

The illegality of selling Australian uranium to India

Australia's planned breach of its international treaty obligations

SUMMARY

- The sale of Australian uranium to India, as proposed by Prime Minister Julia Gillard in November 2011, would violate Australia's obligations under the South Pacific Nuclear Free Zone Treaty (SPNFZT) – an international legal instrument initiated by Australia in the 1980s.
- The SPNFZT, which Australia ratified in 1986, prohibits members from selling uranium to countries such as India that do not accept full-scope nuclear safeguards. India has refused to open all of its nuclear facilities – civilian as well as military – to international inspectors.
- The SPNFZT presents an insurmountable legal obstacle for the Australian government. Australia cannot withdraw from the treaty unless another country violates it in a substantial way. Nor can it amend the treaty without the consent of all other parties.

'Australia is obligated under the Treaty of Rarotonga to not provide India with nuclear materials until such time as India has concluded a full-scope safeguards agreement.'

Prof. Donald R. Rothwell

*Professor of International Law,
Australian National University;
Co-Editor-in-Chief, Australian Year
Book of International Law*

What is the South Pacific Nuclear Free Zone Treaty?

The SPNFZT, or the Treaty of Rarotonga, is a legally binding agreement among South Pacific nations, including Australia, that establishes a region-wide 'nuclear-free zone'. It entered into legal force in 1986.

The treaty makes it illegal for any country in the zone to manufacture, acquire, possess or have control over nuclear weapons, and places constraints on non-military nuclear activities, including the export of uranium.

What restrictions does the treaty place on uranium exports?

The treaty states that uranium sales by a party, such as Australia, to a 'non-nuclear-weapon state' must be subject to special safeguards required by Article III.1 of the Nuclear Non-Proliferation Treaty (NPT).

These safeguards are known as 'full-scope' or 'comprehensive' safeguards. They require, among other things, the nation receiving the uranium to open up all of its nuclear facilities to inspections by the International Atomic Energy Agency (IAEA).

India has declared some of its nuclear facilities to be 'civilian' and others 'military', with a number of its civilian facilities now open to the IAEA. But this falls short of satisfying the requirements of comprehensive safeguards.

The fact that the SPNFZT requires full-scope safeguards is not in dispute. Numerous official documents, including from the Australian government, make this explicit. For example, in 1996 the then Australian foreign minister Alexander Downer stated: 'Article 4(a) of the SPNFZT 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.'

Is India considered a 'non-nuclear-weapon state' under the treaty?

Yes. Although India is known to possess nuclear weapons, it is not considered to be a 'nuclear-weapon state' under international law. The NPT defines 'nuclear-weapon state' as any country that manufactured and exploded a nuclear weapon before 1 January 1967. India did not develop nuclear weapons until later.

Under the NPT, the only countries defined as 'nuclear-weapon states' are the United States, Russia (formerly the Soviet Union), Britain, France and China. Any other country is a 'non-nuclear-weapon state'.

Based on government statements and other official records produced in relation to the SPNFZT, including Australian government documents, it is clear that the terms 'nuclear-weapon state' and 'non-nuclear-weapon state' are intended to have the same meaning as in the NPT context.

Based on official statements, India will not accept full-scope safeguards on its nuclear facilities in the foreseeable future.



The Indian Agni-II nuclear missile, with a range of more than 2000km

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Does the restriction apply to nations that have not joined the NPT?

Yes. The SPNFZT requires uranium exports by a party to be subject to 'special safeguards required by Article III.1 of the NPT'. This requirement applies whether or not a country has joined the NPT. (India has not.)

The SPNFZT simply requires a particular type of safeguards – namely, NPT Article III.1 safeguards. This interpretation of the treaty is supported by Australian government statements and practice.

For example, in debates on uranium sales to Taiwan in 1996, the Australian government made it clear that the SPNFZT required Taiwan to accept full-scope safeguards, even though Taiwan was not a party to the NPT.

LEGAL ADVICE FROM PROFESSOR DONALD R. ROTHWELL

The International Campaign to Abolish Nuclear Weapons has received formal legal advice from international law professor Donald R. Rothwell concluding that Australia is prohibited under international law from selling uranium to India unless India accepts full-scope safeguards. Professor Rothwell is a leading expert on treaty law at the Australian National University. He is co-editor-in-chief of the *Australian Year Book on International Law*.

The advice concludes: 'If India does not agree to Article III.1 Non-Proliferation Treaty 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.'

The full legal advice is available at:

www.icanw.org/australiaindia

Is it likely that India would accept full-scope safeguards?

No. Based on statements by Indian officials, India will not accept full-scope safeguards on its nuclear facilities in the foreseeable future.

Under the nuclear deal brokered with the United States, India has accepted only limited IAEA safeguards. These fall well short of meeting the requirements of the SPNFZT.

Can Australia withdraw from the treaty to avoid its obligations?

No. Australia would only be permitted to withdraw from the SPNFZT if another member of the treaty had violated a provision of the treaty 'essential to the achievement of the objectives of the treaty'. Without such a violation, Australia is unable to withdraw.

Can Australia amend the treaty to allow uranium exports to India?

Australia could propose an amendment to the SPNFZT to allow uranium exports to India without full-scope safeguards. However, this is highly unlikely to succeed, as it would require the acceptance of all other parties.

What would happen if Australia breached the treaty?

If Australia exported uranium to India without India's accepting full-scope safeguards, other members of the SPNFZT could lodge a formal complaint with the treaty depositary. The treaty sets out a process for dealing with complaints about breaches.

If this process proved unsuccessful in stopping Australia from exporting uranium to India, a nation could take the matter to the International Court of Justice, the highest authority on international law, for adjudication.