The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 138

Treaties tabled on 11 and 12 December 2013, 20 January 2014 and referred on 15 January 2014

Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, with Protocol (Sydney, 30 July 2013)

Arms Trade Treaty (New York, 2 April 2013)

Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes (Montevideo, 10 December 2012)

Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam (Canberra, 26 June 2013)

Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communications Facilities of 29 May 1980 (Canberra, 21 November 2013)

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

   (i) either House of the Parliament, or

   (ii) a Minister; and

c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of abbreviations

ACIAR	Australian Centre for International Agricultural Research
ANSTO	Australian Nuclear Science and Technology Organisation
ARC	Australian Research Council
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DFAT	Department of Foreign Affairs and Trade
FNCA	Forum for Nuclear Cooperation in Asia
MOU	Memoranda of Understanding
NASA	National Aeronautics and Space Administration
NIA	National Interest Analysis
OECD	Organisation for Economic Cooperation and Development
RIS	Regulation Impact Statement
UNGA	United Nations General Assembly
UNSCAR	United Nations Trust Facility Supporting Cooperation on Arms Regulations

List of recommendations

2 Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income

Recommendation 1

The Committee supports the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income* and recommends that binding treaty action be taken.

3 Arms Trade Treaty

Recommendation 2

The Committee supports the *Arms Trade Treaty (New York, 2 April 2013)* and recommends that binding treaty action be taken.

4 Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes* and recommends that binding treaty action be taken.

5 Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam

Recommendation 4

The Committee supports the *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam* and recommends that binding treaty action be taken.

6 Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities of 29 May 1980, as amended

Recommendation 5

The Committee supports the *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities* and recommends that binding treaty action be taken.

1

Introduction

Purpose of the report

1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions tabled on 11 and 12 December 2013 and 20 January 2014 and referred on 15 January 2014:

- ⇒ *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, with Protocol (Sydney, 30 July 2013);*
- ⇒ *Arms Trade Treaty (New York, 2 April 2013);*
- ⇒ *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes (Montevideo, 10 December 2012);*
- ⇒ *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam (Canberra, 26 June 2013); and*
- ⇒ *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communications Facilities of 29 May 1980 (Canberra, 21 November 2013).*

1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.

1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.

1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers

arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties considered in this report do not require Regulation Impact Statements.

1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.7 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:

- http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/11_12december2013/index.htm
- http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/15january2014/index.htm
- http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/20january2014/index.htm

Conduct of the Committee's review

1.8 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by Friday 31 January 2014, Monday 3 February 2014 and Friday 14 March 2014, with extensions available on request.

1.9 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.

1.10 The Committee held public hearings into these treaties in Canberra on Monday 10 February 2014 and Monday 3 March 2014.

1.11 The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaties tabling dates, being:

- 11 and 12 December 2013;
- 15 January 2014; and
- 20 January 2014.

1.12 A list of submissions received and their authors is at Appendix A.

1.13 A list of witnesses who appeared at the public hearings is at Appendix B.

2

Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income

Introduction

2.1 The proposed treaty action is to bring into force the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol*. The Agreement will replace an existing Agreement which was signed on 28 February 1980.[1]

2.2 The Agreement was tabled in the Commonwealth Parliament on 11 December 2013.

Overview and national interest summary

2.3 The National Interest Analysis (NIA) explains that the Agreement will update the existing bilateral tax arrangements between Australia and Switzerland and align them with current Australian and international tax policy settings. This is expected to encourage trade and investment, which

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1 National Interest Analysis [2013] ATNIF 21 with attachment on consultation *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol* done at Sydney, 30 July 2013 [2013] ATNIF 21 (hereafter referred to as 'NIA'), para 1.

will further enhance economic relations between the two countries, and enhance tax system integrity.[2]

2.4 The Agreement will strengthen the administrative assistance arrangements between Australian and Swiss revenue authorities, by permitting the exchange of taxpayer information to help address tax evasion. The existing Agreement does not provide a legal basis for this type of cooperation. In this regard, the Agreement is consistent with ongoing international efforts, supported by the G20, to improve tax system integrity. Bilaterally, it reflects the efforts of both countries to improve international standards of tax transparency and information exchange.[3]

Reasons for Australia to take the proposed treaty action

2.5 The following information on the claimed benefits to Australia of the proposed treaty action is taken from the NIA.

Reducing barriers to bilateral trade and investment

2.6 The Agreement is expected to reduce taxation barriers to bilateral trade and investment, primarily by reducing source country taxes on cross-border payments of dividends, interest and royalties. Rather than taking unilateral action to reduce such taxes (which are imposed as withholding taxes in Australia), Australia has adopted the approach of agreeing to such reductions on a reciprocal bilateral basis. This approach 'locks in' the tax limits in both countries, thus ensuring a stable tax framework for business between Australia and its tax treaty partners.[4]

2.7 The Agreement will fulfil Australia's 'most favoured nation' obligation, contained in the Protocol to the existing Agreement, to reduce its withholding tax limits on dividends, interest and royalties paid to Swiss residents. The obligation requires Australia to provide Switzerland with the same treatment, with regard to these limits, as that agreed to by Australia in a subsequent treaty with another member state of the Organisation for Economic Cooperation and Development (OECD). The obligation was triggered in 2003 following Australia's agreement to lower the corresponding limits in its tax treaty with the United States of America ([2003] ATS 14). Australia has since agreed to similar treatment in its tax

2 NIA, para 3.

3 NIA, para 4.

4 NIA, para 5.

treaties with France ([2009] ATS 13), Finland ([2007] ATS 36), Japan ([2008] ATS 21), New Zealand ([2010] ATS 10), Norway ([2007] ATS 32) and the United Kingdom ([2003] ATS 22).[5]

2.8 The Agreement will reduce the dividend withholding tax rate limit from 15 per cent to zero on inter-corporate dividends (that is, dividends distributed between two companies arising from a shareholding or participation in the capital of the paying company) on holdings of 80 per cent or more, subject to certain conditions, and to 5 per cent on inter-corporate dividends on other holdings of 10 per cent or more (Article 10). This will promote direct investment and will allow Australian companies to repatriate profits made by certain Swiss subsidiaries back to Australia without facing any further tax. Article 10 will also provide for a zero tax rate on dividends derived by complying Australian superannuation funds and tax-exempt Swiss pension funds, which will help stimulate cross-border investment by such funds.[6]

2.9 The Agreement will reduce the interest withholding tax rate limit from 10 per cent to zero for interest paid to: bodies exercising governmental functions; banks performing central banking functions; banks that are unrelated to, and dealing wholly independently with, the payer; and complying Australian superannuation and tax-exempt Swiss pension funds (Article 11).[7]

2.10 The Agreement will also reduce the royalty withholding tax limit from 10 to 5 per cent (Article 12). Reduced source country taxation on royalties is likely to encourage Australian businesses to source intellectual property from Switzerland and vice versa. While Australian withholding taxes on royalties effectively seek to tax the foreign recipients of the royalties, contracts often include provisions (known as 'gross-up' clauses) which effectively transfer the economic burden of the tax onto the payer of the royalties. Reducing these rates is expected to reduce the costs for Australian businesses of accessing Swiss intellectual property.[8]

Increased certainty and reduced compliance costs for taxpayers

2.11 Where the revenue authority of one country adjusts the taxable income of a resident of the other country, to reflect the arm's-length price of goods or services provided to an associated enterprise, the Agreement will require

5 NIA, para 6.
6 NIA, para 7.
7 NIA, para 8.
8 NIA, para 9.

the revenue authority of the other country to make an appropriate adjustment to the amount of tax charged in its jurisdiction in respect of the same income (Article 9). This will help remove double taxation of transactions between associated enterprises.[9]

2.12 The Agreement will allocate taxing rights over fringe benefits provided by employers to their employees to the country that has the primary taxing right over the underlying employment income (Article 15). This will prevent the double taxation of fringe benefits that can otherwise arise, and remain unrelieved, because Australia taxes the provider of the benefit (the employer) as opposed to the recipient (the employee).[10]

2.13 The Agreement will protect taxpayers from one country from tax discrimination in the other country based on their nationality (Article 23). This will ensure that Australian nationals are not subject to more burdensome taxation and connected requirements in Switzerland than Swiss nationals in the same circumstances, and vice versa. This will provide certainty for individuals and businesses that have dealings in both countries.[11]

2.14 The Agreement will provide for the referral of unresolved tax disputes to independent arbitration (Article 24). This will enable taxpayers to seek arbitration in cases where they believe the actions of one or both of the two revenue authorities have resulted in taxation contrary to the provisions of the proposed Agreement.[12]

2.15 Under the Agreement, the rules that allocate taxing rights over business profits will apply to beneficiaries of trusts that derive such profits through a permanent establishment located in the source (of the income) country (Protocol, paragraph 5). This will clarify that such beneficiaries are entitled to the benefits of the proposed Agreement.[13]

2.16 The Agreement will ensure that complying Australian superannuation funds that derive Swiss-sourced dividends and interest shall be treated as the beneficial owner of such income to the extent that the income is treated as the income of the fund under Australian tax law (Protocol, paragraph 8). This will provide greater certainty for Australian superannuation funds and entitle them to the benefits of the Agreement.[14]

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9 NIA, para 10.
10 NIA, para 11.
11 NIA, para 12.
12 NIA, para 13.
13 NIA, para 14.
14 NIA, para 15.

