

National Interest Analysis [2012] ATNIA 10

with attachment on consultation

**Exchange of Notes, done at Canberra on 9 December 2011, constituting an
Agreement between Australia and the United States of America
to Amend and Extend the Agreement on Cooperation in Defense Logistics Support,
done at Sydney on 4 November 1989**

[2011] ATNIF 27

**NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY
SUMMARY PAGE**

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Nature and timing of proposed treaty action

1. The proposed treaty action is to amend and extend, through an exchange of notes, the *Agreement between Australia and the United States Concerning Cooperation in Defense Logistics Support*, done at Sydney on 4 November 1989 (“the CDLSA”, [1989] ATS 28), as amended by the *Agreement between the Government of Australia and the Government of the United States to Amend and Extend the Agreement concerning Cooperation in Defense Logistics Support*, effected by an exchange of notes at Canberra on 7 August 2000 and 30 July 2001 ([2001] ATS 13), which expired on 4 November 2009. The *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States to Amend and Extend the CDLSA* (the proposed Agreement) was effected by an exchange of notes at Canberra on 9 December 2011.
2. The proposed Agreement will enter into force with retrospective effect, which is permitted by the Executive Power of the Commonwealth, from 4 November 2009 once the Parties have notified each other in writing that all domestic procedures necessary to give effect to the proposed Agreement have been satisfied. It is proposed that Australia will send this written notification to the United States as soon as practicable following consideration of the proposed Agreement by the Joint Standing Committee on Treaties.

Overview and national interest summary

3. The purpose of the proposed Agreement is to extend the operation of the CDLSA until 4 November 2020, with some minor amendments. The CDLSA underpins the Australia/United States defence logistics relationship. It provides the legal basis and broad policy guidance for the provision of reciprocal logistics support between Australia and the United States; including the provision of military support (both supplies and services) from within the respective military systems, the establishment of maintenance programs which enhance industrial capability and the expeditious provision of equipment in relevant circumstances. The CDLSA complements the *Agreement between the Government of Australia and the Government of the United States of America Concerning Acquisition and Cross-Servicing* done at Canberra on 27 April 2010 (the ACSA, [2010] ATS 18) which, among other things, facilitates the provision of United States supply, support and services to Australian forces deployed in Afghanistan.
4. Given the importance of both the CDLSA and ACSA in providing logistics support to Australian Forces when deployed with the United States Forces, it is important that the CDLSA be further extended. The CDLSA entered into force on 4 November 1989 for an initial period of ten years. In 2001 the Parties agreed (with retrospective effect from 4 November 1999) to extend the CDLSA until 4 November 2009. In May 2008, the Minister

for Foreign Affairs approved the commencement of formal treaty negotiations with the United States to amend and extend the CDLSA to ensure the continued cooperation in defence logistics support between Australia and the United States.

5. At the same time, the Parties have agreed to take the opportunity provided by this treaty action to amend four other provisions of the CDLSA as discussed below. These proposed amendments do not raise any new international legal policy issues. The proposed Agreement will also insert a new provision dealing with liability and claims. This provision is substantially similar to comparable provisions in Australia's existing bilateral defence cooperation agreements.

Reasons for Australia to take the proposed treaty action

6. The proposed Agreement will extend the CDLSA for a period of eleven years, and ensure that our bilateral defence logistics cooperation with the United States remains on a sound footing. Except as discussed below, all provisions of the CDLSA remain as previously in force. The continued operation of the CDLSA is important to the Australia/United States military relationship because it enables the reciprocal provision of military support (both supplies and services) from within respective military systems for the conduct and sustainment of operations. It also provides for the establishment of maintenance programs which enhance industry capability and contributes to Australia's military preparedness and interoperability with the United States through expeditious provision of equipment in relevant circumstances.

Obligations

7. The key obligations of the CDLSA are to:

- provide or facilitate the provision of logistic support to the other Party on a cooperative basis, as far as possible within its defence policies and the exigencies of war (Article II);
- approve the commercial export of defence articles and services purchased or to be purchased by the other Party (Article IV);
- provide, arrange or facilitate the provision of logistic support to operate and maintain acquired defence articles and services throughout their service life (Article IV);
- provide assistance, when mutually arranged, in the activation and expansion of their respective defence industrial bases as necessary to produce selected items of equipment, spare parts and munitions of the other Party's origin during periods of international tension or circumstances of armed conflict involving either or both Parties (Article IV);
- endeavour to continue, and when requested to expedite, the delivery of all defence articles and services during periods of international tension or in circumstances of armed conflict involving either or both Parties (Article IV);
- provide, or assist with, transportation of defence articles during periods of international tension or circumstances of armed conflict involving either or both Parties (Article IV);
- as appropriate, exchange releasable information concerning equipment plans, programs and logistic requirements (Article IV);
- approve the export of technology which each Party sells to effectively and efficiently support defence articles and services purchased from each other (Article V);

- assist in negotiations, where appropriate, with private sector firms to transfer releasable technologies (Article V);
- on a case-by-case basis, secure the waiver or reduction of license and royalty fees associated with the manufacture of defence articles (Article VI); and
- work together in the planning of cooperative logistic support that may be required during periods of international tension or in circumstances of armed conflict involving either or both Parties (Article X).

The proposed Agreement amends Articles V, XI, XIII, XIV and XX of the CDLSA, and inserts a new Article XXI.

