

**Documents tabled on 14 May 2008:**

**National Interest Analysis [2008] ATNIA 15**

**with attachment on consultation**

**Treaty between the Government of Australia and the Government of  
the United States of America concerning Defense Trade Cooperation,  
done at Sydney on 5 September 2007  
[2007] ATNIF 31**

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### SUMMARY PAGE

**Treaty between the Government of Australia and the Government of  
the United States of America concerning Cooperation in Defense Trade,  
done at Sydney on 5 September 2007  
[2007] ATNIF 31**

#### **Nature and timing of proposed treaty action**

1. The proposed action is to bring the *Treaty between the Government of Australia and the Government of the United States of America concerning Cooperation in Defense Trade* (the Treaty) into force through an exchange of notes. The Treaty was signed by the former Prime Minister of Australia, John Howard, and the President of the United States of America (USA) George W. Bush, in the sidelines of the 19<sup>th</sup> APEC Ministerial Meeting in Sydney, Australia. When the Treaty enters into force, a non-binding ‘Implementing Arrangement,’ concluded by the parties to facilitate the implementation of the Treaty, will come into effect.

2. Article 20 of the Treaty provides that it shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic requirements to bring the Treaty into force. Before Australia can exchange notes, the Commonwealth must enact legislation to incorporate Australia’s rights and obligations under the Treaty into our domestic system. The US Senate must pass the Treaty with a two-thirds majority before the USA can exchange notes.

#### **Overview and national interest summary**

3. The purpose of the Treaty is to enable greater access and sharing of defence equipment, technology, information and services between Australia and the USA. It is a significant step forward in our long-standing defence cooperation relationship with the USA. The only other country that the USA has a similar agreement with is the United Kingdom.

4. The Treaty establishes a bilateral framework to reduce barriers (including requirements for licences or other written authorisations) to the exchange and trade of classified and unclassified but ‘controlled’ defence goods, services and technology between certain pre-approved US and Australian government facilities and private companies. Those ‘controlled’ items are regulated in the USA under its International Traffic in Arms Regulations and in Australia under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* (Cth). The Treaty will apply to “Defense Articles” (as defined in the Treaty) required for combined military or counter-terrorism operations; cooperative security and defence research, development, production and support programs; mutually determined specific security programs where the Australian Government is the end-user; and US Government end-use.

5. The Australian Defence Force (ADF) will benefit from the Treaty through faster and easier acquisition of and support for US-defence technology over the life cycle of that equipment, by-passing the time consuming US International Traffic in Arms Regulations.

## **Reasons for Australia to take the proposed treaty action**

6. The Treaty will improve the interoperability of the Australian and US armed forces by facilitating the movement and maintenance of Defense Articles in support of certain mutually agreed activities and operations, while maintaining and ensuring proper safeguards against the unauthorised release of defence technology and equipment.

7. The benefits of the Treaty will extend to Australian defence industry by opening new avenues for industrial cooperation and allowing for effective partnering and technology sharing. The Treaty will permit the transfer of equipment to members of the 'Approved Community.' The Approved Community consists of governmental entities and private companies, which have been accredited in accordance with article 4 of the Treaty, for Australian entities, and article 5 of the Treaty, for US entities. This will facilitate the involvement of Australian companies in support work for the ADF and for US defence programs. A particular benefit will be timely access to US technology and the ability to share technical data without the need for a licence, which will reduce lead times in discussing potential business opportunities and improve the prospects for Australian companies seeking to participate in US defence programs.

8. Australian members of the Approved Community that support ADF equipment will save significant time through licence-free movement of Defense Articles and related intangible data within the Approved Community. The US Department of State has advised that it approved 2,361 licences and 312 technical data agreements for Australia in 2006. The Treaty will eliminate the requirement for a number of these approvals, each of which can take three months or more. Transfers and exports of Defense Articles outside the Approved Community will still require normal US and Australian export licences.

9. Failure to bring the Treaty into force would mean the ADF and Australian defence industry would have to continue to abide by the time consuming licensing requirements of both Australia and the USA for trade in defence technology, equipment and services. It could potentially mean that the ADF would experience delays in obtaining support of and maintenance for its US-sourced equipment in an operational setting that could be avoided if the Treaty was in force.

