

Documents tabled on 20 August 2009:

National Interest Analysis [2009] ATNIA 14

**Agreement to amend the Agreement between the Government of Australia and the
Government of the United States of America concerning Certain Mutual Defense
Commitments (Chapeau Defense Agreement) of 1 December 1995
done on 4 December 2008**

[2008] ATNIF 23

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement to amend the Agreement between the Government of Australia and the Government of the United States of America concerning Certain Mutual Defense Commitments (Chapeau Defense Agreement) of 1 December 1995 done on 4 December 2008 [2008] ATNIF 23

Nature and timing of proposed treaty action

1. The Agreement to amend the Agreement between the Government of Australia and the Government of the United States of America concerning certain Mutual Defense Commitments (Chapeau Defense Agreement) was signed on 4 December 2008 through an Exchange of Notes ('the proposed Agreement').
2. The proposed Agreement will amend the Chapeau Defense Agreement, done at Sydney and Canberra on 1 December 1995. The proposed Agreement will enter into force when Australia informs the United States through diplomatic channels that Australia has completed all its domestic procedures necessary to give effect to the proposed Agreement.
3. It is proposed that Australia's notification will be provided to the United States as soon as practicable after the tabling period and subject to recommendations from the Joint Standing Committee on Treaties (JSCOT) that binding treaty action be taken.

Overview and national interest summary

4. The proposed Agreement amends the Chapeau Defense Agreement to facilitate the continued exchange and secondment of personnel and units between the Australian and United States defence forces. The continuation of this form of defence cooperation will strengthen the bilateral defence relationship between Australia and the United States and ensure that Australia continues to receive the considerable benefits that flow from our close relationship, including access to their defence technology, facilities and training opportunities.
5. The proposed Agreement extends the application of the terms and conditions set out in the Chapeau Defense Agreement to the assignment, exchange or liaison of units and personnel between the Australian and United States defence forces. The current Chapeau Defense Agreement contains provisions relating to the provision of logistics support and the conduct of cooperative research, development, test and evaluation and production programs. The proposed Agreement supplements the Chapeau Defense Agreement with additional provisions covering:
 - access to classified and controlled unclassified information
 - criminal and disciplinary jurisdiction
 - termination of assignments
 - the carrying of weapons
 - privileges and immunities, and
 - duties to be undertaken by personnel.

6. These provisions will apply to written arrangements relating to the assignment, exchange or liaison of units and personnel between the Australian and United States defence forces when explicitly invoked.

Reasons for Australia to take the proposed treaty action

7. The proposed Agreement is a response to a United States legal requirement that military assistance provided by its government to another nation must be authorised by US law and governed by an agreement with the recipient nation that is binding in international law. Since the conclusion of the Chapeau Defense Agreement, the United States Government has determined that military assistance includes personnel programs. Therefore all personnel exchange and liaison programs concluded between the US and other nations, including Australia, must be conducted under instruments which are binding in international law.

8. At present, numerous arrangements of less-than-treaty status exist between the Australian Department of Defence and the United States Department of Defense, governing personnel exchanges and liaison programmes. The most efficient way for Australia to meet United States legal requirements and support the defence relationship between Australia and the United States is to amend the existing Chapeau Defense Agreement to extend its application to personnel programs.

9. Australia's ongoing collaboration with the United States through the exchange of Defence personnel and liaison officers pursuant to the Chapeau Defense Agreement (as amended by the proposed Agreement) will strengthen and contribute to the defence alliance between Australia and the United States.

10. Australia will also enjoy considerable benefits from extending the application of the Chapeau Defense Agreement to personnel programs, including access to United States defence personnel, facilities, and courses. The proposed Agreement will also benefit the Australian Defence Force (ADF) by supporting and facilitating the exchange of defence information and ideas with the United States. It will contribute to the development of ADF military capabilities and training programs, supporting Australia's defence partnership with the United States.

Obligations

11. Clause 1 of the proposed Agreement broadens the scope of Article 1(b)(ii) of the Chapeau Defense Agreement. Article 1(b)(ii) deals with the sharing of costs from claims from third parties for injury or death to persons or damage to property. The proposed amendment will remove specific reference to damage arising from 'the performance of official duties in carrying out cooperative research, development, test, evaluation or production programs, and the provision of logistic support'. Proposed Article 1(b)(ii) will apply to claims from third parties arising from the performance of all official duties.

