

National Interest Analysis [2022] ATNIA 2

with attachments

**Agreement between Australia and Japan concerning the Facilitation of Reciprocal
Access and Cooperation between the Australian Defence Force and the Self-Defense
Forces of Japan**

(Canberra and Tokyo, 6 January 2022)

[2022] ATNIF 2

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan

(Canberra and Tokyo, 6 January 2022)

[2022] ATNIA 2

[20220 ATNIF 2

Nature and timing of proposed treaty action

1. The proposed treaty action is the entry into force of the *Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan* (the Agreement). The Agreement was signed by Prime Ministers Morrison and Kishida on 6 January 2022 in Canberra and Tokyo respectively.
2. For the Agreement to enter into force, the Parties must notify each other of the completion of their necessary domestic requirements through an exchange of diplomatic notes. The Agreement would enter into force on the fifth day after the Parties exchange diplomatic notes (Article XXIX). Australia intends to send its diplomatic note as soon as practicable following the completion of its domestic requirements.

Overview and national interest summary

3. The purpose of the Agreement is to establish a legally-binding framework to govern cooperative defence activities conducted jointly by Australia and Japan on each other's territories. It will create standing arrangements that streamline legal and administrative processes for Australian Defence Force and Japan Self-Defense Forces personnel to operate in each other's territories for the purposes of such cooperative activities. This is achieved through a package of legally-binding and less-than-treaty-status documents.
4. Australia's strategic environment is deteriorating and competition is sharpening. It is in Australia's national interest to work closely with likeminded partners to support an open, secure and resilient Indo-Pacific region. Closer engagement with capable and professional partners like Japan will contribute to strengthening Australia's military capabilities, improving Australia's capacity to shape our strategic environment.
5. Australia and Japan share a common vision in this regard, reflected in our Special Strategic Partnership. The Agreement will give effect to Australia and Japan's ambition to increase the depth, sophistication and regularity of defence training, exercises and other cooperative activities.

Reasons for Australia to take the proposed treaty action

6. Australia and Japan already have a very well-developed pattern of engagement across various defence domains, including maritime, ground and air domains, which continues to increase in tempo and complexity. The Agreement will enable Australia and Japan to build on our current defence cooperation more effectively and with less cumbersome administration.

Obligations

Purpose

7. The purpose of the Agreement is to facilitate mutually beneficial defence cooperation between the Parties on each other's territories, by establishing a legally-binding framework to govern such cooperation.

Scope

8. Once entered into force, the Agreement will establish a framework governing the legal status of a Party's defence forces (the 'Sending State' and its 'Visiting Force') while present in the territory of the other Party (the 'Receiving State') for the purpose of a mutually determined cooperative activity (Article IV).
9. The obligations set out in the Agreement are reciprocal, meaning that they will apply equally to both Australia and Japan. The implementation of the Agreement will be underpinned by the mutual spirit of coordination and consultation between the Parties.
10. The Agreement comprises a package of legally binding instruments including the treaty text, annex and agreed minutes. These instruments will be equally authentic in both English and Japanese. There are also less-than-treaty-status instruments associated with the Agreement, namely the Record of Discussion and further subsidiary instruments implementing certain treaty articles.
11. The main text of the Agreement contains 29 articles, which set out obligations the Parties agree to undertake. The Preamble and Articles I - IV outline mutual understandings under which the Parties enter into the Agreement, and define the purpose, scope and key terms of the Agreement.
12. Articles V-XX set out various conditions that the Parties have agreed will apply to each other's Visiting Forces and accompanying civilian personnel (the 'Civilian Component') when they are operating in the other's territory for the purposes of cooperative activities. In general terms, the Receiving State undertakes to simplify or expedite processes, or allow for favourable or equal treatment for the other Party's personnel. The Sending State undertakes to ensure that its forces operate with good order and abide by the Receiving State's laws and regulations, with due care for public safety and for the protection of the environment and cultural heritage of the Receiving State.
13. Collectively, the purpose of these provisions is to facilitate the effective deployment and operation of a Visiting Force in the territory of the Receiving State. The Agreement