Establishing a more effective framework to address international fiscal evasion

2.17 The Agreement will enhance tax system integrity by establishing a framework in which the revenue authorities of Australia and Switzerland can cooperate to detect and prevent tax evasion. In particular, it will provide a legal basis for the exchange of taxpayer information, including bank information, by the revenue authorities (Article 25). The existing Agreement, which reflects Switzerland's long-standing position on bank secrecy, does not authorise tax information exchange for anti-tax evasion purposes.[15]

2.18 Treasury outlined how the changes would enhance the existing arrangements regarding tax integrity and secrecy:

> … a non-discrimination article has been inserted in this treaty—there was no article in the previous treaty or the current treaty. The mutual agreement procedure article has been updated to include for the possibility of arbitration of tax disputes, and the exchange-of-information rules have been updated so that when the treaty enters into force the two countries can now exchange taxpayer information for the purpose of preventing tax evasion. Under the existing treaty such information can only happen for the purpose of preventing double taxation or for administering the treaty in other ways.[16]

2.19 The standard contained in Article 25 is consistent with Article 26 of the OECD *Model Tax Convention on Income and on Capital* and reflects the current international standard endorsed by the Global Forum on Transparency and Exchange of Information for Tax Purposes, the United Nations and the G20. The exchange-of-information rules contained in Article 25 are expected to discourage the use of Swiss banks as a location for concealing untaxed income and assets, thereby improving taxpayer compliance. In this regard the Agreement will enhance Australia's ability to administer and enforce its domestic tax laws.[17]

2.20 Asked about the extent of tax evasion between Australia and Switzerland, the Australian Taxation Office (ATO) acknowledged the difficulty of placing a dollar figure on the issue but told the Committee that over 188 000 transactions took place between the two countries during the 2012-

15 NIA, para 16.

16 Mr Gregory Wood, Manager, Tax Treaties Unit, Tax System Division, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 7.

17 NIA, para 17.

13 financial year involving over $41 billion.[18] Although the Australian Transaction Reports and Analysis Centre (AUSTRAC) cannot identify entity type from information reported on bank to bank funds movements, the ATO advised that of these transactions 52 547 could be attributed to 20 249 individuals and 44 481 to 7 278 companies.[19] These transactions account for nearly $16 billion. However no details of entities could be supplied for nearly 81 000 of the transactions, totalling over $22.5 billion.[20] While many of these transactions are legitimate the Agreement will provide a 'screening mechanism' to identify those that may not be.[21]

2.21 Although the provisions of the Agreement cannot be exercised retrospectively, the ATO assured the Committee that they will be a useful deterrent and may encourage compliance with Australian tax law.[22] The Treasury emphasised that the lack of retrospectivity would not prevent investigation of existing accounts.[23]

2.22 The Agreement will also provide an agreed basis for determining the allocation of profits within multinational enterprises and whether the profits on related party dealings by members of a multinational group operating in both countries reflect the pricing that would be adopted by independent parties (Articles 7 and 9). This will assist the ATO in its ability to respond to international profit shifting through its administration of transfer pricing laws (that is, laws that seek to ensure that the prices charged for goods and services transferred between associated entities reflect market prices).[24]

2.23 Questioned on the most effective way to stem loss of revenue through profit-shifting, the Treasury suggested a two-part solution:

> … the first is better compliance activity… with this treaty there are much more robust information-sharing arrangements. More broadly, there is the automatic exchange of information standard that is being developed by the OECD and the G20, so all G20 countries are acting in concert to limit the extent and the ease with which profit shifting and evasion happen. Then there is the issue … of ensuring one's own tax system and tax settings are right and

18 Mr Grant Goodwin, Executive Director, Exchange of Information Unit, Transparency Practice, Internationals, Public Groups and International, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 10 February 2014, p. 8.

19 Australian Taxation Office (ATO), *Submission 2*.

20 ATO, *Submission 2*.

21 Mr Gerry Antioch, General Manager, Tax System Division, Revenue Group, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 12.

22 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 10 February 2014, p. 7.

23 Mr Wood, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 11.

24 NIA, para 18.

> competitive. Profit shifting happens presumably because people find that it is profitable to locate in another jurisdiction, and so ensuring that tax policy and tax settings are right also helps in stemming the leakage.[25]

Obligations

2.24 **Articles 6 to 21** allocate taxing rights in respect of certain types of income and fringe benefits between the two countries. The obligations contained in these articles are of a kind already present in the existing Agreement, with the key differences discussed below.[26]

2.25 **Article 2** clarifies that Australia's fringe benefits tax, petroleum resource rent tax and minerals resource rent tax will be included within the scope of the Agreement. None of these taxes are explicitly covered by the existing Agreement.[27]

2.26 **Article 5** defines the term 'permanent establishment', which is relevant to determining when a business, which is a resident of one country, will have a taxable presence in the other country. [28]

2.27 **Article 6** provides that income from immovable property will include income from agriculture or forestry activities, and the definition of 'immovable property' will include leases or other interests in land, property accessory to immovable property and rights to explore for mineral, oil or gas deposits or other natural resources, and to mine those deposits or resources.[29]

2.28 **Article 7** clarifies that beneficiaries of trusts that derive business profits through a permanent establishment located in the source country will be deemed to be carrying on a business through that permanent establishment and taxable (in the source country) on their share of the profits attributable to it.[30]

25 Mr Antioch, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 8.
26 NIA, para 19.
27 NIA, para 20.
28 NIA, para 21.
29 NIA, para 22.
30 NIA, para 23.

2.29 **Article 8** provides that profits from shipping or air transport activities undertaken between two ports within a country will be taxable in that country.[31]

2.30 **Article 9** requires the revenue authorities to make correlative adjustments to the amount of tax charged on income in certain circumstances to remove double taxation.[32]

2.31 **Article 10, 11 and 12** applies to the taxation of dividends, interest and royalties respectively, reducing the source country tax rate limits that apply to such income from the corresponding rates contained in the existing Agreement.[33]

2.32 **Article 13** provides for source country taxation of gains derived from the alienation of immovable property located within its jurisdiction, including from the disposal of interests in land-rich entities.[34]

2.33 **Article 15** prevents the double taxation of fringe benefits by allocating relevant taxing rights to the country that has the primary taxing right over the underlying employment income.[35]

2.34 **Article 18** provides for pensions and similar payments to be taxed in the recipient's country of residence, provided the recipient is taxable on those payments in that country.[36]

2.35 **Article 19** provides for government pensions paid in respect of past employment to be taxed exclusively in the source country in certain circumstances.[37]

2.36 **Article 23** requires each country to treat nationals of the other country no less favourably for tax purposes than it treats its own nationals in the same circumstances.[38]

2.37 **Article 24** establishes a dispute resolution procedure, including a mechanism for taxpayers to present complaints to their country of residence, irrespective of the remedies provided by the domestic laws of either country, where they consider that they have been erroneously taxed. It will also permit taxpayers to pursue independent arbitration where a dispute remains unresolved after three years.[39]

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31 NIA, para 24.
32 NIA, para 25.
33 NIA, para 26.
34 NIA, para 27.
35 NIA, para 28.
36 NIA, para 29.
37 NIA, para 29.
38 NIA, para 30.
39 NIA, para 31.

