

National Interest Analysis [2017] ATNIA 12

with attachment on consultation

**Agreement between the Government of Australia and the Government of Japan
concerning Reciprocal Provision of Supplies and Services between the Australian
Defence Force and the Self-Defense Forces of Japan**

(Sydney, 14 January 2017)

[2017] ATNIF 11

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of Japan concerning Reciprocal Provision of Supplies and Services between the Australian Defence Force and the Self-Defense Forces of Japan

(Sydney, 14 January 2017)

[2017] ATNIA 12

[2017] ATNIF 11

Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of Japan concerning Reciprocal Provision of Supplies and Services between the Australian Defence Force and the Self-Defense Forces of Japan* (the proposed Agreement). For the proposed Agreement to enter into force, the Parties must exchange diplomatic notes notifying each other of the completion of their necessary internal procedures (Article VII(1)).
2. The exchange of notes by the Parties would occur as soon as practicable after the tabling period and consideration by the Joint Standing Committee on Treaties and by the Japan Diet (legislature).

Overview and national interest summary

3. The purpose of the proposed Agreement is to replace the current *Agreement between the Government of Australia and the Government of the Japan concerning Reciprocal Provision of Supplies and Services between the Australian Defence Force and the Self-Defense Forces of Japan* done at Tokyo on 19 May 2010 and which entered into force 31 January 2013 (the 2013 Agreement).
4. The proposed Agreement continues the operation of basic terms, conditions and procedures under the 2013 Agreement to facilitate the reciprocal provision of logistic supplies and services to the military forces of one Party by the other Party. The provision of logistic supplies and services to the military forces of one Party is undertaken in return for either cash payment or the reciprocal provision of logistic supplies and services to the military forces of the other Party.
5. The reciprocal provision of logistic supplies and services under the proposed Agreement will occur for the purpose of exercises and training with participation by both the Australian Defence Force (ADF) and the Self-Defense Forces of Japan (JSDF); United Nations peacekeeping operations; internationally coordinated peacekeeping and security operations; humanitarian international relief operations; operations in response to large scale disasters in Australia, Japan or a third country;

emergency evacuation of Australian or Japanese nationals, or others from third countries; communication and coordination or other routine activities including visits of ships or aircraft of the ADF or the JSDF; and for other cooperative efforts as mutually determined and permitted under the laws and regulations of the respective Parties (including for unforeseen circumstances or exigencies).

6. The differences between the proposed Agreement and the 2013 Agreement primarily reflect changes in the national laws of Japan passed by the Japanese Parliament in September 2015, concerning peace and security. The proposed Agreement expands both the scope of its application in terms of the activities to which logistic supplies and services may be provided, as well as the supplies and services the Parties' militaries may exchange, in particular ammunition.
7. Importantly, the proposed Agreement retains explicit exclusions relating to the exchange of weapons and the transfer by either Party of any items the transfer of which would be prohibited by the national laws and regulations of either Party and the explicit obligation to use supplies and services provided under the proposed Agreement in accordance with the Charter of the United Nations (the UN Charter).

Reasons for Australia to take the proposed treaty action

8. The proposal to replace the 2013 Agreement was initiated by Japan, which sought to broaden that Agreement so as to achieve congruence with Japan's new defence reforms passed by the Japanese Parliament in September 2015.
9. The expanded scope of the proposed Agreement aligns with Australia's other military logistic support agreements and arrangements and offers Australia the opportunity to further enhance the quality of, and potential for, defence cooperation with Japan, and to broaden the interoperability between the two forces.
10. The replacement of the 2013 Agreement will ensure the continuation of means through which the reciprocal provision of logistic supplies and services can be facilitated between Australia and Japan.
11. The proposed Agreement is uncontroversial, builds on Australia's existing relationship with Japan in relation to defence matters, and raises no international defence policy issues.

Obligations

12. The proposed Agreement, like its predecessor, is designed to facilitate reciprocal provision of logistic supplies and services between the ADF and the JSDF. All activities of the Parties, and the provision of any supplies and services, under the proposed Agreement must be carried out in accordance with the Parties' respective national laws and obligations.

