

National Interest Analysis [2024] ATNIA 12

with attachment on consultation

Exchange of Notes to extend the Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to Amend and Extend the Agreement concerning the Conduct of Scientific Balloon Flights for Civil Research Purposes of 16 February 2006

(Canberra on [date to be confirmed])

[2024] ATNIF 17

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is an exchange of notes between the United States of America (US) and Australia constituting an agreement to extend until 12 June 2032 the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to Amend and Extend the Agreement concerning the Conduct of Scientific Balloon Flights for Civil Research Purposes*, done at Canberra on 16 February 2006 ([2006] ATS 8) (Agreement).
2. The Agreement was originally concluded in 2006, with retrospective effect from 2002. The Agreement was extended through an exchange of notes in 2012 for ten years. The Parties have agreed the extension of the Agreement will be for ten years with retrospective effect from 12 June 2022.

Overview and national interest summary

3. Operational-level cooperation with the United States (US) on space-related activities began in 1957 with the establishment of facilities at Woomera in South Australia to track US satellites. This was broadened to include additional scientific facilities set up by the US National Aeronautics and Space Administration (NASA) in 1960. Since then, the civil space relationship between Australia and the US has been the subject of successive agreements and exchanges of notes, under which NASA has spent in excess of \$1 billion on space-related activities in Australia.
4. The treaty action is the extension of the Agreement, which enables NASA to use the facilities and services for scientific balloon launchings and recoveries in Australian territory, tracking and telemetering of information from each balloon, and the recording and sharing of information from these flights. The extension of the Agreement will continue the long-standing and fruitful cooperation in space-related activities between Australia and the US including enhanced collaboration between Australian and NASA scientists. Australia's established cooperation with NASA on balloon flights to date has proven politically, scientifically and economically advantageous.

Reasons for Australia to take the proposed treaty action

5. Australia first entered into an agreement with the US regarding the conduct of scientific ballooning activities in Australia in 1984 ([1984] ATS 32). In 1985, a further agreement was concluded that related to the launching of long duration balloon flights

- financial arrangements in relation to the programs (that is, a balloon campaign from commencement to conclusion);
- provision of facilities and services for balloon launchings and recoveries;
- tracking and telemetering of information from each balloon;
- recording and sharing of information from each balloon; and
- publication of information concerning the programs.

12. Article 2 provides that the US Government must coordinate any necessary support activities with other countries and must comply with Article 8 of the *Convention on International Civil Aviation* (Chicago Convention). Article 8 of the Chicago Convention requires that pilotless aircraft flown over the territory of a Chicago Convention state to have special authorisation by that State, and that the State conducting the activity undertakes to ensure that the flight shall be so controlled as to obviate danger to civil aircraft. Article 2 also directs the Parties to the conditions relating to ‘Unmanned Free Balloons’ set out in Appendix D of Annex 2 to the Chicago Convention.

13. Under Article 3, CSIRO may permit balloon flight to occur, upon receipt of advice from NASA that all steps required by Article 8 of the Chicago Convention have been taken. CSIRO is not obliged to permit balloon flight where it has not received this advice, or not all required steps have been taken.

14. Article 4 states that should a flight end prematurely in a third country, the US Government shall be responsible for recovery of the balloon and its payload. Recovery shall be subject to the third country’s laws and regulations.

15. Article 5 states that each party must not make any claims against the other party, its employees, contractors or subcontractors arising from any activities performed under the Agreement. The claims envisaged in Article 5 are those related to any injury to, or death of a party’s employees, contractors or subcontractors or for damage to, or loss of either party’s property whether such damage results from negligence or otherwise, except in the case of wilful misconduct. Article 5 does not limit the application of criminal laws of either party.

16. Article 6 states that the US Government must be responsible for any meritorious claims brought against the Australian Government by third parties for personal injury (including death) or damage to, or loss of property, caused by NASA, its employees, contractors or subcontractors, within or beyond Australia’s territorial jurisdiction, resulting from activities carried out on behalf of the US Government under the Agreement. The Australian Government recognises that any payment required to be paid by the US Government pursuant to Article 6 is subject to appropriation of specific funds for this purpose by the US Congress. Article 6 provides that meritorious claims include judgements awarded by courts of competent jurisdiction.

17. Article 7 provides that, where a claim is made against the Australian Government pursuant to Article 6, the Australian Government must notify the US Government within one calendar month of the receipt of the claim. The US Government must be permitted to assist in the defence of any such action by providing information and advice.