2.38 **Article 25** obliges the exchange of tax information between both countries, including a specific obligation to gather and provide information upon request. **Article 25(2)** imposes a correlative obligation on the country receiving any such information to treat it as secret in the same manner as information obtained under its domestic laws. **Article 25(3)** allows either country to decline to supply information in certain circumstances.[40]

Implementation

2.39 The implementation of the Agreement requires amendment to the *International Tax Agreements Act 1953* to give it the force of law in Australia. The amendment must be effected prior to the Agreement entering into force in Australia. The legislative framework required for Australia to fulfil its obligations under Article 25 (Exchange of Information) is contained in section 23 of the *International Tax Agreements Act 1953*. The implementation of the Agreement will not affect the existing roles of the Commonwealth, or the States and Territories, in tax matters.[41]

Costs

2.40 The reciprocal nature of tax treaties means that both countries can expect direct costs and benefits to their revenue bases as a result of changes to their taxing rights and increased taxpayer compliance.[42]

First-round impact of the Agreement

2.41 Treasury estimates that the revenue costs of reducing Australian withholding tax on dividends, interest and royalties will be offset by the revenue gains arising from enhanced tax system integrity. The establishment of effective exchange-of-information arrangements with Switzerland is expected to discourage the use of Swiss banks to conceal untaxed income and assets. No other material costs have been identified as likely to arise from the implementation of the Agreement. As the Agreement is broadly consistent with international norms, it is expected to

40 NIA, para 32.
41 NIA, para 33.
42 NIA, para 34.

reduce compliance costs for those taxpayers with cross-border dealings between the two countries.[43]

2.42 There would be a small, unquantifiable cost in administering the changes made by the Agreement, including minor implementation costs to the ATO in educating the taxpaying public and ATO staff concerning the new arrangements. There are also 'maintenance' costs to the ATO and Treasury in terms of dealing with inquiries, rulings and other interpretative decisions and mutual agreement procedures (including advance pricing arrangements). However, these costs will continue to be managed within existing agency resources.[44]

Second-round impact of the Agreement

2.43 The estimated revenue costs and benefits do not take account of any additional revenues that may flow from the second-round impacts generated by the treaty. Second-round impacts include revenue gains from changes in cross-border investment levels, improved access to technology, reduced capital costs, economic growth and job creation. The revenue cost does not therefore take into account anticipated revenue benefits from expected increases in cross-border trade and investment.[45]

2.44 The Committee sought clarification regarding the actual cost of implementing the Agreement. The Treasury estimated that the reduction in withholding tax would amount to a loss of approximately $70 million and admitted that there was no provision in forward estimates to cover this loss.[46]

Conclusion

2.45 The Committee is aware of the ongoing need to improve the integrity and transparency of the tax system and combat tax evasion and profit-shifting. The revision and modernisation of the Australian-Switzerland treaty is an important step in this process. The Committee also welcomes the benefits that will flow to individuals and businesses with cross-border dealings between the two countries.

2.46 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

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43 NIA, para 35.

44 NIA, para 36.

45 NIA, para 37.

46 Mr Wood, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 11.

Recommendation 1

The Committee supports the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income* and recommends that binding treaty action be taken.

3

Arms Trade Treaty

Introduction

3.1 The proposed treaty action is to bring into force the *Arms Trade Treaty* tabled in the Commonwealth Parliament on 12 December 2013.

3.2 The Treaty will enter into force 90 days after it has been ratified by 50 States in accordance with Article 22(1), a figure that is expected to be reached by mid-2014. As at 27 February 2014 there are 116 signatories to the Treaty and it has been ratified by 11 States.[1]

Background

3.3 The trade in conventional arms is estimated to be worth $US70 billion annually and, to date, there has not been a comprehensive, legally binding international agreement governing it. The Secretary-General of the United Nations has acknowledged the pervasive damage caused by the lack of control on the trade world-wide and the resulting difficulties. He said:

> Whether it is promoting sustainable development, protecting human rights, carrying out peacekeeping efforts, delivering food aid, improving public health, advancing gender equality, building safer cities, protecting forcibly displaced persons or fighting crime and terrorism, the Organization [United Nations] faces armed violence, conflict and civil unrest involving violations of

1 United Nations Office for Disarmament Affairs, 'Arms Trade Treaty: Status of the Treaty', <http://disarmament.un.org/treaties/t/att> accessed 27 February 2014.

> international law, abuses of the rights of children, civilian casualties, humanitarian crises and missed social and economic opportunities.[2]

3.4 The National Interest Analysis (NIA) explains that, since 2006, Australia has actively supported the development of a legally binding instrument that would set common international standards for the transfer of conventional arms. Australia was a co-author of the United Nations General Assembly (UNGA) resolution which called for the development of such a treaty, and has co-authored subsequent resolutions on the matter.[3]

3.5 In 2007, Australia outlined its position on a treaty in a submission to the United Nations Secretary-General. This submission expressed Australia's support for a treaty to address the irresponsible or illicit transfer of conventional arms, and set out its views regarding the feasibility, scope and parameters of the Treaty. Australia was actively engaged in various other preparatory processes and outreach activities.[4]

3.6 Australia co-authored and co-sponsored UNGA Resolution 64/48, passed in 2009, which called for a conference to be convened in 2012 'to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms'.[5]

3.7 Australia was elected Vice-Chair of the Preparatory Committee tasked with preparing an Arms Trade Treaty in July 2010 and its views were incorporated into the draft prepared in July 2012. That draft failed to obtain the support of a number of key States.[6]

3.8 Australia's Ambassador to the UN in Geneva, Mr Peter Woolcott, was appointed President of the Conference convened in March 2013 to negotiate a final text which was adopted on 2 April 2013.[7] The text passed by 154 votes, with 23 abstentions and three States voting against it: Iran, Syria and the Democratic People's Republic of Korea.[8]

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2 Office for Disarmament Affairs, *United Nations Disarmament Yearbook*, vol. 36 (Part II): 2011, United Nations, New York, 2012, p. 71.

3 National Interest Analysis [2013] ATNIA 19 with attachment on consultation, *Arms Trade Treaty, done at New York, 2 April 2012* [2013] ATNIF 18 (hereafter referred to as 'NIA'), para 8. The other co-authors were Argentina, Costa Rica, Finland, Japan, Kenya and the UK.

4 NIA, para 9.

5 NIA, para 10.

6 NIA, para 11.

7 NIA, para 12 and 13.

8 Mr Jeff Robinson, Assistant Secretary, Arms Control and Counter-Proliferation Branch, International Security Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 3 March 2014, p. 9.

3.9 The Committee queried the effectiveness of the Treaty given that China and Russia had abstained from the vote and that, although the United States had signed the Treaty, the US Congress may not ratify it. With regard to the US, the Department of Foreign Affairs and Trade (DFAT) explained that under the Vienna Convention on the Law of Treaties signatories are obligated 'to refrain from acts which would defeat the object and purpose of the treaty, pending its entry into force or ratification'.[9] Further, existing US export control arrangements largely comply with the requirements of the Treaty.[10]

3.10 DFAT acknowledged that the Treaty was only the 'beginning of the process' and that the challenges ahead included engaging Russia and China.[11] However, they emphasised the significance of the achievement:

> We are very conscious of the importance of having a universal treaty to ensure its effectiveness. Such a treaty is the beginning of setting a new international norm that will put pressure on those countries that are not members of it to comply. …It is not the end of the story; we intend to continue to put pressure on countries outside the treaty to become part of it. It will take time and it will take diplomatic and other pressure. Our current priority is to have an early first meeting of states parties which will provide an opportunity to set the framework for the implementation of the treaty into the future.[12]

3.11 Australia was one of the first States to sign the Treaty when it opened for signatures at the Unites Nations in New York on 3 June 2013.[13]

Overview and national interest summary

3.12 The objective of the Treaty is to establish common global standards for national regulation of the international trade in conventional arms. It encourages States Parties to trade conventional arms more responsibly and transparently; thereby helping to deter their diversion to the illicit

9 Dr Gregory Alan French, Assistant Secretary, Legal Division, International Legal Branch, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 3 March 2014, p. 10.

10 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

11 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

12 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

13 NIA, para 7.

market and preventing the destabilising impact the illicit arms trade has on peace and security, human suffering and development.[14]

Reasons for Australia to take the proposed treaty action

3.13 According to the NIA Australia has been a long-standing advocate of a robust treaty because of its potential to advance our humanitarian objectives and serve national and international security interests. Better controls will help reduce the deleterious impact that irresponsible and illicit arms transfers have on security and development internationally—with impacts most seriously felt by vulnerable countries, including in our region. The NIA states that the establishment of a legally binding and widely supported multilateral treaty provides a strong tool in meeting these challenges.[15]

3.14 The Committee noted that the Treaty has no enforcement provisions and suggested this may detract from its effectiveness. DFAT admitted that it had proved too difficult to gain consensus for such provisions at this stage, despite a number of States wishing to include dispute settlement arrangements.[16] However, DFAT maintained that the detailed reporting requirements would encourage compliance with the Treaty and that States within the jurisdiction of the International Court of Justice already come under a compulsory dispute settlement regime.[17] DFAT also indicated that Article 19 provides dispute settlement guidelines and that there is provision for future amendment.[18]

3.15 Asked if the Treaty will help curb the role of non-state players in the illicit arms trade, DFAT re-iterated that the Treaty is primarily a humanitarian instrument and that it was 'not an arms control treaty as such'.[19] Notwithstanding its key objective, by imposing an obligation on States Parties to control the trade in arms crossing their borders the Treaty will limit the participation of non-state players in the illicit trade.[20]

3.16 In particular, DFAT drew attention to Article 6 which deals with prohibition requirements, Article 7 which covers export and export assessment, and Article 11 which sets out measures to prevent diversion,