includes provisions addressing: diplomatic clearances (Article V); harbour and airport charges and fees (Article V); entry and departure of the Visiting Force and civilian personnel (Article VI); movements of official vehicles (Article V); importation and exportation of personal and official items (Article VII); access to facilities, areas and related services (Articles XI and VIII); and recognition of driving licenses and licensing and qualifications of members of the Visiting Force and the Civilian Component for the duration of the deployment (Articles X and XI). It also sets out requirements for carriage of weapons and ammunition and the transportation, storage and handling of weapons, ammunition, explosives and dangerous goods for the conduct of cooperative activities in the Receiving State (Articles XII and XVI). Further, the Agreement sets out obligations to ensure the protection of personal and classified information (Article XV); requirements concerning health and medical treatment of visiting personnel (Article XVI); requirements relating to local purchases of materials, supplies, equipment and services in the Receiving State (Article XVII); the Parties' agreed approach to handling the costs of cooperative activities (Article XVIII); requirements regarding foreign exchange and personal taxation (Article XIX), and obligations regarding environmental protection (Article XX).

14. Article XXI pertains to disciplinary matters and criminal jurisdiction. This includes a framework for determining which State will have primary jurisdiction to prosecute criminal or service offences committed by the military or civilian personnel of a Visiting Force while in the Receiving State. It also provides ancillary provisions addressing how the Parties will cooperate on the investigation, prosecution and punishment of any such offences. The legally-binding Annex and less-than-treaty-status Record of Discussion further detail the Parties' understandings regarding certain aspects of commitments agreed in Article XXI.
15. Article XXII includes obligations aimed at ensuring the security of the facilities and areas made available in the Receiving State to visiting personnel, as well as their property, official records and information. It also affirms the right of the Sending State to maintain military police within the Visiting Force, and provides that military police will be employed subject to certain conditions and arrangements with the authorities of the Receiving State.
16. Japan and Australia both place importance on ensuring the good order and discipline of their defence forces at all times, and are mindful that when deployed abroad it is necessary to respect local laws and customs. The Agreement sets out the core provisions on the use of military disciplinary powers by the Sending State while in the territory of the Receiving State. It is based on an expectation of close coordination and cooperation to resolve any issues that might arise. The Visiting Force of the Sending State would exercise command and control over its personnel when operating in the Receiving State's territory. Australia and Japan will implement the Agreement so that some elements of disciplinary powers, namely arrest, search and seizure may be conducted in a cooperative manner. In some cases regarding arrest, search and seizure, the Sending State will seek the assistance of the Receiving State's authorities to undertake actions it would normally exercise autonomously. Further detail on how this cooperation would occur is included in a less-than-treaty-status Implementing Arrangement on Articles XXI and XXII, which is to be confirmed by the Joint Committee following entry into force of the Agreement.

17. Article XXIII concerns the handling of civil claims arising out of the cooperative defence activities. It includes provisions which commit each Party to waiving certain claims arising between them for property damage, injury or death, or maritime salvage. It also includes provisions which will ensure certain third-party civil claims are handled effectively if they arise during a deployment. In the event this Article needs to be used, it will greatly simplify the process for determining how such matters are to be resolved.
18. Articles XXIV-XXIX cover matters such as: the management of accidents and incidents; notification of the death of any visiting personnel and handling of mortuary affairs; avoiding misuse of privileges; establishment and functioning of a Joint Committee, as a means for consultation between the Parties on matters regarding the implementation of the Agreement; dispute resolution (which is to be by negotiation); timing for entry into force and procedures for amendment and termination of the Agreement.
19. The Agreed Minutes record a number of matters agreed by Australia and Japan in negotiating the text of the treaty. They pertain to five articles, as titled.

Implementation

20. Any legislative or regulatory action necessary to implement the Agreement will be completed prior to entry into force. There will be no effect upon the existing roles of the Commonwealth Government and the State and Territory governments.
21. In the course of negotiating the Agreement the Parties also developed a number of other implementing arrangements that provide further detail on how certain articles of the Agreement will be implemented. The Parties may mutually determine to develop additional implementing arrangements in the future. The Joint Committee to be established after entry into force of the Agreement (pursuant to Article XXVII) will be a means for consultation between the Parties on implementation.

Costs

22. The Agreement does not impose any foreseeable direct financial costs for Australia. The costs for Australia and Japan of cooperative activities undertaken pursuant to the Agreement will be handled in accordance with Article XVIII.

Future treaty action

23. In accordance with Article XXIX, the Agreement can be amended in writing, if both Parties agree. The amendments would need to be agreed according to the domestic treaty-making processes of each party. They would come into force on the date to be agreed by the Parties.

Termination

24. In accordance with Article XXIX, the treaty can be terminated by either Party with six months' notice in writing. Even if terminated, the provisions relating to security of

information remain binding. Any obligations relating to costs, jurisdiction or claims remain binding until they are satisfied, unless otherwise mutually determined by the Parties.

