

National Interest Analysis [2023] ATNIA 1

with attachment on consultation

**Agreement between the Government of Australia and the Government of the
Democratic Republic of Timor-Leste on Cooperation in the Field of Defence and the
Status of Visiting Forces**

(Canberra, 7 September 2022)

[2023] ATNIF 1

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Cooperation in the Field of Defence and the Status of Visiting Forces

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Nature and timing of proposed treaty action

1. The proposed treaty action is the entry into force of the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Cooperation in the Field of Defence and the Status of Visiting Forces* (the Agreement). The Agreement was signed by both Australia and Timor-Leste on 7 September 2022 in Canberra.
2. For the Agreement to enter into force, each Party must present the other with written notification, through diplomatic channels, confirming that it has completed its domestic requirements for entry into force. The Agreement would enter into force on the date that the last Party presents written notification to the other Party (Article 5(1)). Australia intends to present its written notification as soon as practicable following the completion of its domestic requirements.

Overview and national interest summary

3. The purpose of the Agreement is to facilitate mutually beneficial defence cooperation activities between Australia and Timor-Leste on each other's territories, by establishing a legally-binding framework to govern such cooperation. The Agreement identifies a number of cooperative defence activities that may be engaged in by Australia and Timor-Leste, where mutually determined.
4. The Agreement also contains status of forces provisions, which establish the conditions governing the legal status of a Party's military and civilian personnel (and dependants) in the other Party's territory for the purpose of a mutually determined cooperative activity. The status of forces provisions set out in the Agreement are reciprocal and apply equally to Australia and Timor-Leste.
5. Australia and Timor-Leste have a longstanding defence relationship. In 1999, Australia led the International Force East Timor to assist in the restoration of peace following Timor-Leste's successful independence referendum. After Timor-Leste's formal independence in 2002, Australia assisted with the development of the newly established military force, the FALINTIL-Forças de Defesa de Timor-Leste (F-FDTL). This

culminated in the creation of a formal Defence Cooperation Program. Under this Program, Australia provides military advice, equipment and training to the F-FDTL. The Defence Cooperation Program remains integral to our bilateral Defence relationship and to the development of the F-FDTL as a capable and professional force.

6. As Australia and Timor-Leste's defence relations mature, both Parties would benefit from a legally binding and comprehensive treaty governing defence cooperation activities between them, while establishing the status of each Party's military and civilian personnel (and dependants) when present in the territory of the other Party for the purposes of these activities.

Reasons for Australia to take the proposed treaty action

7. The Agreement would enable Australia to participate in more frequent and sophisticated bilateral military activities with Timor-Leste, a key strategic defence partner, by providing a reciprocal and legally binding framework to govern the legal status of the visiting force of one Party while present in the territory of the other for the purpose of mutually determined cooperative defence activities.
8. The Agreement also provides a clear pathway to expand and improve the quality of defence engagement with Timor-Leste in areas such as maritime operations, joint or unilateral training of military personnel, logistics support and international humanitarian assistance and disaster relief. Each of these activities reflect the maturity of Australia's bilateral relationship with Timor-Leste, and will contribute to our shared vision of a stable and secure Indo-Pacific region.
9. The Agreement would reinforce Australia's close bilateral defence relationship with Timor-Leste, deepening the bilateral military cooperation between our two countries.

Obligations

10. The Agreement comprises the main treaty text and two annexes (Annex 1 and Annex 2). Annex 1 and Annex 2 form an integral part of the Agreement, and would apply to the cooperative activities undertaken pursuant to the Agreement (Article 2(7)). The Agreement is equally authoritative in English and Portuguese.

Main text

11. The main text of the Agreement contains five (5) articles, which set out the Parties' key rights and obligations. Under Article 2(1), the Parties undertake to facilitate defence relations between each other through mutually determined cooperative defence activities. The scope of these cooperative activities includes visits and military exchanges, the provision of international humanitarian assistance and disaster relief, military education and training, the conduct of maritime military operations and associated exercises, training and education, logistics support, intelligence and information sharing, activities to enhance and broaden the interaction of Australia and Timor-Leste's respective military cultures, and other cooperative defence activities that both Parties mutually determine (Article 2(2)).

12. Any exchange of information, including classified information, would be as mutually determined between the Parties on a case-by-case basis. In the absence of a security of information instrument for the protection of classified information, the Parties may mutually determine to negotiate such an instrument (Article 2(5)).
13. The sending State may submit requests for facilities and related services for the purposes of activities under the Agreement, which the receiving State would make reasonable efforts to address. Any such facilities and services would be the subject of mutually determined arrangements (Article 2(6)).
14. Article 4 provides that any dispute regarding the interpretation or implementation of the Agreement would be resolved solely by consultation and negotiation between the Parties and would not be referred to any third party or tribunal.