12. Clause 2 inserts a new Article 6 to the Chapeau Defense Agreement. Proposed Article 6 will provide that when the Chapeau Defense Agreement is specifically invoked in subsequent arrangements, each Party is obliged to comply with the terms and conditions in relation to the assignment, exchange or liaison of units and personnel, as set out in the Chapeau Defense Agreement (as amended), the proposed Annex to the Chapeau Defense Agreement and in written arrangements between the national defence organisations of the Parties.

13. Clause 3 inserts a new Article 7 to the Chapeau Defense Agreement. Proposed Article 7 establishes that the obligations of both Parties concerning certain key provisions of the Chapeau Defense Agreement and arising out of action taken in accordance with the Chapeau Defense Agreement will continue after its termination.

14. Clause 4 amends the penultimate paragraph of the Chapeau Defense Agreement. The new paragraph states that the Chapeau Defense Agreement consists of Articles 1 through 7 and Annex A. These provisions will not apply to any written arrangements between Australia and the United States unless it is explicitly invoked by or for that arrangement.

Proposed Annex A to the Chapeau Defense Agreement

15. Clause 5 of the proposed Agreement inserts Annex A to the Chapeau Defense Agreement. Annex A sets out terms and conditions for the assignment, exchange or liaison of units and personnel between the Australian and United States defence forces (referred to as assigned units and personnel). As with the provisions of the Chapeau Defense Agreement, Annex A will only apply to the assignment, exchange or liaison of units and personnel when explicitly invoked by or for the written arrangements for that assignment, exchange or liaison.

16. Paragraph 2 of Annex A requires the Parent Defense Organisation (the organisation that assigns units and/or personnel, or PDO) to provide the Host Defense Organization (the organisation to which the units and/or personnel are assigned, or HDO) with appropriate security assurances in accordance with the host nations' laws regulations and policies for assigned personnel prior to the commencement of the assignment. Security assurances must be provided according to the established visit procedures of the HDO. Paragraph 2 also provides that access to Classified Information and Controlled Unclassified Information will not occur until security assurances have been received. Controlled Unclassified Information is unclassified information to which access or distribution limitations have been applied.

17. Paragraphs 3, 4 and 5 set out the obligations of both Parties in relation to access and disclosure of Classified Information and Controlled Unclassified Information. Assigned units and personnel must comply with the security and disclosure laws, regulations and policies relating to Classified Information and Controlled Unclassified Information of both Parties, and all applicable international agreements and arrangements between the Parties (paragraph 3). The 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) applies to all Classified Information exchanged or disclosed to assigned units and personnel (paragraph 4).

18. Access by assigned units and personnel to Controlled Unclassified Information must be authorised by the HDO and will be granted on a need-to-know basis (paragraph 5(a)). Disclosed Controlled Unclassified Information can only be used to fulfil the purpose of the assignment of personnel (paragraph 5(b)). Use for any other purpose would require separate authorisation from the HDO. Where Controlled Unclassified Information is provided by or produced with the PDO, it cannot be released to a third party by the HDO without prior written approval from the appropriate authorities of the Parent Government (paragraph 5(a)).

19. Paragraphs 6 to 9 and 11 set out the obligations of both Parties in relation to the conduct of assigned personnel while in the country of the Host Government. The status of assigned personnel will be governed by any bilateral agreements between the Parties regarding the status of forces. Such agreements will govern the exercise of criminal and disciplinary jurisdiction. Any other jurisdiction will be exercised in accordance with the laws of the Host Government (paragraph 6). Assigned personnel and their dependants will be granted privileges and exemptions from the laws of the Host Government as provided for in such bilateral

agreements, as well as the laws and regulations of the Host Government and any other international agreements or arrangements between the Parties (paragraph 11).