13. Article I of the proposed Agreement outlines the bilateral activities covered by the proposed Agreement and emphasises the principle of reciprocity and mutual consent. The activities covered by the proposed Agreement are:
- a) exercises and training with participation by the ADF and JSDF (with the exception of exercises and training conducted unilaterally by the forces of either Party) (Article I(1)(a.));
 - b) United Nations peacekeeping operations (Article I(1)(b.));
 - c) internationally coordinated peace and security operations (Article I(1)(b.));
 - d) humanitarian international relief operations (Article I(1)(b.));
 - e) operations in response to large scale disasters in Australia, Japan or a third country (Article I(1)(b.));
 - f) emergency evacuation of Australian or Japanese nationals, or others from third countries (Article I(1)(c.));
 - g) communication and coordination, or other routine activities, including visits to the territory of either Party of ships or aircraft of the forces of the other Party (with the exception of exercises and training conducted unilaterally by the forces of either Party) (Article I(1)(d.)); and
 - h) any other activity in which the provision of supplies and services is permitted under the respective laws and regulations of the Parties (Article I(1)(e.)).
14. The scope of the activities covered by the 2013 Agreement has been expanded under the proposed Agreement to include ‘internationally coordinated peace and security operations’ (Article I(1)(b.)), as well as a new provision (Article I(1)(e.)) enabling the ADF and the JSDF to apply the procedures set out in the proposed Agreement to provide logistic supplies and services for ‘any other activity’ in which the provision of supplies and services is permitted under the respective laws and regulations of the Parties, but that do not fall within the scope of the other specified activities (as listed under Article I (1)(a.) to (d.)). The proposed Agreement requires that such ‘other activities’ be mutually determined, taking into account the respective domestic laws, regulations and policies of the Parties and the proposed Agreements limitations/restrictions (Article VI(2)). The effect of this change is to allow the reciprocal provision of supplies and services mutually determined by the Parties and permitted under their laws and regulations, even if the activity for which they are to be used is not expressly identified in the proposed Agreement.
15. Article II of the proposed Agreement lists the categories of supplies and services that may be provided by either Party, within each Party’s competence, for the purposes of the activities listed in Article I. The specific items falling within each of these categories are set out in the Annex to the proposed Agreement. To reflect the change in the national laws of Japan, supplies and services related to ammunition have been added to the categories of supplies and services that may be provided under the proposed Agreement. Some other minor amendments to the categories have also been undertaken to update the scope of permissible logistics supplies and services and terminology used by the defence organisations of both Parties.

16. As with its predecessor, the proposed Agreement continues to exclude from its operation the provision of weapons by the ADF or the JSDF (Article II(3)). Additionally, as with its predecessor, the provision of any supplies and services by either the ADF or JSDF must be in accordance with the respective Party's laws and regulations. Accordingly, the proposed Agreement will continue to exclude the transfer by either Party of any supplies or services where such a supply or service is prohibited by a Party's national laws or regulations (Article II(4)).
17. Article III maintains the obligation that supplies and services provided under the proposed Agreement be used consistently with the UN Charter. Notably, Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN. The proposed Agreement also provides that supplies and services are not to be transferred outside of the forces of the receiving Party without the prior written consent of the providing Party (Article III(2)).
18. The proposed Agreement, like its predecessor, sets out the possible settlement (reimbursement) procedures for the provision of supplies (Article IV). For the provision of supplies, where possible, the receiving Party must return the supplies in a condition and manner satisfactory to the providing Party. Where the supplies provided are consumable or cannot be returned in a satisfactory condition, the receiving Party must give the providing Party supplies of the same type, quality and quantity and in a condition and manner that is satisfactory to the providing Party. Where neither option is possible, the receiving Party must reimburse the providing Party in a currency specified by the providing Party (Article IV(1)(a.)).
19. For the provision of services, the receiving Party may either reimburse the providing Party in its chosen currency, or provide services of the same type and equivalent value (Article IV(1)(b.)(i.)). The manner of settlement in relation to the provision of services must be agreed between the Parties prior to the provision of the services (Article IV(1)(b.)(ii.)).
20. Article V of the proposed Agreement, like its predecessor, provides that provision and receipt of supplies and services under the proposed Agreement must be carried out in accordance with the Procedural Arrangement made between competent authorities of the Parties (the Australian Department of Defence and the Japanese Ministry of Defense). A new Procedural Arrangement, to replace the current Procedural Arrangement made under the 2013 Agreement, has been concluded and specifies the procedures and supplementary detail to implement the proposed Agreement. The Procedural Arrangement, like its predecessor, further sets out, for the purposes of Article VI, a dispute resolution mechanism based on consultation between the competent authorities of the Parties and provides for standards for dealing with claims arising under the proposed Agreement. The Procedural Arrangement is a less-than-treaty status document.