Annex 1 – Status of Forces

15. Annex 1 consists of eighteen (18) legally binding articles concerning the legal status of visiting military and civilian personnel and dependants of the sending State (being the State to which the visiting force belongs) in the receiving State (being the State in whose territory the visiting force is located) while undertaking cooperative activities pursuant to the Agreement. Provisions in Articles 1-3 of Annex 1 set out joint understandings relating to local law, disciplinary matters and criminal jurisdiction. Provisions in Articles 4-18 of Annex 1 facilitate effective operation of the sending State's forces when deployed in the territory of the receiving State.

Local Law, Disciplinary Matters and Criminal Jurisdiction

16. Article 1 of Annex 1 provides that members of the visiting force and its civilian component and dependants would be subject to the laws and regulations of the receiving State, subject to Articles 2 and 3 of Annex 1. Accordingly, Australian personnel sent to Timor-Leste under the Agreement would be subject to, and must observe, the laws and regulations of Timor-Leste, subject to Articles 2 and 3 of Annex 1.
17. Article 2 of Annex 1 provides that the sending State would have exclusive competence regarding administrative and disciplinary matters, in accordance with the sending State's laws and regulations, over members of the visiting force and civilian component when in the receiving State (Annex 1, Article 2(1)). Accordingly, Australia would have exclusive competence regarding administrative and disciplinary matters over members of the Australian visiting force and its civilian component when they are in Timor-Leste under this Agreement. If the behaviour is liable to administrative or disciplinary action in the receiving State, the sending State is required to inform the receiving State of the nature of the possible punishment before carrying it out where practicable (Annex 1, Article 2(2)). The receiving State may request that the member of the visiting force or its civilian component be repatriated to the sending State for the punishment to be carried out (Annex 1, Article 2(3)).
18. Article 3(1) and (2) of Annex 1 provide that the receiving State would have exclusive criminal jurisdiction over the sending State's visiting force and its civilian component and dependants with respect to offences committed in the receiving State that are punishable by the law of the receiving State but not by the law of the sending State. The sending State would have exclusive criminal jurisdiction over its visiting force and

its civilian component and dependants who are in the receiving State, with respect to offences committed in the receiving State and punishable by the law of the sending State but not by the law of the receiving State.

19. Article 3(3) of Annex 1 provides that where the right to exercise jurisdiction is concurrent (for example, where the conduct is an offence under both the sending State's laws and the receiving State's laws) the sending State would have the primary right to exercise its jurisdiction when the offences are solely against the property or security of the sending State, are solely against the person or property of another member of the sending State's visiting force or its civilian component or dependants, or arise out of an act or omission done in the performance of official duty. The receiving State would have primary jurisdiction over all other offences. If a Party that has a primary right to exercise jurisdiction decides not to exercise jurisdiction, they are required to notify the other Party as soon as practicable. The Parties are required to give sympathetic consideration to a request to waive the primary right to exercise jurisdiction of the other Party. Such a decision may be given on conditions, including that proceedings be commenced by the requesting Party. The Parties are required to notify each other as soon as practicable of the disposition of all cases where the right to exercise jurisdiction is concurrent.
20. Article 3(4) of Annex 1 requires the Parties to cooperate in the arrest of members of the visiting force or its civilian component or a dependant and in handing them over to the authorities of the Party entitled to exercise jurisdiction. Each Party is required to promptly notify the other Party if they arrest or detain a member of the visiting force or its civilian component or a dependant where that person is subject to the primary jurisdiction of the receiving State (Annex 1, Article 3(5)-(6)). Where the receiving State will exercise jurisdiction over a member of the visiting force or its civilian component or a dependant, the receiving State is required to give sympathetic consideration to a request from the sending State that the sending State be entrusted with the custody of that person pending the conclusion of all judicial proceedings. The sending State is required to make that person available for the purposes of investigation or trial upon request (Annex 1, Article 3(7)). The Parties are to cooperate in carrying out investigations of offences, including in the collection and production of evidence (Annex 1, Article 3(8)).
21. Article 3(9)-(12) of Annex 1 sets out a number of procedural safeguards in respect of criminal proceedings that must be accorded to members of the visiting force or its civilian component or a dependant, including a list of minimum procedural safeguards. Whenever a member of the visiting force or its civilian component or a dependant is taken into custody, detained or prosecuted by the receiving State, the receiving State is required to accord that person all generally accepted procedural safeguards pursuant to the international law obligations of the receiving State and no less than those provided to its nationals (Article 3(10)). A sentence of death would not be sought, imposed or carried out by either Party over members of a visiting force or its civilian component or dependants (Section 3(12)). Where the receiving State is to exercise jurisdiction over members of a visiting force or its civilian component or dependants, proceedings would only be commenced in the courts of ordinary jurisdiction of the receiving State and would never take place under the military jurisdiction of the receiving State (Annex 1, Article 3(11)). Any person convicted or acquitted for an offence by one Party cannot

be retried by the other Party for an offence that is substantially the same (Annex 1, Article 3(9)).