14 NIA, para 3.
15 NIA, para 5.
16 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.
17 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.
18 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March, 2014, p. 12.
19 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.
20 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

as useful tools to control non-state players.[21] They again indicated that the amendment provisions, which require a three-quarters majority rather than the consensus of all States Parties, will facilitate future changes in this area.[22]

3.17 The Committee asked if the Treaty had the power to cover conventional arms transferred other than by sales, for example by rental agreement or as gifts. DFAT explained that, in their view, it did:

> We believe that, properly interpreted, it can cover any category of physical transfer of weapons, which can include non-monetary transactions that result in the title and/or control of weapons being handed from one entity to another.[23]

3.18 DFAT admitted that some countries did not agree with this view but maintained that 'trade' and 'transfer' are used interchangeably throughout the Treaty and that 'transfer' encompasses a broader meaning than 'trade'.[24] The Attorney-General's Department confirmed that the activities covered by the Treaty apply to any 'transfer' of arms:

> … the activities of international trade comprise export, import, transit, transhipment and brokering, which are referred to as 'transfer' throughout the text of the treaty. Where the obligations of the treaty refer to transferring items, it is capturing the conduct, whether it is export, import, transhipment or transit.[25]

Obligations

3.19 **Article 1** describes the object and purpose of the Treaty as being to establish the highest possible common international standards for regulating the international trade in conventional arms and to prevent and eradicate illicit trade in such arms, for the purposes of contributing to peace and security, reducing human suffering and promoting cooperation, transparency and responsible action by States Parties.[26]

3.20 **Article 2(1)** sets out the types of conventional arms and types of activities covered by the Treaty in the following eight categories:

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21 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

22 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

23 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 14.

24 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

25 Ms Anne Sheehan, Acting Assistant Secretary, International Law Trade and Security Branch, Office of International Law, Attorney-General's Department, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

26 NIA, para 14.

- battle tanks;
- armoured combat vehicles;
- large-calibre artillery systems;
- combat aircraft;
- attack helicopters;
- warships;
- missiles and missile launchers; and
- smalls arms and light weapons.[27]

3.21 The Treaty does not define these categories, leaving this to States Parties' national implementation of the Treaty. While **Article 5(3)** prescribes minimum conditions for definitions for national control lists it is open to States Parties to adopt a broader, more comprehensive definition if they wish.[28]

3.22 The Committee queried the absence of cluster munitions and grenades from the list of weapons covered by the Treaty. DFAT indicated that cluster munitions are covered under the United Nations Convention on Cluster Munitions. Grenades did not fit into any of the suggested categories during the negotiations and it had proved too difficult to bring them within the scope of the Treaty. Again, DFAT suggested that the amendment provisions will allow future adjustments and categories could be added as required.[29]

3.23 **Article 2(2)** provides that the Treaty applies to the activities of the international trade in conventional arms, which for the purpose of the Treaty, comprise 'export', 'import', 'transit', 'trans-shipment' and 'brokering'. Likewise these terms are not defined in the Treaty but are left to the domestic implementation of States Parties.[30]

3.24 **Article 2(3)** excludes from the scope of the Treaty any international movement of conventional arms by, or on behalf of, a State Party for that Party's use provided that those arms remain under the Party's ownership. This provision excludes the re-supply of arms and equipment to a Party's military or police stationed abroad provided the arms and equipment are not sold on to a third party.[31]

3.25 **Article 3** obliges States Parties to establish and maintain a national control system to regulate the export of ammunition/munitions fired,

27 NIA, para 15.

28 NIA, para 15.

29 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014.

30 NIA, para 16.

31 NIA, para 17.

launched or delivered by any of the conventional arms categories covered under **Article 2(1)**. States Parties, prior to authorising the export of ammunition/munitions, are then required to apply the provisions relating to prohibited transfers **(Article 6)** and export assessment **(Article 7)**, prior to authorising the export of parts and components.[32]

3.26 **Article 5** requires States Parties to implement the Treaty in a consistent, objective and non-discriminatory manner having regard to the principles set out in the preambular section of the Treaty. **Article 5(2)** is a core provision of the Treaty and obliges States Parties to establish and maintain a national control system, including a national control list, in order to implement the provisions of the Treaty. The national control list will define which conventional arms are covered by the national control system. For Australia, the Defence Export Control Office and the Australian Customs Border Protection Service will be the key national authorities and points of contact under our national control system.[33]

3.27 **Article 6** details the circumstances in which States Parties shall prohibit the transfer of conventional arms or their ammunition/munitions and parts or components. Paragraph 1 reaffirms the obligation of Parties to implement decisions of the UN Security Council, particularly arms embargoes or other similar measures. Paragraph 2 reaffirms existing legal obligations on Parties to abide by international agreements to which they are party and to prohibit any transfer of conventional arms that would violate those agreements. Paragraph 3 prohibits the transfer of conventional arms where a Party has knowledge at the time of authorisation that the arms would be used in the commission of genocide, crimes against humanity and certain war crimes.[34]

3.28 **Article 7** requires each exporting State Party to conduct an assessment, as part of its national control system, of the proposed export of conventional arms against specific criteria, including whether the conventional arms:

- would contribute to or undermine peace and security;
- could be used to commit or facilitate serious violations of international humanitarian or human rights law or acts constituting terrorism or a transnational organised crime;
- could be used to commit or facilitate serious acts of gender-based violence or violence against women and children.[35]

32 NIA, para 19.
33 NIA, para 20.
34 NIA, para 21.
35 NIA, para 22.

3.29 **Article 8** obliges importing States Parties to establish import systems and ensure appropriate and relevant information is provided to the exporting State Party to assist with its export assessment.[36]

3.30 **Article 9** obliges each State Party to take appropriate measures to regulate the transit or trans-shipment under its jurisdiction of conventional arms covered under **Article 2(1)**—excluding ammunition and parts and components—through its territory in accordance with relevant international law.[37]

3.31 **Article 10** obliges each State Party to take measures at a national level to regulate the brokering of conventional arms covered under **Article 2(1)**—excluding ammunition and parts of components—that occurs within its jurisdiction.[38]

3.32 **Article 11** outlines ways and means to prevent and react to diversion, particularly in the transfer of conventional arms covered under **Article 2(1)**.

3.33 **Article 12** requires each State Party to maintain national records for a minimum of ten years, pursuant to its national laws and regulations, of its export authorisations or actual exports of conventional arms under **Article 2(1)**. Each State Party is encouraged to maintain records of conventional arms that are imported to its territory as the final destination or that are authorised to transit or trans-ship through its territory.[39]

3.34 **Article 13** requires each State Party to provide an initial report to the Treaty Secretariat describing its national implementation measures within one year of the Treaty's entry into force for the Party. Each Party must submit an annual report to the Secretariat concerning its authorised or actual export and imports of conventional arms covered under **Article 2(1)**. Parties are permitted to exclude commercially sensitive or national security information.[40]

3.35 **Article 14** obliges each State Party to take appropriate measures to enforce national laws and regulations that implement the provisions of the Treaty.[41]

3.36 **Article 15** encourages international cooperation among States Parties in the effective implementation of the Treaty, including through

36 NIA, para 23.
37 NIA, para24.
38 NIA, para 25.
39 NIA, para 27.
40 NIA, para 28.
41 NIA, para 29.

consultation, exchange of information and lessons learned, information sharing and mutual legal assistance, and cooperation to prevent or address diversion of arms, violations of national measures and corruption.[42]

3.37 **Article 16** provides for States Parties to seek assistance in implementing the Treaty and requires Parties to provide such assistance on request. It also provides for a voluntary trust fund to be established to assist requesting Parties requiring assistance.[43]

3.38 **Article 17** provides that a Conference of States Parties will be held within 12 months after the entry into force of the Treaty and thereafter at such times as decided by the Conference. Its role includes reviewing the implementation of the Treaty, considering amendments and issues arising from the interpretation of the Treaty and considering and adopting recommendations regarding the implementation and operation of the Treaty.[44]

3.39 **Article 18** establishes a Secretariat to assist States Parties in the effective implementation of the Treaty.[45]

3.40 **Article 19** provides for any disputes regarding the interpretation or application of the Treaty to be cooperatively resolved between States Parties through mutually consenting to negotiations, mediation, conciliation, arbitration, judicial settlement or other peaceful means.[46]

3.41 **Article 20** provides for amendments to the Treaty.[47]

3.42 **Article 24** provides for the Treaty to be of unlimited duration and allows for a State Party to withdraw from the Treaty.[48]

3.43 **Article 26** sets out the Treaty's relationship vis-à-vis other international agreements for States that are party to both.[49]

Implementation

3.44 No new legislation is required to give effect to the Treaty in Australia. The legislative framework established by the *Customs Act 1901*, the

42 NIA, para 30.
43 NIA, para 31.
44 NIA, para 32.
45 NIA, para 33.
46 NIA, para 34.
47 NIA, para 42.
48 NIA, para 44.
49 NIA, para 35.