10. Australia has a long-standing alliance with the USA, which is the foundation for our extensive cooperation in defence and security matters. Australia's close relationship with the USA enhances our ability to protect our interests by providing access to leading-edge defence hardware and technologies, access to training courses and combined exercises, and to vital intelligence capabilities.

11. The USA is Australia's most important partner in defence and security matters. It is because of our close relationship that the Treaty was proposed.

## **Obligations**

12. The purpose of the Treaty, in article 2, is to provide a framework which will allow the export and transfer of Defense Articles pursuant to the Treaty without a licence or other written authorisation.

### *Approved Community*

13. Under articles 4 and 5 respectively, Australia and the USA agree to establish, maintain and monitor an Approved Community of government facilities and non-government companies. Only members of the Approved Community will be able to operate within the transfer and export system established by the Treaty.

### *Security Procedures*

14. Articles 6, 8 and 11 require each Party to establish procedures to ensure that all Defense Articles are clearly marked or identified as being traded pursuant to the Treaty at various points of their movement. These procedures are intended to ensure that security measures for handling such sensitive items are followed during their movement. Further, article 11 provides that each Party must respect its obligations under the *Security Agreement between the Government of Australia and the Government of the United States of America concerning Security Measures for the Protection of Classified Information [2002] ATS 25* in marking, identifying, transmitting, storing and handling the Defense Articles.

### *Recordkeeping and Notification*

15. Article 12 provides that each Party must require the entities within its Community maintain detailed records of their movement of Defense Articles. Further, each Party agrees to make such records available to the other Party upon request. These obligations are intended to allow each Party to monitor the compliance of the procedures established pursuant to the Treaty by the members of the Approved Community.

### *Approved Community Exports and Transfers*

16. Under article 8, Australia agrees to ensure that members of the Approved Community shall be permitted to export Defense Articles within the Approved Community without seeking a licence or authorisation for each export. Australia must ensure that “Australian Defence Articles” (which are Defense Articles exported from Australia to the USA) are clearly marked and identified as articles exported to the USA under the Treaty.

17. Under article 6, the US Approved Community may export and transfer Defense Articles to Australia pursuant to the Treaty, without prior licenses or authorisations by the US Government.

18. Under article 3(1), the Treaty covers Defense Articles used for: combined military or counter-terrorism operations; cooperative security and defence research, development, production and support programs; mutually determined specific security programs where the Australian Government is the end-user; and US Government end-use.

### *Re-transfers and Re-exports*

19. Under article 9, Australia agrees that all ‘re-transfers’ and ‘re-exports’ of Defense Articles shall require the approval of both the Australian and United States

Governments. The Treaty allows for certain mutually determined exceptions, such as where the Defense Article is destined for operational use in direct support of ADF personnel. This provision will streamline the provision of US-origin articles to ADF units on operations outside Australia and the maintenance of such articles. Article 1 defines 'Re-transfer' to mean the movement of Defense Articles, that have been exported from the US to Australia, to a location within the territory of Australia. Article 1 also defines 'Re-export' to mean the movement of Defense Articles, that had been exported from the US to Australia, to a location outside the territory of Australia.

#### *Compliance and Enforcement*

20. Under article 13, each Party agrees to investigate promptly all suspected violations and reports of alleged violations of the Treaty. Additionally, each Party agrees to cooperate with the other Party on investigations of suspected violations of the Treaty, and to keep each other informed of the progress of prosecutions and any civil or administrative actions taken in relation to the Treaty. The Parties may also conduct post-shipment verifications and end-use or end-user monitoring of exports and transfer of the Defense Articles and at the request of either Party, provide assistance to each other on such matters.

#### *Implementing Arrangement*

21. Pursuant to article 14 of the Treaty, Australia and the USA have concluded an Implementing Arrangement that details the way in which the Treaty will be implemented in both countries. The *Implementing Arrangement pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation* was signed on 14 March 2008 and will come into effect on the date of entry into force of the Treaty. The Implementing Arrangement supplements the provisions of the Treaty by prescribing detailed procedures and standards to be adopted by the Parties. It is not, however, an instrument of treaty status.