Arrangements to facilitate defence cooperation activities

22. Article 4 of Annex 1 obliges each Party to take specific steps to facilitate the entry into their territory of the visiting force, its civilian component and dependants for the purpose of cooperative activities under the Agreement.
23. Article 5 of Annex 1 requires the receiving State to submit all appropriate permanent or occasional flight or ship diplomatic clearances to the sending State. Official aircraft, vessels and official motor vehicles of the visiting force and its civilian component are afforded a level of freedom of movement within the territory of the receiving State for mutually approved activities, subject to restrictions that may be imposed by the receiving State (Annex 1, Article 5(3)-(5)). Individual members of the visiting force and its civilian component are afforded freedom of movement in the territory of the receiving State for the purpose of lawful activities (Annex 1, Article 5(6)). The visiting force's vessels, aircraft and vehicles are to be subject to the same conditions in respect of harbour, airport and road taxes, fees and charges as the receiving State (Annex 1, Article 5(7)-(8)).
24. Article 6 of Annex 1 provides specific provisions regarding the importation and exportation of goods to and from the receiving State, including items that may be imported and exported free of duty and taxes (Annex 1, Article 6(1),(3)-(11)). An exemption to customs inspections is provided for documents under an official seal (Annex 1, Article 6(2)).
25. Members of the visiting force are entitled to wear uniforms while performing official duties and, if authorised by the sending State and in circumstances previously approved by the receiving State, possess and carry weapons (Annex 1, Articles 7(1) and 10). Specified types and quantities of weapons, ammunition and dangerous goods of the visiting force must be imported, transported, stored and used in compliance with the laws, regulations and policies of the receiving State (Annex 1, Article 7(2)-(3)).
26. Article 8 of Annex 1 provides understandings that the sending State and its contractors are to endeavour to purchase local goods and services for the purpose of cooperative activities while in the receiving State, and permits the sending State and its contractors to engage local labour in the receiving State while respecting the minimum standards laid down in the receiving State's laws and regulations (Annex 1, Article 8(1) and (2)).
27. Article 9 of Annex 1 provides that, except where the Agreement otherwise provides, the liability for taxes and duties of members of the visiting force or its civilian component or a dependant would be governed by any applicable agreement entered into by Australia and Timor-Leste that has been implemented under the laws of both Parties.
28. Article 11 of Annex 1 provides that both Parties are to cooperate with regard to ensuring the security of installations and areas made available in the receiving State to the visiting force, as well as their property, official records and information (Annex 1, Article 11(1)). The sending State has the right to maintain military police in order to maintain discipline and good order within the visiting force (Annex 1, Article 11(2)).

The receiving State retains responsibility for external security (Annex 1, Article 11(3)-(4)).

29. Articles 12 and 13 of Annex 1 make provisions in respect of the validity of professional, technical and trade licences and qualifications, driving licences and vehicle registrations of the sending State in the receiving State.
30. Article 14 of Annex 1 provides that the sending State may only install communication systems with the permission of the receiving State and may only operate within allocated frequencies (Annex 1, Article 14(1)-(2)). The Parties will take reasonable measures to avoid interference with each other's communications networks by communications or other electrical installations (Annex 1, Article 14(3)).
31. Article 15 of Annex 1 requires the sending State to ensure that all members of the visiting force, civilian component and dependants comply with the biosecurity laws and regulations of the receiving State (Annex 1, Article 15(3)). Members of the visiting force must also be medically and dentally fit to conduct cooperative activities upon entry into the receiving State (Annex 1, Article 15(1)). Any medical or dental fees (including with respect to aeromedical evacuation) incurred by the receiving State will be fully recoverable from the sending State (Annex 1, Article 15(2)).
32. While operating in the territory of the receiving State, both Parties are committed to act in a manner consistent with the protection of the environment, cultural heritage and human health and safety of the receiving State (Annex 1, Article 16(1)-(2)). In cooperation with the receiving state, the sending state will take appropriate measures to address any damage or potential damage made to the environment, cultural heritage, and human health and safety (Annex 1, Article 16(3)).
33. Under Article 17 of Annex 1, in the event of the death of a member of the visiting force or its civilian component or a dependant in the receiving State, the receiving State will, among other things, issue a death certificate (Annex 1, Article 17(1)-(2),(5)). Subject to the laws and regulations of the receiving State, the sending State would have the right to take, retain charge of, and make arrangements for the disposition of the remains of the deceased person upon notification from the receiving State. If requested and circumstances permit, the receiving State would be required to assist with arrangements to return the deceased's remains to the sending State (Annex 1, Article 17(3)). If a member of the visiting force or its civilian component is believed to be dead but their remains have not been recovered, the sending State is permitted to be involved in the search and recovery of those remains, subject to the receiving State's laws and regulations (Annex 1, Article 17(4)).
34. The purpose of Article 18 of Annex 1 is for the Parties to assist each other in carrying out accident investigation involving the official aircraft, vessels or vehicles of the sending State, subject to international law and the laws and regulations of the receiving State (Annex 1, Article 18(1)). It is intended that, at the request of the receiving State, members of the visiting force and its civilian component would assist the receiving State to secure the site and take custody of all wreckage resulting from all accidents or incidents involving official aircraft, vessels or vehicles of the sending State wherever possible (Annex 1, Article 18(2)).

