Jeff Bleich Centre for Democracy and Disruptive Technologies

18 March 2024

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

AGREEMENT BETWEEN THE GOVERNMENT AUSTRALIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON TECHNOLOGY SAFEGUARDS ASSOCIATED WITH UNITED STATES PARTICIPATION IN SPACE LAUNCHES FROM AUSTRALIA

We thank the Joint Standing Committee on Treaties ('**JSCOT**') for the opportunity to make a submission regarding the *Agreement between the Government Australia and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from Australia* ('**TSA**').

The Jeff Bleich Centre for Democracy and Disruptive Technologies ('**JBC**') is a research centre within Flinders University's College of Business, Government and Law. It is the mission of the JBC to be the expert voice on how to strengthen the core values and institutions of democratic societies in a world where technology constantly disrupts the status quo. The JBC has a research concentration on space and national security.

It is the view of the JBC that the TSA is in Australia's national interest.

The TSA is a measure that has been called for from various segments of the Australian space industry for an extended period. This included during submissions to the House of Representatives Standing Committee on Industry, Innovation, Science and Resources' 2020 and 2021 inquiry into developing Australia's space industry.[i]

It is our view that the TSA as signed by Australia and the United States ('**US**') achieves the desires of the space industry.

1. Purpose and Role

We note that there has been some adverse reporting on the TSA following its tabling in the Parliament in February 2024. Concerns have included suggestions that the TSA cedes Australian sovereignty and restricts potential future collaboration. It is our view that this is not the case and, in some instances, misrepresents the purpose of the TSA.

The TSA serves a narrow purpose; it is (and always has been) intended to facilitate the importation of US-sourced launch vehicles and spacecraft to Australia by US entities for launch. The TSA meets US legal requirements regarding the export of Category I Missile Technology Control Regime regulated technology.

The TSA has never been presented as allowing technology sharing between Australian and US businesses. Nor has it ever been suggested that a TSA would enable Australian businesses to avoid the US's International Traffic in Arms Regulations and export control laws. US businesses seeking to bring their launch vehicles and other spacecraft to Australia will still need to seek export licences from the relevant US authorities.

With this narrow purpose in mind, the TSA achieves its goal.

2. Opening Australia to US Businesses

The TSA will enable US-based entities to consider Australia as a viable location to launch their vehicles or spacecraft.

There are several businesses in Australia that will benefit from the TSA. Firstly, those developing launch facilities. The TSA will enable these businesses to approach US-based businesses to launch their vehicles from Australian territory. Without the TSA, these businesses would effectively be prohibited from hosting US-based businesses at their facilities. Secondly, those Australian-based businesses seeking to develop their own launch capabilities could use the mechanisms in the TSA to allow them to act as launch service providers for US manufactured spacecraft. Thirdly, those businesses seeking to facilitate the return and recovery of spacecraft from outer space to Australian territories will be enabled by this agreement.

Without the TSA, these Australian businesses are unlikely to be able to provide the above services.

3. Areas of Concern

The text of the TSA does present some concerns. It is our view that these concerns are not fatal, with the potential benefits of the TSA outweighing the potential disadvantages of adopting the TSA.

3.1. *Restrictions on use of funds*: Article III(2) appears to restrict how Australia can use funds raised as a consequence of launch activities. We recognise that this provision as drafted is not as restrictive as comparable provisions in technology safeguards agreements the US has in place with other countries.[ii] The ability for funds derived from launch activities subject to the TSA to enter consolidated revenue and then be distributed to technology development programs appears to undermine the provision. The Australian Government should consider releasing further guidance on the material consequences of Article III(2).

3.2. *Restrictions on working with other countries:* While Articles III(3)(a)-(b) appear to be highly restrictive in who Australian businesses are able to work with, we are of the view that the provisions are unlikely to be any more restrictive than existing aspects of Australian law on technology sharing and sanctioned or terrorist-supporting countries.

3.3. *Politically binding agreements:* Article III(3)(e) is a complex provision. This provision appears to require Australia to enter into 'politically binding agreements' with countries that have jurisdiction over entities involved in launches of non-US launch vehicles where a US-sourced spacecraft is on that non-US launch vehicle.

This could be a prohibitive requirement. This is especially the case if a non-US launch vehicle was to be launched from Australia with payloads from the US as well as other countries. This could lead to launch service providers offering dedicated launches from Australia for US-sourced spacecraft on a non-US launch vehicle and other launches for non-US sourced spacecraft on the non-US launch vehicle. This could cause launches for US spacecraft from Australia to become cost prohibitive.

The Australian Government should consider proactively entering into the required politically binding agreements to ensure this requirement does not become a barrier to US businesses entering Australia.