#### *Consultations*

22. Under article 17, Australia and the USA agree that consultations at a senior level to review the operation of the Treaty will be carried out at least annually.

#### **Implementation**

23. It is proposed that the Commonwealth implement legislation to give the Treaty effect in domestic law. New legislation is required to create a framework for licence-free trade in Defense Articles with the USA and to ensure compliance and enforcement with the terms of the Treaty. It is proposed to introduce legislation in Parliament in late 2008 or early 2009.

24. The Australian agency authorised to implement the Treaty, under article 15, is the Department of Defence.

## **Costs**

25. Entry into force of the Treaty will result in costs to the Australian Government. These costs would be associated with the establishment and maintenance of the Approved Community, including security assessments for applicants, and providing resources for the administration and enforcement of the Treaty. Costs have been estimated at \$26.8m for the first year, and \$26.7m for each year after that. These costs will be met from within the Department of Defence's budget.

26. Entry into force of the Treaty will not result in mandatory costs for industry, since operating within the framework of the Treaty is voluntary. Companies that are involved in defence projects for Australian or US Government end-use are eligible to apply for membership of the Approved Community should they wish. Companies are under no obligation to apply for Approved Community membership. If a company applies for membership, it will have to undergo an eligibility assessment, which will involve checks by Australian Government officials to ensure satisfactory standards of physical, information and personnel security are in place and can be maintained. Therefore, costs for companies of developing and maintaining security standards will differ depending on what already is in place.

27. Australian State and Territory governments will bear no costs associated with ratification of the Treaty.

## **Regulation Impact Statement**

28. A Regulation Impact Statement is not attached. Due to the process by which the Treaty was negotiated and signed, a Regulation Impact Statement was not prepared in accordance with the best practice regulation requirements. Accordingly the Office of Best Practice Regulation has advised that the Treaty and its implementation will be subject to a Post Implementation Review by the Office of Best Practice Regulation within one to two years of the Treaty being put into effect.

## **Dispute Resolution**

29. Article 18 provides that any disputes between the Parties concerning the Treaty shall be resolved through consultation between the Parties and will not be referred to any court, tribunal or third party.

## **Future treaty action**

30. Under article 19, the Treaty may be amended by written agreement of the Parties. Any amendments would be subject to Australia's domestic treaty process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties.

## **Withdrawal or denunciation**

31. Under article 21(1), the Treaty is of unlimited duration, unless either party withdraws in accordance with article 21(2). Article 21(2) provides that each Party has the right to withdraw from the Treaty if it decides that extraordinary events related to the Treaty have jeopardised its national interests. In such event, the Party must give notice of its intention to withdraw to the other Party. Such notice of intention to withdraw must include a statement of the extraordinary events the notifying Party regards as having jeopardised its national interests. The Parties must then consult with the aim of allowing the continuation of the Treaty. If, after such consultation, the notifying Party still wishes to withdraw, such withdrawal will take effect upon the expiry of six months from the provision of the notice of intention to withdraw. In the event of withdrawal, the procedures for protection of Defense Articles will continue until such time as appropriate defence export licences or other authorisations are in place.

32. Withdrawal from the Treaty by Australia would be subject to Australia's domestic treaty process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties.

### **Contact details**

Defence Export Control Office  
Strategy Division  
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ATTACHMENT ON CONSULTATION

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**CONSULTATION**

1. The Treaty was negotiated at Government direction and signed in accordance with Australia's treaty processes. The Department of Defence is the line agency for the implementation of the Treaty (as it primarily concerns its portfolio) and consulted with other relevant government agencies.

2. Australia's defence industry will also be affected. The Department of Defence briefed the CEOs of defence prime contractors at the time the Treaty was signed. Companies have indicated support for the Treaty, noting its potential benefits, but were not consulted on the details of the treaty while government-to-government negotiations of the details were underway as such details remained confidential between the Parties until the Treaty was signed. As the Implementing Arrangement, which contains the details on how each Party will implement the procedures pursuant to the Treaty, has been concluded, industry will be targeted by a major outreach program to be conducted by the Department of Defence to inform it of the terms of the Treaty and how it will affect industry. Industry will also be consulted on the legislation that will be required to incorporate Australia's rights and obligations under the Treaty into our domestic system.