuclear technology, in which Senator Coonan acknowledges that the NPT does not prohibit the transfer of nuclear material to India “provided that appropriate safeguards are in place.”⁴³

Conclusion

50. Australia is obligated under the Treaty of Rarotonga to not provide India with nuclear materials until such time as India has concluded a fullscope safeguards agreement as per Article III.1 of the NPT. While India is not a party to the NPT, this does not preclude it from being subject to such safeguards consistently with the NPT requirements for ‘non-nuclear-weapon States’. The term ‘non-nuclear-weapon State’ in international law has acquired a precise meaning which reflects the NPT and the use of that term in the Treaty of Rarotonga needs to be read in that context. If India does not become subject to Article III.1 NPT safeguards and Australia were to export uranium to India, Australia would be in violation of its Treaty of Rarotonga obligations. If Australia’s action were in breach of the Treaty, Australia could be exposed to the complaints procedure of Annex 4 of the Treaty initiated by other state parties to the Treaty of Rarotonga.

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⁴³ The Senate, Questions on Notice, Uranium Exports, Question 3433, Tuesday, 18 September 2007.