Defence and Strategic Goods List and the Customs (Prohibited Exports) Regulations (1958) already meets Australia's obligations under the Treaty.[50]

3.45 Some new administrative procedures may be required to comply with Australia's obligations under Article 12 of the Treaty for record keeping and Article 13 for reporting.[51] Defence assured the Committee that their existing export control regime will require little adjustment to comply with the Treaty requirements. Current reporting requirements for the UN Register of Conventional Arms will fulfil the reporting requirements under the Treaty and an updated IT system is expected to streamline the process.[52]

Costs

3.46 To further the implementation of the Treaty, Australia has pledged $1 million to provide assistance to developing countries with implementation of the Treaty, namely through the United Nations Trust Facility Supporting Cooperation on Arms Regulations (UNSCAR).[53]

3.47 DFAT informed the Committee that currently nine projects are being funded by UNSCAR focused on ratification and implementation, including research and education programs.[54] The Committee asked what was being done in Australia's immediate region. DFAT advised that Australia was working with New Zealand in the Pacific region and Japan in the South-East Asian area on a number of projects:

> For example, we worked together [with New Zealand] in a workshop in Fiji late last year, helping Pacific island countries understand what the implications of the treaty would be for them. New Zealanders have been developing model legislation which we have provided input to and which would be useful for those countries that have more limited capacity to develop their own legislation for use in, for example, the South Pacific, South-East Asia or elsewhere.[55]

50 NIA, para 36.

51 NIA, para 37.

52 Ms Gabrielle Burrell, Assistant Secretary, Defence Export Control Office, Strategic Policy Division, Department of Defence, *Committee Hansard*, Canberra, 3 March 2014, pp. 15–16.

53 NIA, para 38.

54 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 13.

55 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 14.

3.48 Costs will likely arise from the Conference of States Parties and the Treaty's Secretariat. Article 17(3) of the Treaty provides that the Conference of States Parties will adopt financial rules for itself, the Secretariat and any subsidiary bodies established.[56]

3.49 The Committee asked for clarification of the possible costs involved in the Conference and Secretariat. DFAT was unable to quantify the costs at this stage advising that it is hoped to agree on the financial arrangements during the first Conference.[57] However, they informed the Committee that to date three countries have offered to host the Secretariat, one country offering significant funding towards the costs.[58]

3.50 The other costs that may be associated with the Treaty will be limited to travel by officers to the Conference of States Parties to represent Australia. The International Security Division of the Department of Foreign Affairs and Trade expects to be able to manage these costs within its divisional allocation.[59]

Conclusion

3.51 The Committee recognises Australia's long-standing support for the Arms Trade Treaty and acknowledges the important milestone it represents. As the first international, legally binding agreement establishing common standards for the transfer of conventional arms, the Treaty provides the basis to curb the damaging illicit arms trade and address associated humanitarian issues.

3.52 The Committee is aware of the pragmatic nature of the agreement and that compromise had to be accommodated to ensure the Treaty came to fruition however it still holds some concerns. The lack of enforcement mechanisms is particularly worrying and, while the Committee accepts assurances that the reporting requirements will encourage compliance, it would like to see more substantial provisions made in this area in the future.

3.53 In regard to future adjustments, the Committee notes that the amendment provisions will also allow alterations to the initial categories of weapons if deficiencies are identified.

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56 NIA, para 39.

57 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

58 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

59 NIA, para 40.

3.54 The Committee is also concerned that a lack of clear definitions could mean that non-monetary transfers of conventional arms may fall outside the scope of the Treaty. To remove the threat of legal challenges and prevent the creation of loopholes, definitions need to be tightened during future negotiations.

3.55 The Committee is keen to see this Treaty come into effect and for Australia to continue its leadership role in that process. To that end the Committee supports the Treaty and recommends that binding treaty action be taken.

Recommendation 2

The Committee supports the *Arms Trade Treaty (New York, 2 April 2013)* and recommends that binding treaty action be taken.

4

Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes

Introduction

4.1 This chapter considers the *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes* (the Uruguay Tax Information Exchange Agreement).[1]

4.2 The proposed Agreement was initially tabled on 18 June 2013 during the 43rd Parliament. Consideration of the proposed Agreement was suspended without taking evidence when Parliament was prorogued on 5 August 2013. The proposed treaty was referred to the current Committee on 15 January 2014.

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1 National Interest Analysis [2013] ATNIA 12 with attachment on consultation *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes,* done at Montevideo, 10 December 2012 [2012] ATNIF 32 (hereafter referred to as 'NIA'), para 1.

Background

4.3 Tax Information Exchange Agreements like the proposed Uruguay Tax Information Exchange Agreement are bilateral Agreements that establish a legal basis for the exchange of tax information relating to persons and entities between the signatories.[2]

4.4 These Agreements are the result of an initiative by the Organisation for Economic Cooperation and Development (OECD) to improve the transparency of financial flows between countries.[3]

4.5 The National Interest Analysis (NIA) indicates that:

> While most financial flows to and from low-tax jurisdictions are legitimate, the legal framework and systems that make low-tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere. In particular, the use of secrecy laws to conceal assets and income that are subject to Australian tax is of concern to Australia.[4]

4.6 The OECD established the Global Forum on Transparency and Exchange of Information for Tax Purposes in 2002 as a mechanism to eliminate harmful tax practices that contribute to international tax evasion. The Forum has 121 members. Australia has played a leadership role in the Forum, including as the Chair of the Forum, until that position was taken over by South Africa in 2013.[5]

4.7 In 2002, the OECD released a model Tax Information Exchange Agreement to facilitate negotiations between OECD members and low tax jurisdictions. In 2003, Australia adopted its own model Tax Information Exchange Agreement based on the OECD model Agreement.[6]

4.8 Since the development of the OECD model Agreement, 100 jurisdictions, including Uruguay, have committed to eliminating harmful tax practices.[7]

4.9 Implemented Agreements support tax authorities by ensuring those authorities have all the available information to determine a taxpayer's correct liability.[8]

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2 NIA, para 3.

3 NIA, para 3.

4 NIA, para 10.

5 Mr Greg Wood, Manager, Tax Treaties Unit, Tax System Division, The Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 15.

6 NIA, para 9.

7 NIA, para 8.

8 NIA, para 8.

4.10 The proposed Uruguay Tax Information Exchange Agreement is one of 36 bilateral Tax Information Exchange Agreements signed by Australia,[9] of which 33, according to the NIA, have entered into force.[10] The Committee has previously reviewed Australian Tax Information Exchange Agreements in Reports 73, 87, 99, 102, 107, 112, 114, 120, 123 and 129.[11]

4.11 Experience has shown Australia's tax information exchange agreements to be effective. The Australian Taxation Office (ATO) provided some tangible examples to the Committee at a public hearing in 2012:

> Our main tax information exchange agreement partners are the British Virgin Islands, Bermuda, the Isle of Man and Jersey. As of this month, fifty-three exchange of information requests had been issued under the tax information exchange agreements. Ten are currently active and five were withdrawn. That leaves thirty-eight requests which have been finalised; and, on the basis of those cases, we have issued six amended assessments to the value of $52 million. Our auditors have also identified a further $127 million as potential omitted income via request[s] made under the tax information exchange agreements.[12]

4.12 In addition, the ATO provided evidence that Tax Information Exchange Agreements were deterring Australian tax payers from using low tax jurisdictions:

> From 2005 to 2011 there was a decrease in the entities transacting, for example, with Vanuatu from around 2,600 to around 300. This tells us that those previously involved in arrangements in Vanuatu have discontinued their dealings and also that they have not moved to another secrecy jurisdiction. Since the financial year 2007-2008 there has been a $12 billion reduction in fund flows to thirteen high-risk secrecy jurisdictions and fund flows returning to Australia from the same secrecy jurisdictions have increased by seven per cent, or around $5 billion in the 2010-11 financial year as compared to 2007-08.[13]

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9 Mr Wood, The Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 15.

10 NIA, para 5.

11 Joint Standing Committee on Treaties, *Report 129*, Tabled 10 September 2012, p. 17.

12 Miss Anna Cyran, Exchange of Information Officer, Transparency Practice – Large Business & International, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 13 August 2012, p. 10.