20. Assigned personnel are required to observe the laws of the Host Government and abstain from activity inconsistent with the intent and provisions of any written arrangements between the Parties. Specifically, assigned personnel are prohibited from undertaking political activity in the territory of the Host Government (paragraph 7). In situations where administrative or disciplinary action must be taken against assigned personnel, such action may only be taken by the PDO and as appropriate in the circumstances. The HDO and the defence forces of the Host Government are prohibited from taking disciplinary action against assigned personnel. The HDO and the defence forces of the Host Government are further prohibited from exercising disciplinary powers over the dependants of assigned personnel (paragraph 8).

21. The HDO may request the termination of an assignment where assigned personnel are unable to perform their duties. Where a termination request is made, the PDO is required to remove the assigned personnel from the territory of the Host Government, and may fill the terminated assignment with another individual. Such replacements are subject to the certification, approval or training requirements of the HDO (paragraph 9).

22. Paragraph 10 provides that assigned personnel may possess and carry arms while on duty, when it is authorised by their orders and approved by the Host Government. Assigned personnel are prohibited from carrying or transporting privately owned weapons into the territory of the Host Government unless authorised by the Host Government, in accordance with the laws of the Host Government (paragraph 10).

23. Paragraph 12 provides that the provision of medical and dental services is subject to the international agreements and arrangements between the Parties. Where no such agreements or arrangements exist, the provision of medical and dental services will be subject to the laws, regulations and policies of the Host Government, including the requirement for reimbursement.

24. Paragraph 13 provides that assigned units and personnel must not be placed on duty in areas of political sensitivity in situations where their presence might jeopardise the interests of their PDO or Parent Government. However, such placements may occur with the written approval of the PDO. Paragraph 13 also sets out additional duties that must not be undertaken by assigned units and personnel without written approval from the PDO, including:

- being placed in duty assignments or situations in which direct hostilities with third state forces have commenced or are likely to occur
- participating in operations, including peacekeeping or combat operations
- performing duties involving travel to a third country
- participating in law enforcement operations, or
- participating in civil-military actions.

25. Paragraph 14 requires the HDO to provide briefings to assigned units and personnel on the Host Government's laws, regulations and policies in relation to Classified Information and Controlled Unclassified Information. Information will also be provided to assigned personnel and their dependants concerning exemptions and privileges, medical and dental services and other matters as appropriate.

26. Paragraph 15 provides that written arrangements between the Parties' defence organisations in relation to the assignment, exchange or liaison of units and personnel must

Implementation

27. No changes to Australian domestic law or policy are required to implement the proposed Agreement. The Chapeau Defense Agreement once amended will not effect any change to the existing roles of the Australian Government or the State and Territory Governments.

28. The agencies responsible for implementing the proposed amendments are the United States Department of Defense and the Australian Department of Defence.

Costs

29. This proposed Agreement neither imposes any foreseeable direct financial costs on Australia, nor grants any financial benefit to Australia. All support provided by Australia to the United States for activities under the proposed Agreement is on a full cost recovery basis.

Regulation Impact Statement

30. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

31. The proposed Agreement does not provide for the negotiation of any future legally binding instruments. Proposed Article 6 provides for the conclusion of less-than-treaty status arrangements between the national defence organisations of the Parties in relation to the assignment, exchange or liaison of units and personnel.

32. Once ratified, the provisions inserted by the proposed Agreement will be read together with the Chapeau Defense Agreement. Any amendments will therefore be to the text of the Chapeau Defense Agreement, as amended by the proposed Agreement.

33. In the absence of specific provisions on amendment, the Chapeau Defense Agreement may be amended by agreement between the Parties. Any amendment to the Chapeau Defense Agreement would be subject to Australia's domestic treaty approval process, including tabling in Parliament and consideration by JSCOT.

Withdrawal or denunciation

34. Once ratified, the provisions inserted by the proposed Agreement will be read together with the Chapeau Defense Agreement. Consequently, it is not possible to denounce the amendments in the proposed Agreement separately from the Chapeau Defense Agreement as a whole.

35. In the absence of specific provisions on termination, the Chapeau Defense Agreement could be terminated at any time, after consultation and written consent of the Parties.

Termination would be subject to Australia's domestic treaty approval process, including tabling in Parliament and consideration by JSCOT.

36. Under proposed Article 7, the obligations of the Parties under the Chapeau Defense Agreement will continue notwithstanding termination of the Chapeau Defense Agreement.

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