18. Article 8 provides that when NASA is conducting balloon operations in Australia, it must use its best efforts to assist Australian scientists that wish to carry out balloon-based

beyond Australia ([1985] ATS 23). In 1992 these two agreements were merged ([1992] ATS 26) and renewed for a further ten years. Following the expiry of the 1992 Agreement in 2002, a new and updated treaty was concluded in 2006 at the request of the US Government. The Agreement was extended in 2012, until 12 June 2022. It is the Agreement entered into in 2006, and extended to 12 June 2022, that is the subject of the proposed extension.

6. Over the last four decades many ballooning campaigns have been conducted by NASA from the Alice Springs Ballooning Facility. At times Australian scientists have flown their own experiments or have been collaborators in experiments with other scientists, allowing Australian scientists to take advantage of, and be involved in, flights launched in Australia.

7. Individual ballooning campaigns have included the launch of 13 different scientific experimental payloads, and 11 different scientific teams from the US, Japan and France converging on Alice Springs, sometimes for up to four months. The teams launch experiments to study matters such as black holes and quasars and conduct experimental research into atmospheric and environmental science. Extension of the Agreement would enable Australian scientists to continue to benefit from such research and will further ensure that Australia remains entitled to receive data and other results from any ballooning experiments conducted.

8. The scientists involved in each balloon campaign are supported by a NASA launch team, which in turn receives local support from the Australian Government through the Commonwealth Scientific and Industrial Research Organisation (CSIRO), and the University of New South Wales, Canberra. Each balloon campaign can involve up to forty people living in Alice Springs for the campaign duration. This provides considerable direct economic benefits to Australia, with CSIRO estimating that each campaign contributes in excess of \$5 million to the economy.

9. In addition to the considerable scientific and economic benefits which would arise from continued cooperation under the Agreement, its extension would also confirm Australia's political commitment to continued cooperation with the US on space and scientific research.

Obligations

10. The exchange of notes between the US and Australia to extend the Agreement involves the Parties agreeing, pursuant to Article 18(a) of the Agreement, to extend the Agreement until 12 June 2032, with retrospective effect from 12 June 2022, and that the exchange of notes constitutes the Parties' agreement to the extension. Article 18(a) of the Agreement provides, among other things, that the Agreement can be extended by the agreement of the Parties. Paragraphs 11 to 27 following set out details of the obligations provided in the Agreement that the Parties intend to extend.

11. Article 1 of the Agreement provides that NASA and CSIRO must mutually determine and set out in a cooperating agency arrangement, between the two parties, the:

- allocation of technical and operations responsibility with respect to the launchings and recoveries in Australia;

experiments, subject to a satisfactory conclusion of a written arrangement covering operations, payment of fees and liability between NASA and the Australian sponsoring institution or organisation.

19. Article 9 obliges the parties to transfer technical data including software and goods necessary to undertake each party's respective obligations under the Agreement, in accordance with the following provisions:

- All activities must be carried out in accordance with each party's national laws and regulations, including those pertaining to export control and the control of classified information (Article 9, paragraph 1);
- The transfer of technical data for the purpose of discharging the parties' responsibilities with regard to interfacing, integration and safety must normally be without restriction, except as provided in Article 9, paragraph 1 (Article 9, paragraph 2);
- Transfers of proprietary or export-controlled goods and technical data are subject to additional conditions, including that each party must abide by identification or marking requirements and protect any such identified goods or data from unauthorised use or disclosure. The parties must cause their related entities (contractors, subcontractors, grantees or cooperating entities) to comply with these conditions through contractual mechanisms or equivalent measures (Article 9, paragraph 3); and
- Proprietary or export-controlled goods and technical data exchanged in the performance of the Agreement, must be used exclusively for the purposes of the Agreement. The receiving party or related entity must return or destroy the said goods or data at the request of the furnishing party or related entity (Article 9, paragraph 4).

20. Article 10 provides that the US Government retains title to equipment, materials, supplies and other movable property provided by or acquired in Australia by it or on its behalf at its own expense for the purpose of activities under the Agreement. The US is entitled to remove any such property at its own expense free from export duties either on termination of the Agreement or upon reasonable notice to the Australian Government. The US Government must not dispose of such property within Australia except in accordance with the *Exchange of Notes constituting an Agreement concerning the Disposal of United States Government Excess Property in Australia*, done in Canberra on 9 November, 1973 (Excess Property Agreement). If, however, the Excess Property Agreement has terminated, disposal will take place on conditions acceptable to both parties.