13 Miss Cyran, ATO, *Committee Hansard*, Canberra, 13 August 2012, p. 10.

Overview and national interest summary

4.13 The proposed Uruguay Tax Information Exchange Agreement follows the format of the Australian model Tax Information Exchange Agreement.[14]

4.14 The NIA claims that the proposed Uruguay Tax Information Exchange Agreement will help improve the integrity of Australia's tax system by discouraging tax evasion.[15]

4.15 The proposed Uruguay Agreement will allow the Australian Commissioner for Taxation to request and receive certain information held by Uruguay.[16]

4.16 According to the NIA, the proposed Agreement contains a number of privacy safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.[17]

4.17 Data from the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates that there are relatively small flows of money between Australia and Uruguay.[18]

4.18 Evidence from AUSTRAC and the ATO indicates that in the 2012/13 financial year, AUSTRAC was provided with 9,801 reports of financial transfers between Australia and Uruguay totalling nearly AU$95m.[19] A similar analysis of financial transfers between Australia and Switzerland indicates that AUSTRAC was provided with 189,405 reports of financial transfers totalling nearly AU$42b.[20]

4.19 The data also indicates that 2,254 unique entities made transfers between Australia and Uruguay, with 1,915 of those entities being individuals. In terms of the sums transferred, the 290 companies that made transfers made up about half the total money transferred (AU$47m), generating 1,081 reported transfers. Individuals, by contrast, transferred only AU$12m, generating 6,302 reported transfers.[21]

14 NIA, para 8.
15 NIA, para 4.
16 NIA, para 4.
17 NIA, para 4.
18 NIA, para 10.
19 Australian Taxation Office (ATO), *Submission 2*, p. 2.
20 ATO, *Submission 2,* p. 1.
21 ATO, *Submission 2*, p. 2.

Reasons for Australia to take the proposed treaty action

4.20 The NIA states that the proposed Uruguay Tax Information Exchange Agreement will combine with Australia's other bilateral Tax Information Exchange Agreements to form an important tool combating offshore tax evasion.[22]

4.21 The proposed Agreement will also, according to the NIA, improve Australia's ability to enforce its domestic tax laws by making it harder for taxpayers to avoid or evade Australian tax and discourage those taxpayers from participating in illegitimate tax arrangements by increasing the probability of detection.[23]

4.22 The NIA notes that:

> Uruguay's commitment to implement the proposed Agreement is a positive step in its relationship with Australia.[24]

Obligations

4.23 The proposed Uruguay Tax Information Exchange Agreement will apply to all Australian taxes imposed under federal laws and administered by the Commissioner for Taxation. Article 3 of the Agreement, which deals with these taxes, will also apply to any similar future taxes imposed after the Agreement is signed.[25]

4.24 Article 5 of the proposed Agreement obliges the competent authorities in Australia and Uruguay to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other Party's domestic tax laws. This obligation applies irrespective of whether the conduct being investigated would constitute a crime under the laws of the requested Party.[26]

4.25 A request for information must contain a standard set of information, including:

- the identity of the person under investigation;
- a statement of the information sought;
- the tax purposes for which the information is sought;

22 NIA, para 6.
23 NIA, para 11.
24 NIA, para 12.
25 NIA, para 13.
26 NIA, para 14.

- the grounds for believing the requested country can provide the requested information;
- to the extent known, the name and address of any persons who may be in possession of the requested information;
- a statement that the request for information is in conformity with the laws of the requesting Party; and
- a statement that the requesting Party has pursued all known avenues for obtaining the requested information in its own territory.[27]

4.26 A Party can also request interviews with individuals or examinations of records within the jurisdiction of the requested Party. Interviews can only take place if the individual concerned provides written consent.[28]

4.27 Information obtained through a request is confidential, and can be disclosed only to people involved in the administration or enforcement of taxes covered by the proposed Agreement. Court proceedings are the only exception to this requirement.[29]

4.28 A Party may refuse a request: if it does not conform to the proposed Agreement; if the laws of the requested Party will not allow the information to be obtained; or if the information may reveal trade or professional secrets.[30]

Implementation

4.29 No legislative change will be required to implement the proposed Uruguay Tax Information Exchange Agreement. The NIA indicates that Australia will be able to fulfil its obligations under the proposed Agreement with existing legislation, specifically, the *International Tax Agreements Act 1953*.[31]

4.30 The proposed Agreement will not change the existing roles of the Commonwealth, or the States or Territories, in tax matters.[32]

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27 *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes,* done at Montevideo, 10 December 2012 [2012] ATNIF 32 (hereafter referred to as the 'Uruguay Agreement'), Article 5(5).

28 Uruguay Agreement, Article 6.

29 Uruguay Agreement, Article 8.

30 Uruguay Agreement, Article 7.

31 NIA, para 24.

32 NIA, para 25.

Costs

4.31 The proposed Agreement states that the requested Party bears the ordinary costs of requests, but the requesting Party must bear any extraordinary costs unless both Parties agree otherwise.[33] However, because Uruguay is unlikely to routinely need Australian information for its own tax purposes, it is likely that most requests made under the proposed Agreement will come from Australia.[34] The ATO and the competent authority in Uruguay are in the process of negotiating a Memorandum of Understanding to enable Australia to contribute to the cost of requests made by Australia.[35]

4.32 The estimated cost of the proposed Agreement is expected to be absorbed into the ATO's existing exchange of information program. In addition, the NIA points out that in the long run, the costs of the proposed Agreement should be recouped through the reduction in avoidance and evasion by Australian tax payers.[36]

Recent developments in international tax information exchange

4.33 At a public hearing into Tax Information Exchange Agreements in 2012 Mr Greg Wood, from the Treasury, indicated that:

> We have an ongoing negotiation program which consists of around thirty-nine countries and jurisdictions. There are a few jurisdictions, three in particular—Cyprus, Panama and the Seychelles—that we are interested in signing agreements with. Those efforts to talk to those countries are ongoing. The ATO is performing a risk analysis to determine which of those countries that are on the list might present the greatest problems so that they can be prioritised in terms of negotiations. We have a list. We are not talking to everybody at this point. There are some countries that we are particularly interested in and it is just a matter of giving each of those jurisdictions priority.[37]

4.34 At the hearing into the proposed Uruguay Tax Information Exchange Agreement, Mr Grant Goodwin, from the ATO, advised the Committee

33 Uruguay Agreement, Article 9.

34 NIA, para 26.

35 NIA, para 27.

36 NIA, para 29.

37 Mr Wood, The Treasury, *Committee Hansard*, Canberra, 13 August 2012, p. 10.

that, to date, of the three jurisdictions identified in the 2012 public hearing, only Panama had indicated any interest in negotiating a Tax Information Exchange Agreement.[38]

4.35 Mr Goodwin, advised that the risk analysis discussed in 2012 had not been undertaken, and that:

> … events really have overtaken some of the urgency around such a process in the sense that many of the low-income countries who would otherwise negotiate a [Tax Information Exchange Agreement] have now agreed to sign the multilateral agreement for tax cooperation matters, which has similar exchange-of-information powers contained therein.[39]

4.36 Mr Goodwin is referring to the multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention), which was developed by the OECD and the Council of Europe in 1988.[40]

4.37 The Convention was significantly amended in 2010 to align it with the international standard on exchange of information on request and to open it for ratification to all countries. According to the OECD:

> Since 2009 the G20 has consistently encouraged countries to sign the Convention including most recently at the meeting of the G20 Leaders Summit in September 2013 where the communique stated "We call on all countries to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters without further delay." Currently over 60 countries have signed the Convention and it has been extended to over 10 jurisdictions. This represents a wide range of countries including all G20 countries, all BRIICS,[41] almost all OECD countries, major financial centres and a growing number of developing countries.[42]

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38 Mr Grant Goodwin, Executive Director, Exchange of Information Unit, Transparency Practice, Internationals, Public Groups and International, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 10 February 2014, p. 14.

39 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 10 February 2014, p. 14.

40 Organisation for Economic Cooperation and Development (OECD), *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm > accessed 7 March 2014.

41 As defined by the OECD, BRIICS refers to: Brazil, Russia, India, Indonesia, China and South Africa.

42 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm > accessed 7 March 2014.

4.38 Further:

> The amended Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.[43]

4.39 Mr Wood advised the Committee that the multilateral Convention was better than the bilateral Tax Information Exchange Agreements, and that as a consequence, Australia would only be ratifying a small number of additional Tax Information Exchange Agreements before relying on the multilateral Convention as a tool for tax information exchange.[44]

4.40 Australia ratified the multilateral Convention in 2012.[45] The Committee's Report on the Multilateral Convention is contained in Report 127.

4.41 Cyprus and the Seychelles, identified in 2012 as priority jurisdictions for Tax Information Exchange Agreements, have not ratified the Multilateral Convention.[46]

Conclusion

4.42 The Committee supports Australia's ratification of the proposed Agreement and recommends that binding treaty action be taken.

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes* and recommends that binding treaty action be taken.

43 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm > accessed 7 March 2014.

44 Mr Wood, The Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 14.

45 OECD, *Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol – 23 December 2013*, <http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf > accessed 7 March 2014.