21. Article VI of the proposed Agreement sets out provisions relating to implementation and dispute settlement procedures. Specifically, in relation to the proposed Agreement's implementation, the proposed Agreement provides:
- a) that it will not apply to any ADF activities conducted by the ADF acting as a member of the United Nations Forces under the *Agreement Regarding the Status of the United Nations Forces in Japan* done at Tokyo on 19 February 1954 (Article VI(1));
 - b) the Parties are to consult with each other regarding the implementation of the proposed Agreement (including, in relation to Article I(1)(e.), such consultation shall include the prior mutual determination of 'any other activity' for the purposes of that provision) (Article VI(2)); and
 - c) the Parties are to settle any disputes relating to the interpretation or application of the proposed Agreement and Procedural Arrangement through consultation (Article VI(3)).
22. In relation to the dispute settlement procedures, the proposed Agreement further provides that:
- a) the competent authorities of the Parties must settle disputes regarding the implementation of the proposed Agreement in accordance with the procedures set out in the Procedural Arrangement (Article VI(4)); and
 - b) where disputes between the competent authorities cannot be settled in accordance with the Procedural Arrangement, they must be settled through consultation between the Parties (Article VI(5)).

Implementation

23. Australia's implementation of the Agreement will be led by the Department of Defence. Implementation of the Agreement does not require changes to Australian laws, regulations or policies. The proposed Agreement will not effect any change to the existing roles of the Commonwealth Government or the State and Territory Governments.

Costs

24. The proposed Agreement replaces the existing 2013 Agreement. There are no foreseeable financial costs to the Australian Government in the implementation of the proposed Agreement.
25. Where the transfer of logistic supplies and services occurs, Article IV of the proposed Agreement provides that the Parties will mutually determine whether payment for the transfer will be made by cash or by supplying logistic supplies and services that are substantially identical or agreed to be of equal monetary value.

26. Article IV also provides that, to the extent permitted by national laws and regulations, the Parties will not charge internal duties and taxes on the provision of supplies and services under the proposed Agreement.

Regulation Impact Statement

27. The Office of Best Practice Regulation, Department of the Prime Minister and Cabinet, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

28. The proposed Agreement does not provide for the negotiation of any future legally binding instruments. A Procedural Arrangement (a less-than-treaty status instrument), foreshadowed by Article V of the proposed Agreement, has been concluded between the competent authorities of the Parties to specify procedures and details of the terms and conditions to implement the proposed Agreement.
29. The proposed Agreement (including the Annex) may be amended by written agreement between the Parties (Article VII(3)). Amendments to the proposed Agreement would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

Withdrawal or denunciation

30. Under paragraph 1 of Article VII, the proposed Agreement will remain in force for a period of ten years and will be automatically extended for subsequent periods of ten years. The proposed Agreement may be terminated by either Party in writing at least six months before the end of each period of ten years. Alternatively, paragraph 2 of Article VII provides that either Party may terminate the proposed Agreement at any time by providing one year's written notice.
31. Termination by Australia would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT. If the proposed Agreement is terminated, paragraph 4 of Article VII provides that Article III, IV, V and paragraphs 3, 4 and 5 of Article VI will remain in force with respect to supplies and services provided under the proposed Agreement.

Contact details:

Director of International Logistics
Strategic Logistics Branch
Department of Defence

ATTACHMENT ON CONSULTATION

Agreement between the Government of Australia and the Government of Japan concerning Reciprocal Provision of Supplies and Services between the Australian Defence Force and the Self-Defense Forces of Japan

(Sydney, 14 January 2017)

[2017] ATNIA 12

[2017] ATNIF 11

CONSULTATION

State and Territory Governments

32. The State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No action will be required from States or Territories to implement the Agreement.

Public Consultation

33. No public consultation has been undertaken as the Agreement relates to operational capability matters.