Annex 2 – Claims

35. Annex 2 consists of two (2) legally binding articles outlining the handling of claims between the Parties, and with third parties arising from an act or omission of the Parties' military or civilian personnel, while undertaking cooperative activities pursuant to the Agreement.
36. Article 1 of Annex 2 requires both Parties to waive all claims against the other Party arising from loss or damage to property owned by a Party and used by its force where the loss or damage arose in connection with official duty; maritime salvage for vessels or cargo used by a Party for official purposes; and injury or death suffered by a member of a Party's military or civilian personnel while engaged in the performance of official duty, except where that injury or death resulted from gross negligence or wilful misconduct of that Party's military or civilian personnel (Annex 2, Article 1(1), (4)). Where both Parties mutually determine that a claim arises from a reckless act or omission, gross negligence or wilful misconduct of a member of a Party's military or civilian personnel, the Party to whom that member belongs will be solely responsible for the claim (Annex 2, Article 1(2)). All other claims against each other are to be settled through consultation (Annex 2, Article 1(3)).
37. Article 2 of Annex 2 outlines the handling of third party claims brought as the result of an act or omission of the Parties' military or civilian personnel in the performance of their official duty, which cause loss or damage to property and/or injury or death to third parties in the receiving State. Such third party claims would be settled or adjudicated in accordance with the receiving State's laws. The receiving State would make any payments arising from such a claim, and would notify the sending State of the payment and propose a distribution of the cost incurred based on the provisions in the Agreement. Under these provisions, where the sending State is determined to be solely responsible for the damage, loss, injury or death, it would meet the costs of the claim in full. Where both Parties are deemed responsible, the amount would be apportioned between the Parties based on their degree of responsibility. Where the degree of responsibility cannot be attributed to either Party, the amount would be distributed equally between the two Parties (Annex 2, Article 2(1), (3)).
38. The sending State forfeits the right to claim immunity from the civil jurisdiction of the courts of the receiving State with respect to any act or omission by a member of its visiting force or civilian component or dependants in the receiving State (Annex 2, Article 2(2)).

Implementation

39. Cooperative activities are to be implemented by the Parties' national defence organisations (the Department of Defence of Australia and the Ministry of Defence of Timor-Leste, respectively). Cooperative activities may be defined by means of agreements or arrangements (Article 2(3)). The coordination of cooperative activities would be undertaken using existing mechanisms for military and defence consultation, unless otherwise mutually determined by the Parties (Article 2(4)).
40. In the event that any legislative or regulatory action is required to ensure consistency with the Agreement, this would be completed by the time of entry into force of the Agreement for Australia.

41. The Agreement will not effect any change to the existing roles of the Commonwealth Government or the State and Territory Governments.

Costs

42. Each Party would bear its own costs of participation in cooperative activities pursuant to the Agreement, unless otherwise mutually determined by the Parties (Article 3).

Future treaty action

43. In accordance with Article 5(2), the Agreement may be amended at any time where both Parties agree in writing. Any amendment would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties. Any amendment would enter into force on the date that the last Party presents written notification, through diplomatic channels, confirming that it has completed its domestic requirements for entry into force of the amendment.

Termination

44. In accordance with Article 5(3), the Parties may terminate the Agreement at any time where both Parties agree in writing. Either Party may give written notice of termination to the other Party at any time, in which case the Agreement shall terminate 180 days after receipt of written notice by the other Party.
45. Obligations relating to protection of information, jurisdiction, claims, and disputes would continue to apply under the Agreement after termination in accordance with Article 5(4).

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ATTACHMENT ON CONSULTATION

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CONSULTATION

Commonwealth Departments

1. The Department of Defence consulted with the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, and Attorney-General's Department. No concerns have been identified.

State and Territory Governments

1. State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No requests for further information or comments on the Agreement have been received to date from the State and Territory Governments. No action will be required from States or Territories to implement the Agreement.