46 Mr Wood, The Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 14.

5

Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam

Introduction

5.1 On 20 January 2014, the *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam* ('the Agreement') was presented to the President of the Senate.[1] The Agreement will further Australia's international research engagement.[2] At present Australia is party to 22 science and technology treaties.[3] The current treaty action builds on the 1992 Memorandum of Understanding between the Government of Australia and the Government of the Socialist Republic of Viet Nam on Scientific and Technological Cooperation (the 1992 MoU).[4]

5.2 The Agreement will provide a formal framework for Vietnamese researchers to seek Vietnamese Government funding for collaborative research with Australian partners. Vietnamese Government policy requires that a treaty-level agreement be in place before government funds for collaborative research can be released. Accordingly, Vietnamese

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1 National Interest Analysis [2013] ATNIA 14 *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam*, done at Canberra, 26 June 2013, [2013] ATNIF 19 (hereafter referred to as the 'NIA'), para 1.

2 Ms Lisa Scholfield, General Manager, Research Collaboration and International Engagement Branch, Science, Research and Innovation Division, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 1.

3 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 1.

4 NIA, para 5.

Government funds were not available under the 1992 MoU.[5] The Agreement provides a formal framework to govern cooperative scientific and technological activities.[6]

5.3 According to the National Interest Assessment (NIA), the Agreement aims to promote cooperation between the Parties for the development of science and technology in their respective countries for peaceful purposes and mutual advantage (Article II (1)(2)).[7]

5.4 Article III states that the Parties shall facilitate the development of joint contracts and cooperation between organisations. The Committee asked the Department of Industry (the Department) to confirm that the Agreement does not override Australia's obligations under the *Defence Trade Controls Act 2012*. The Department stated:

> … this treaty does not override the controls, obligations and rules under the Defence Trade Controls Act, so those requirements would be in force for any research conducted under the broad auspices of this agreement, much as it would any other research activities that were taking place.[8]

5.5 Articles II and VIII back up this interpretation, stating that activities carried out under the treaty are required to be '[I]n conformity with the laws and regulations of their respective countries' and 'consistent with its applicable laws and regulations'.[9] The Department further explained:

> … the general rule of law regarding treaty making in Australia states that treaties entered into by the Australian Government do not form part of Australia's domestic law unless and until they are incorporated by legislation, and cannot give rise to rights and obligations unless they are so enacted into law.[10]

5.6 Article IV sets out the scope of the Agreement:

> Scientific and technological cooperation under this Agreement may include, but is not limited to, the following:
>
> (a) Formulation and implementation of joint research and development programs and projects;

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5 NIA, para 6.

6 NIA, para 4.

7 *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam* (herein after referred to as the Agreement), done at Canberra, 26 June 2013, [2013] ATNIF 19, Article II (1)(2).

8 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 4.

9 The Agreement, Article II and VIII.

10 Department of Industry, *Submission no 1*.

(b) Exchange of scientific and technological information, including through making information available to third parties, in accordance with Article VII of this Agreement;

(c) Exchange of scientists and technical experts participating in cooperative programs and projects as well as other activities under this Agreement;

(d) Organisation of scientific conferences, seminars and workshops on topics of mutual interest; and

(e) Other forms of cooperation as may be agreed upon by the Parties.[11]

5.7 Article XII of the Agreement provides that it will enter into force when the Parties notify each other through diplomatic channels that their domestic requirements have been fulfilled.[12]

Overview and national interest summary

5.8 The Department told the Committee that although Australia is one of the highest per capita producers of world science, global partnerships are still necessary to remain competitive:

> We must continue to make our international research relationships a priority in order to continue to have a world-class innovation system that drives productivity.[13]

5.9 The Agreement will strengthen and encourage bilateral cooperation by providing a formal framework that allows for the negotiation and conclusion of implementing arrangements to govern cooperative scientific and technological activities.[14]

Reasons for Australia to take the proposed treaty action

5.10 The Agreement formalises the existing 1992 MoU and will allow the Vietnamese Government to provide funds for joint projects. As the Department confirmed:

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11 The Agreement, Article IV.

12 NIA, para 2.

13 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 1.

14 NIA, para 4.

> The 1992 MOU sets out very similar statements around cooperation, but the Vietnamese government needs a treaty-level agreement in order to allow funds to be released.[15]

5.11 The Agreement will provide a broad framework for enhanced scientific and technological cooperation between Australia and Vietnam. It does not include specific commitments to fund cooperative activities. Rather, cooperative activities will be carried out by 'cooperating organisations' (including government agencies, universities, research centres or other relevant institutions or enterprises) and will be governed by activity-specific 'implementing arrangements', to be negotiated between the relevant organisations.[16]

5.12 Australia's scientific and technological relationship with Vietnam is still developing. Much of Australian scientific and technological cooperation with Vietnam is focused on aid-based projects in health and agriculture, predominantly managed by the Department of Foreign Affairs and Trade and the Australian Centre for International Agricultural Research (ACIAR).[17] Projects currently underway were outlined by the Department:

> The three areas that ACIAR focuses on at the moment with Vietnam is work on climate change adaptation and mitigation in rice systems in the Mekong Delta. They do some work on the south central coast around sustainable crop cultivation and livestock production systems and sustainable marine culture systems for high-value species. They also do some work in the north-western highlands around high-value temperate fruits and vegetables, sustainable production of cash crops, livestock and forestry products.[18]

5.13 Australia is currently building a scientific and technological relationships with Vietnam outside the aid program, for example:

- Questacon toured Vietnam in April 2013, showcasing Australia's capacity for innovative, accessible science communication and an MoU for cooperation in science communication was signed;
- CSIRO has a long history of science cooperation with Vietnam, particularly in agriculture, land management and water resources research;

15 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 2.

16 NIA, para 8.

17 NIA, para 13.

18 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, pp. 2-3.

- in 2013 over $2.3 million of Australian Research Council (ARC) funding was tied to 17 new and ongoing research projects in collaboration with Vietnam;
- the Vietnamese Centre for Science and Technology Communication recently toured Australia;
- the Australian Nuclear Science and Technology Organisation (ANSTO) has been working with Vietnam through the Forum for Nuclear Cooperation in Asia (FNCA); and
- Australian universities are beginning to undertake research cooperation with Vietnamese counterparts.[19]

5.14 The Vietnamese Government is keen to progress its scientific capacity and is aiming to have hi-tech products and applications accounting for 45 per cent of GDP by 2020. The development of scientific and technological and equipment innovation in Vietnam is expected to increase 10-15 per cent per year between 2011 and 2015 and over 20 per cent per year between 2016 and 2020, offering opportunities to Australian goods and services exporters to service this increasing demand.[20] According to the Department:

> The Vietnamese government has launched efforts to increase the country's capacity in cutting-edge science and innovation. Their economy is also growing rapidly under policies of internationalisation and reform. Recognising this potential, most leading scientific producers, including the US, France, Germany, Japan and China, already have science cooperation treaties with Vietnam.[21]

5.15 The Committee questioned the Department about how the Agreement would progress Australia's trade interests. The Department responded that:

> [t]here are no specific obligations in the treaty that talk about trade provisions. However, what we have seen from other arrangements that we have in place is that export and trade opportunities tend to flow following the build-up of strategic science research, innovation and collaboration.[22]

19 NIA, paras 14-15.

20 NIA, para 11.

21 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 2.

22 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 2.

5.16 According to the Department, to date the relationship between the Parties has been characterised by Australia providing assistance to Vietnam.[23] However, the Department stressed that the development of science and technology sectors has been rapid in many emerging economies:

> What we have seen is that some of those countries are getting ahead of us now in some of those fields. So for us to be in from the beginning is important, and we would see that there would be advantages on both sides as we go forward.[24]

5.17 There are no specific obligations in the treaty that cover trade provisions. However, the NIA indicates that export and trade opportunities tend to flow following the development of strategic science research, innovation and collaboration.[25]

Obligations

5.18 The Agreement imposes a general obligation on the Parties to promote cooperation in science and technology between their respective countries, including between relevant organisations in each country, for peaceful purposes (Article II). For example, parties will use their best efforts to facilitate the entry and exit of scientific personnel and material involved in cooperative activities under the Agreement.[26]

5.19 The Agreement is explicit that the implementation of the various obligations is subject to the relevant laws of each country and the availability of funds (Article VI).[27] Furthermore, organisations participating in cooperative activities under the Agreement are solely responsible for protecting their own legal and commercial interests (Article VII).[28] The Department stated that:

> The intellectual property provisions in this treaty are the same as they are in most of the other treaties that we have signed. We have found that that has not caused any issues or concerns and we would expect that this would be the same.[29]

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23 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 3.

24 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 3.

25 NIA, para 11.

26 NIA, para 21.

27 NIA, para 19.

28 NIA, para 20.

29 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 3.