21. Article 11 obliges the Australian Government, in accordance with its laws, regulations and procedures to facilitate entry and exit of any US Government or NASA personnel (employees, staff, consultants and contractors) who are not normally resident in Australia, in connection with the activities provided for in the Agreement.

22. Article 12 provides that the personal and household effects of the US Government or NASA personnel referred to in Article 11, must be permitted free entry, in accordance with Australian customs law in effect at the date such goods are imported.

23. Article 13 provides that the activities under the Agreement are subject to the availability of appropriated funds.

24. Article 14 provides that US personnel (that is, US nationals not ordinarily resident in Australia who are employees of the US Government or NASA) sent to Australia for the purposes of activities under the Agreement shall be exempt from income tax in accordance with the *Convention between Australia and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, 1982*, as amended by the 2001 Protocol (Convention) and the domestic laws of Australia. Other persons engaged and employed for the purposes of activities under the Agreement remain subject to Australian taxation laws (as modified by the Convention).

25. Under Article 15, the Australian Government must take the necessary steps to facilitate the admission into Australia of US Government equipment, materials, supplies and other property provided by or on behalf of the US Government in connection with activities under the Agreement. Duties, taxes or like charges must not be levied on such property. Article 15 also provides that Australia must refund indirect federal taxes in respect of equipment, materials, supplies and other property and services purchased in Australia and certified as being for use in connection with activities under the Agreement.

26. Article 16 obliges parties to consult promptly on issues involving interpretation or implementation of the Agreement. Disputes must be referred to the program managers of the cooperating agencies, and otherwise to the parties or their designated representatives for joint resolution.

27. Article 17 obliges the US Government to use Australian resources in activities under the Agreement to the maximum extent practicable.

Implementation

28. No changes are required to existing legislation to implement the extension of the Agreement. The extension of the Agreement does not amend or create new obligations.

29. Australia has already given effect to, and complies with those obligations under the Agreement that required domestic implementation, namely Articles 11, 14 and 15,

30. With respect to Articles 14 and 15, the provisions of the *Taxation Administration Act 1953* (with recourse to *Taxation Administration Regulations 2017*) require refunds for indirect tax paid by a specified entity if the Commonwealth is under an international obligation to grant indirect tax concessions to that kind of entity. *A New Tax System (Goods and Services Tax) Act 1999* also permits (with recourse to the *Customs Act 1995 (Cth)*) that importation of goods of a scientific nature and covered by an agreement between Australia and another country are non-taxable and duty-free.

31. With respect to Article 11, an implementing arrangement between the parties provides that the now-Department of Industry, Science and Resources will assist with obtaining the relevant immigration clearances required for balloon programs (through the Department of Home Affairs).

Costs

32. No additional costs to Australia are anticipated as a consequence of the extension of the Agreement.

33. NASA, through its contractual arrangements with CSIRO, funds CSIRO to maintain the Alice Springs Ballooning Facility (this includes costs of the establishment, operation and maintenance of the balloon launching facilities in Australia). NASA is also responsible for relevant remediation work.

Impact Analysis

34. The Office of Impact Analysis has advised that an Impact Analysis is not required. The reference number for this proposal is OIA23-05051.

Future treaty action

35. Article 18(a) provides that the Agreement may be extended by the agreement of the parties. Any further extension would be subject to Australia's domestic treaty-making process.

Withdrawal or denunciation

36. Article 18(b) of the Agreement allows either party to terminate the Agreement by giving written notice of termination through the diplomatic channel after consultations have occurred. Termination would take effect one year after the date of written notice and would be subject to Australia's domestic treaty-making processes.

Contact details

Space and Astronomy
Digital, National Facilities and Collections
Commonwealth Scientific and Industrial Research Organisation

ATTACHMENT ON CONSULTATION

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CONSULTATION

1. CSIRO sought the views of the following Australian Government agencies during the negotiation of the proposed extension of the Agreement:
 - Department of Foreign Affairs and Trade;
 - Attorney-General's Department;
 - The Treasury;
 - Department of Infrastructure, Transport, Regional Development, Communications and the Arts;
 - Department of Defence;
 - Department of Home Affairs - Immigration and Citizenship.
 - Australian Communications and Media Authority;
 - Bureau of Meteorology;
 - Geoscience Australia;
 - Department of Industry, Science and Resources; and
 - Australian Space Agency.
2. No requests for amendment or further information concerning the Agreement were received from these agencies.
3. States and Territories were advised of the intention to extend the Agreement through the Standing Committee on Treaties process. No comments were received.