3.4. *Further Agreements:* While we understand that not all detail could be included in the TSA, the ability to enter into future agreements or side arrangements could negatively impact on the operation of the TSA and the Australian space industry. The Australian Government

should take steps to ensure it continues to engage with industry on a regular basis on the operation of the TSA and any side arrangements (or potential side arrangements).

We also note that one such side agreement was released following the TSA's tabling in the Parliament: *Arrangement between the Government of Australia and the Government of the United States of America relating to the Agreement between the Government of Australia and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from Australia* dated 15 February 2024.

3.5. *Restrictions on access to covered technology:* We understand that the restrictions on access (including the establishment of controlled and segregated areas) to US technology are a requirement for the TSA. The requirements in the TSA may appear to be overly oppressive or restrictive to those not involved in covered activities or without an understanding of technology control laws.

We strongly encourage the Australian Government to consider producing publicly accessible materials that set out why these requirements are necessary and the checks and balances that are in place to protect Australia from any negative consequences.

3.6. *Regulatory Changes:* We understand that the Australian Government is of the view that legislative or regulatory changes are not required to bring the TSA into force.

We understand that existing authorities, such as those contained in ss 22(2)(b) and 56(2)(b) of the *Space (Launches and Returns) (General) Rules 2019* (Cth) will be utilised to impose conditions on launch facility licences and Australian launch permits that reflect the obligations contained in the TSA.

While we welcome confirmation that the Australia Government will be implementing its obligations under the TSA, we express concern with the proposed approach. While the existing authorities, such as those noted above, may provide a clear basis to impose obligations on Australian businesses that reflect the content of the TSA, we find that this approach is not transparent, nor will it always be sufficient to address all possible circumstances in the TSA that require implementation. We would recommend the Australian Government, once it has determined the baseline and consistent requirements it will impose in reliance on the TSA, proceed with regulatory changes to ensure that the public is put on notice as to the 'standard conditions' that will attach to authorisations involving US launch vehicles and spacecraft being launched from Australia. This will ensure regulatory certainty.

The Australian Government has not advised of specific authorities it intends to rely upon to enforce Article V(2) of the TSA. Article V(2) requires Australia to prohibit the 'retransfer' of technology or information falling within the scope of the TSA without the consent of the US Government. It is conceivable that a person subject to Australia's jurisdiction could retransfer captured technology or information and not be subject to the conditions contained in an authorisation granted under the *Space (Launches and Returns) Act 2018* (Cth). We note that the National Interest Analysis makes mention of the *Defence Controls Act 2018* (Cth), *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), *Crimes Act 1914* (Cth), *Biosecurity Act 2015* (Cth) and *Customs Act 1901* (Cth) as relevant. We would ask the Australian Government to clearly identify the provisions of these instruments that enact the content of the TSA to ensure that the general public is on notice as to the laws that apply within Australia. This would ensure regulatory certainty for those directly involved in activities falling within the scope of the TSA, ensure the public is aware of how Australian laws are implementing international obligations and follows the

general common law position that international obligations are not directly enforceable within Australia without enabling legislation.

3.7. *Competition:* We understand that some participants in the Australian space industry have raised concerns that the TSA will negatively impact on the development of an Australian launch capacity by preferencing US businesses. We disagree with this position.

As has been suggested above, the TSA will enable several Australian businesses to provide services to US businesses (including the use of launch facilities in Australia). These are services that could not be provided without the TSA being in place.

Furthermore, the compliance obligations in the TSA are not trivial and will impose real restrictions on Australian access to US technology being used in Australia. It will take Australian businesses significant effort to comply with the TSA's requirements, meaning they will need to have both the will and means to host US businesses in Australia.

The TSA opens new opportunities for some Australian businesses, including the placement of Australian-built payloads on flight-proven US developed launch vehicles. Orbital launches from Australia are not yet possible. While the TSA may introduce competition for Australian businesses seeking to develop these capabilities domestically, competition is essential to the operation of competitive markets. Competition drives down prices, leads to innovations and is ultimately beneficial to Australian businesses and consumers.

It is our view that the TSA is in the Australian interest and should enter into force. The possible negatives are outweighed by the possible benefits the TSA could enable.

We hope this Submission is of assistance to the JSCOT. We are available to answer any questions regarding the content of this submission.

Regards

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[i] See the House of Representatives Standing Committee on Industry, Innovation, Science and Resources, *The Now Frontier: Developing Australia's Space Industry* (Commonwealth of Australia, November 2021) 103-5 [4.55]-[4.60] and the submission of Southern Launch, Gilmour Space Technologies and Equatorial Launch Australia dated 29 January 2021 which recommended the execution of a US-Australia Technology Safeguards Agreement (page 5).

[ii] See, *Agreement between the Government of New Zealand and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from New Zealand*, signed 16 June 2016, NZ Treaty Code B2016-07, Art III(1)