

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

Introduction

- 3.1 On 20 March 2012, the *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* was tabled in the Commonwealth Parliament.

Background

- 3.2 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*, (CDLSA) done at Sydney on 4 November 1989. 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.¹

- 3.3 The purpose of the Agreement is to extend the operation of the CDLSA until 4 November 2020, with some minor amendments. The CDLSA underpins the Australia/United States (US) defence logistics relationship. It provides the legal basis and broad policy guidance for the provision of reciprocal logistics support between Australia and the US; 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 (ACSA) which, among other things, facilitates the provision of US supply, support and services to Australian forces deployed in Afghanistan.²

National interest summary

- 3.4 Given the importance of both the CDLSA and ACSA in providing logistics support to Australian Forces when deployed with the US 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 US to amend and extend the CDLSA to ensure the continued cooperation in defence logistics support between Australia and the US.³
- 3.5 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
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1 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, (Hereafter referred to as 'NIA'), paras 1 – 2.

2 NIA, para 3.

3 NIA, para 4.

provision is substantially similar to comparable provisions in Australia's existing bilateral defence cooperation agreements.⁴

Reasons for Australia to take the proposed treaty action

3.6 The proposed Agreement will extend the CDLSA for a period of eleven years, and ensure that our bilateral defence logistics cooperation with the US 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/US 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 contribute to Australia's military preparedness and interoperability with the US through expeditious provision of equipment in relevant circumstances.⁵

Obligations

- 3.7 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;
 - approve the commercial export of defence articles and services purchased or to be purchased by the other Party;
 - provide, arrange or facilitate the provision of logistic support to operate and maintain acquired defence articles and services throughout their service life;
 - 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;

4 NIA, para 5.

5 NIA, para 6.

- 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;
- provide, or assist with, transportation of defence articles during periods of international tension or circumstances of armed conflict involving either or both Parties;
- as appropriate, exchange releasable information concerning equipment plans, programs and logistic requirements;
- approve the export of technology which each Party sells to effectively and efficiently support defence articles and services purchased from each other;
- assist in negotiations, where appropriate, with private sector firms to transfer releasable technologies;
- on a case-by-case basis, secure the waiver or reduction of license and royalty fees associated with the manufacture of defence articles; 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.⁶

3.8 Within the CDLSA, the Agreement amends:

- Article V 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.⁷
- Article XI 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 2002.⁸
- Article XIII relating to cooperative military airlifts. The extant references to airlifts being undertaken in accordance with the “Cooperative Military Airlift Arrangement Between the US Air Force and the Royal Australian Air Force” dated 10 September 1984, and the

6 NIA, para 7.

7 NIA, para 8.

8 NIA, para 9.

“Detailed Working Procedures for the Implementation of Cooperative Military Airlift Arrangement Between the US 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 US Department of Defense and the Australian Department of Defence concerning Airlift Support”, which came into effect on 4 January 2006.⁹

- Article XIV 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 1994.¹⁰
- Article XX, 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.¹¹

3.9 The Agreement also inserts a new Article XXI into the CDLSA. This 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 (SOFA) or any other agreement between Australia and the US concerning the status of forces of one country when in the other will apply to claims that fall within the scope of these agreements.¹²

3.10 Where the SOFA or any other agreements between Australia and the US 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

9 NIA, para 10.

10 NIA, para 11.

11 NIA, para 12.

12 NIA, para 13.

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.¹³

Implementation

3.11 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.¹⁴

Is the agreement's potential being fulfilled?

3.12 Although the agreement has potential for greater access to US equipment and industry, it appears that this potential has not been explored as thoroughly as it could be. Indeed, the agreement is 'being infrequently used'.¹⁵ When asked if the agreement gave Australia influence in gaining access to US technology - particularly with regard to International Traffic in Arms Regulations (ITARs) - the Department of Defence replied:

Potentially, yes. I would ask you to note that the key word of this agreement is cooperative. It is not binding on both parties but we would certainly create an opportunity for those discussions to take place. If your question was: have we tested that? Not as yet. That is not to say that we could not use it. This is very much the broad spectrum. It does allow those sorts of discussions to occur. In answer to your question, yes it could. It would not allow us to step around if it was a significant military equipment issue or

13 NIA, para 14.

14 NIA, para 15.

15 Commodore Mark James Sackley, Director General Strategic Logistics, Joint Logistics Command, Department of Defence, *Committee Hansard*, 25 June 2012, p. 14.

perhaps a specific ITARs requirement does not necessarily allow us to step around a requirement. However, it does open the door for negotiation.¹⁶

- 3.13 Similarly, some of the provisions are intended to stimulate and encourage the industrial base in both countries. In response to a question regarding the US marine deployment in the Northern Territory engaging with Australian companies for the provision of maintenance as opposed to US forces doing all their own maintenance in house, Defence replied:

Again, potentially, yes. You will be aware that those discussions are quite preliminary. In fact, I am engaged in some of those discussions with our US Force Posture Review team. We do have a very close relationship with [the US] marines on the ground and we are discussing where we could potentially use this agreement right now. You will be aware that it is only an incremental approach so far. But, as we do build up then, yes, this agreement really does give us the potential, on both sides, to leverage. While we have not specifically discussed industry engagement as yet, that does give us a potential, as you have highlighted, whereas other agreements do not necessarily afford us that.¹⁷

Costs

- 3.14 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.¹⁸

Conclusion

- 3.15 Australia's relationship with the United States is our most important defence relationship. The ANZUS alliance – now in effect for over 60
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16 Commodore Mark James Sackley, Director General Strategic Logistics, Joint Logistics Command, Department of Defence, *Committee Hansard*, 25 June 2012, p. 13.

17 Commodore Mark James Sackley, Director General Strategic Logistics, Joint Logistics Command, Department of Defence, *Committee Hansard*, 25 June 2012, p. 13.

18 NIA, para 16.

years – is the cornerstone of that relationship and subsequent agreements such as the one being reviewed here help facilitate that defence relationship.

- 3.16 Given the increased cooperation between the US and Australian defence force over the past decade, this exchange of notes is both logical and practical. It will help facilitate ongoing operation in Afghanistan as well as the deployment of US marines to the Northern Territory. The Committee agrees that binding treaty action be taken.
- 3.17 Nonetheless the Committee notes that the agreement is currently ‘infrequently used’ and could perhaps better serve Australia’s interests if some of its provisions were more fully utilised.

Recommendation 2

The Committee supports the *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* and recommends that binding treaty action be taken.