8. Numbered paragraph 1 of the proposed Agreement amends Article V of the CDLSA so as to require any exports and transfers of Defense Articles and Defense Services to be undertaken in accordance with the laws, regulations and policies of the Parties, including provisions of any relevant agreements between the Parties.

9. Numbered paragraph 2 amends Article XI of the CDLSA relating to the protection of classified information. The extant reference to the “United States/Australia General Security of Information Agreement” of 2 May 1962 is replaced with a reference to the more recent *Agreement between the Government of Australia and the Government of the United States of America concerning Security Measures for the Protection of Classified Information*, done at Canberra on 25 June 2002 ([2002] ATS 25), which entered into force on 7 November 2002.

10. Numbered paragraph 3 amends Article XIII of the CDLSA relating to cooperative military airlifts. The extant references to airlifts being undertaken in accordance with the “Cooperative Military Airlift Arrangement Between the United States Air Force and the Royal Australian Air Force” dated 10 September 1984, and the “Detailed Working Procedures for the Implementation of Cooperative Military Airlift Arrangement Between the United States Air Force and the Royal Australian Air Force” dated 17 October 1984 are replaced with a new reference to the more recent “Implementing Arrangement between the United States Department of Defense and the Australian Department of Defence concerning Airlift Support”, which came into effect on 4 January 2006.

11. Numbered paragraph 4 amends Article XIV of the CDLSA relating to the provision of quality assurance. The extant reference to the provision of quality assurance in accordance with the “United States/Australia Details of Agreement on Mutual Acceptance of Government Quality Assurance” of October 1984 is replaced with a reference to the more recent “Details of Agreement between the Defense Authorities of the United States of America and the Commonwealth of Australia for Mutual Acceptance of Government Quality Assurance” dated 29 November 1994.

12. Numbered paragraph 5 amends Article XX of the CDLSA, which sets out the process for entry into force of the amended CDLSA and its duration. The proposed amendments to Article XX provide that the amended CDLSA shall enter into force with retrospective effect from 4 November 2009 once the Parties have notified each other that their domestic procedures for entry into force of the proposed Agreement have been satisfied. The proposed amendments to Article XX provide that the amended CDLSA will remain in force until 4 November 2020 unless terminated earlier in accordance with existing Article XIX of the CDLSA.

13. Numbered paragraph 6 of the proposed Agreement inserts a new Article XXI into the CDLSA. Proposed Article XXI concerns the Parties' liability for claims arising under the proposed Agreement. Subparagraph 1(a) of the proposed Article provides that the provisions of the *Agreement concerning the Status of United States Forces in Australia, and Protocol*, done at Canberra on 9 May 1963 (the SOFA, [1963] ATS 10) or any other agreement between Australia and the United States concerning the status of forces of one country when in the other will apply to claims that fall within the scope of these agreements.

14. Where the SOFA or any other agreements between Australia and the United States related to the status of forces *do not* apply, subparagraph (1)(b)(i) of proposed Article XXI requires each Party to waive all claims against the other for injury or death to its personnel or for damage to or loss of its property arising out of the performance of official duties. Liability for claims by third parties for injury or death to third persons or damage to or loss of property arising from the performance of official duties will be shared, in accordance with the proportions stated in relevant arrangements (subparagraph 1(b)(ii)). However, where the Parties agree that the damage, injury or death was caused by recklessness, wilful misconduct or gross negligence, the liability is to be borne by the Party of the culpable person (subparagraph 1(b)(iii)). Subparagraph 1(b)(iv) of proposed Article XXI provides that any claims arising out of a contract shall be resolved in accordance with the terms of the contract.

Implementation

15. No changes to national laws, regulations or policies are required to implement the proposed Agreement. The proposed Agreement will not effect any change to the existing roles of the Australian Government or the State and Territory governments. The proposed Agreement is to operate retrospectively as both Parties have continued to observe the terms of the CDLSA since it ceased to be in force.

Costs

16. Article XII of the CDLSA provides that the cost of all Defence Articles and Defence Services provided by both Parties to each other shall be priced on a full cost basis with neither Party realizing a financial gain or loss. The proposed Agreement does not alter this provision.

Regulation Impact Statement

17. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

18. The proposed Agreement does not provide for the negotiation of any future legally binding instruments.

19. Article XVIII of the CDLSA provides that the CDLSA may be amended by written agreement of the Parties. Any further extension to the duration of the CDLSA beyond 4 November 2020 would require such an amendment, which would be subject to the domestic treaty process.

Withdrawal or denunciation

20. Once renewed by the proposed Agreement, pursuant to Article XX (as amended by the proposed Agreement), the CDLSA will remain in force until 4 November 2020 unless terminated sooner in accordance with Article XIX of the CDLSA. Article XIX provides that the CDLSA may be terminated by either Party upon 180 days' written notice to the other Party. Article XIX also provides that the rights and obligations of the Parties concerning protection, transfer and use of information and Defense Articles and Services, furnished pursuant to the CDLSA shall remain in force notwithstanding such termination.

Contact Details

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ATTACHMENT ON CONSULTATION

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Consultation

21. The State and Territory governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the proposed Agreement was provided to State and Territory representatives through the biannual SCOT meetings throughout the course of the negotiations concerning the proposed Agreement. No requests for further information or comments on the proposed Agreement have been received to date from the State and Territory governments.