Contact details

International Policy Division
Strategy, Policy, and Industry
Department of Defence

ATTACHMENT ON CONSULTATION

Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Forces of Japan

(Canberra and Tokyo, 6 January 2022)

[2022] ATNIA 2

[2022] ATNIF 2

CONSULTATION

Commonwealth Departments

25. The Department of Defence consulted with the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, Attorney-General's Department and Home Affairs. No concerns have been identified.

State and Territory Governments

26. The State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No requests for further information or comments on the proposed Agreement have been received to date from the State and Territory Governments. No action will be required from States or Territories to implement the proposed Agreement.

Public Consultation

27. No public consultation has been undertaken as the Agreement relates to bilateral defence cooperation matters. Public statements have been made throughout the course of the negotiations since 2014 providing progress updates and key milestone achievements.

ATTACHMENT ON RECORD OF DISCUSSION

Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Forces of Japan

(Canberra and Tokyo, 6 January 2022)

[2022] ATNIA 2

[2022] ATNIF 2

Record of Discussion on Article XXI

This Record of Discussion is intended to record matters discussed between the Parties to the Agreement between Japan and Australia concerning the Facilitation of Reciprocal Access and Cooperation between the Self-Defense Forces of Japan and the Australian Defence Force (hereinafter referred to as “the Agreement”) in the course of negotiations on Article XXI and the Annex of the Agreement. It is not legally binding and does not alter the scope of the Parties’ domestic laws and regulations or international legal obligations arising under, or existing independently of, the Agreement:

1. With reference to paragraph 2 of the Annex to the Agreement, the Parties confirm that the expression “such assistance would be inconsistent with its obligations under applicable international agreements existing at the time of entry into force of this Agreement” is intended to apply to situations where the Party seeking to refuse assistance considers there is a sufficient likelihood that as a result of such assistance, the person could be subject to the death penalty. While each situation will be assessed on a case-by-case basis, the Parties currently do not consider that such assistance in any other cases under the Agreement would be inconsistent with their obligations under applicable international agreements existing at the time of entry into force of the Agreement and do not envisage any concrete situation where they would refuse such assistance because of the other Party’s criminal justice system.

2. The Parties also confirm that when a Party considers whether the assistance under paragraph 5(a) of Article XXI of the Agreement would be inconsistent with its obligations under applicable international agreements existing at the time of entry into force of the Agreement, that Party will have regard to relevant available information. Such information may include, among other things:

- (a) representations made by or on behalf of the person in custody;
- (b) representations made by the other Party, including supporting information relating to the offence of which a person has been accused, relevant statutory penalties and sentencing trends;
- (c) relevant assurances provided by the other Party; and
- (d) other relevant country information.

3. In particular, the Parties acknowledge that an assurance from the appropriate authority not to seek the death penalty would be considered as a ‘relevant assurance’ for the purpose of

paragraph 2(c) above. The Party receiving such an assurance will give it serious consideration when considering whether the assistance under paragraph 5(a) of Article XXI of the Agreement would be inconsistent with its obligations under applicable international agreements existing at the time of entry into force of the Agreement.

4. (a) With regard to paragraph 6(a) of Article XXI of the Agreement, at this moment, Japan does not envisage any concrete situations where Japan would refuse the assistance in the carrying out of all necessary investigations into offences allegedly committed by a member of the Visiting Force or the Civilian Component, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence.
- (b) With regard to paragraph 6(a) of Article XXI of the Agreement, at this moment, Australia does not envisage any concrete situations where Australia would refuse the assistance in the carrying out of all necessary investigations into offences allegedly committed by a member of the Visiting Force or the Civilian Component, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence except where Australia considers there is a sufficient likelihood that the person under investigation could be subject to the death penalty.

5. When Australia considers whether there is a sufficient likelihood that the person under investigation could be subject to the death penalty, Australia will have regard to relevant available information. Such information may include, among other things:

- (a) representations made by or on behalf of the person in custody;
- (b) representations made by Japan, including supporting information relating to the offence of which a person has been accused, relevant statutory penalties and sentencing trends;
- (c) relevant assurances provided by Japan; and
- (d) other relevant country information.

6. The Parties acknowledge that nothing agreed or mutually determined in connection with the Agreement will prejudice any future negotiations between the Parties on treaties concerning extradition or mutual legal assistance.