5.20 Article IX obliges the Parties to establish a Joint Australia – Viet Nam Committee on Scientific and Technical Cooperation (the Joint Committee) composed of representatives of both Parties. The Joint Committee is to meet alternately in Vietnam and Australia every two years or when mutually determined by both Parties.[30] The Department was unable to provide the Committee with details on the composition of the Joint Committee, as these will be negotiated once the treaty is signed.[31]

5.21 Disputes arising from the Agreement are to be settled 'amicably' through consultation or negotiation.[32]

Implementation

5.22 No new domestic legislation or amendments to existing legislation are required to allow Australia to meet its obligations under the Agreement.[33]

Costs

5.23 The Agreement does not commit Australia to any financial outlays or to participation in specific programs. It is the responsibility of the cooperating organisations to meet the costs of cooperative activities from their own resources, sponsorship or government grants. While there will be some costs associated with implementation and management of the Agreement (scientific delegation visits, providing policy advice and hosting Joint Committee meetings) these costs will be absorbed by the Department of Industry.[34] Budget supplementation is not required.[35]

Conclusion

5.24 The Committee endorses the Australian Government's commitment to fostering international research relationships. The proposed Agreement

30 NIA, para 21.
31 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 2.
32 NIA, para 23.
33 NIA, para 24.
34 Ms Scholfield, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 3.
35 NIA, para 25.

formalises the 1992 MoU and will allow the Vietnamese Government to provide funds for joint projects.

5.25 The Committee supports Australia's ratification of the proposed Agreement and recommends that binding treaty action be taken.

Recommendation 4

5.26 **The Committee supports the *Agreement on Scientific and Technological Cooperation between the Government of Australia and the Government of the Socialist Republic of Viet Nam* and recommends that binding treaty action be taken.**

6

Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities of 29 May 1980, as amended

Introduction

6.1 On 20 January 2014, the *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities of 29 May 1980, as amended* ('the Exchange of Notes') was presented to the President of the Senate.[1] Australia and the United States first concluded an Exchange of Notes constituting an Agreement relating to Space Vehicle Tracking and Communications in 1960. This agreement was superseded in 1970 and again in 1980. Since 1980, the base Agreement document has been reviewed and amended every 10 years.[2] The treaty action extends the Agreement which expired on 26 February 2014.[3]

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1 National Interest Analysis [2013] ATNIA 18 *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities of 29 May 1980,* as amended, done at Canberra, 21 November 2013, [2013] ATNIF 27 (hereafter referred to as the 'NIA'), para 1.

2 NIA, para 6.

3 NIA, para 1.

6.2 The Agreement consists of a base document and multiple subsequent Exchanges of Notes. In 2009, it was agreed by both Parties to conclude a new agreement to consolidate the provisions contained in previous Exchanges of Notes into one document. Both parties also agreed to extend the Agreement for two years until 2012, and then for a further two years until 2014 to allow the new agreement to be developed.[4]

6.3 The Parties have agreed to extend the Agreement for a further four year period or until the new consolidated agreement can be brought into force. Therefore it is proposed that Paragraph 1 of Article 13 of the Agreement be replaced with the following:

> This Agreement shall remain in force until February 26, 2018, or until a further agreement between the Government of the United States of America and the Government of Australia concerning space vehicle tracking and communication facilities is concluded and enters into force, whichever occurs first. The present Agreement may be further extended by the agreement of the two Governments.[5]

6.4 The Department of Industry (the Department) told the Committee '[w]e are seeking a further extension to the treaty to allow us to bring those consolidation discussions to a conclusion'.[6] The proposed extension was intended to enter into force with effect from 26 February 2014, once Australia had advised the United States of America (the US) that all domestic requirements for entry into force had been met. In order to ensure continuity of the Agreement, the proposed extension may enter into force with retrospective effect.[7]

Overview and national interest summary

6.5 The proposed Exchange of Notes will extend the current Agreement and allows time for the development of a consolidated agreement.

6.6 The Agreement covers the operations of the Canberra Deep Space Communication Complex, located at Tidbinbilla. The Complex is one of three facilities which makes up the National Aeronautics and Space Administration's (NASA) Deep Space Network, with the other two being

4 NIA, para 7.

5 Note from the Embassy of the United States of America, Canberra, to the Australian Department of Foreign Affairs and Trade, NOTE No. 13-212, November 18 2013.

6 Dr Michael Green, Acting Head of Industry Division, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 5.

7 NIA, para 2.

located in the US and Spain.[8] Each facility is located one third of the way around the globe and as the earth rotates one station is available to continually track and command spacecraft beyond the earth's orbit.[9]

6.7 Since the inception of the space treaty process in the 1960s, NASA has spent approximately AUD $800 million on space-related activities in Australia.[10] Currently NASA is investing a further $110 million in the construction of two new 34-metre antennas at the Canberra Deep Space Communication Complex. The first antenna is due to come online in late 2014, with the second scheduled to be completed in 2016.[11]

6.8 The Committee was concerned as to why a consolidated agreement had not been completed by the 2014 deadline. The Department indicated that it had a draft consolidated text since May 2013, however, procedural issues had slowed the process.[12] The issues were cited as:

- the 2013 Federal Election in Australia;
- NASA's budget negotiations in the US; and
- the complexity of the task which involves consolidating and updating 30 years of amendments.[13]

6.9 The Department confirmed that there are no problems in the relationship between the Parties and it was 'really a matter of getting the legal drafting approvals on both sides through'.[14] The Department indicated that political intervention would be unlikely to expedite the process.[15]

6.10 The Department stated that it aimed to have a consolidated treaty text completed within the four year timeframe, however, a further extension would be sought if necessary and this eventuality would not negatively affect the operations of the Canberra Complex.[16]

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8 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, pp. 5-6.
9 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 6.
10 NIA, para 4.
11 NIA, para 5.
12 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 5
13 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, pp. 5-6
14 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, pp. 6-7.
15 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 7.
16 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 5-6.

Reasons for Australia to take the proposed treaty action

6.11 The National Interest Assessment (NIA) states that: 'all activities conducted in Australia under the Agreement are managed to ensure that they are consistent with Australian interests'.[17] The Commonwealth Scientific and Industrial Research Organisation (CSIRO) manages the facilities on behalf of NASA, with operational and maintenance activities contracted out as required to Australian industry. One hundred staff are currently employed at the Canberra Deep Space Communication Complex. [18] The Department reiterated that NASA funds the total cost of the facilities, including the salaries and administrative costs of Australian Government personnel involved in the management of activities under the Agreement.[19]

6.12 The Department confirmed that the Australian Government has full access to the data gathered and that it is 'provided routinely to a range of people in Australia'.[20] Australia's role is also acknowledged in NASA's publications.[21]

Obligations

6.13 As previously discussed, the proposed extension amends Article 13(1) of the Agreement to extend the period of operation of the Agreement to either 26 February 2018, or until a further agreement between the Governments of the US and Australia concerning space vehicle tracking and communication is concluded (whichever is earlier).[22] The proposed extension does not otherwise increase the scope or operation of the Agreement, nor impose new obligations on Australia.[23]

6.14 The proposed extension continues existing arrangements under the current Agreement for exchange of scientific data (Article 4), facilitation of the entry and exit of US personnel through immigration barriers (Article 7(1)), and duty-free import of personal and household effects of US personnel (Article 7(2)). In accordance with Article 8 of the Agreement, taxation of US personnel continues to be governed by the *Convention*

17 NIA, para 10.

18 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 7.

19 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 7.

20 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 7.

21 Dr Green, Department of Industry, *Committee Hansard*, Canberra, 3 March 2014, p. 7.

22 NIA, para 13.

23 NIA, para 14.

between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income ([1983] ATS 16), as amended.[24]

6.15 The Agreement explicitly provides for further (non-treaty) arrangements between NASA and the CSIRO, as the cooperating agencies, in respect of the establishment and operation of the facilities (Article 3). These arrangements encompass financing, constructing and installing new facilities, and disposing of or removing infrastructure and remediation work (where a facility is surplus to requirements). NASA is currently entitled to an exemption from duties, taxes and like charges, including Goods and Services Tax (Article 9).[25]

Implementation

6.16 According to the NIA, no changes are required to existing legislation to implement the proposed extension.[26]

Costs

6.17 No additional costs are anticipated as a consequence of this treaty action.[27]

Conclusion

6.18 The Exchange of Notes extends the Agreement's timeframe by four years to allow the Parties to reach a consolidated agreement. The Canberra Deep Space Communication Complex is the US's only space station in the Southern Hemisphere and is therefore vital to NASA's Deep Space Network. Under the Agreement, NASA funds the total cost of the facility and all associated activities. Australia benefits in a range of ways from the Agreement, including through the employment of 100 staff and access to all data collected.

24 NIA, para 15.
25 NIA, para 16.
26 NIA, para 17.
27 NIA, para 18.

6.19 The Committee supports Australia's ratification of the proposed Exchange of Notes and recommends that binding treaty action be taken.

Recommendation 5

6.20 **The Committee supports the *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communication Facilities* and recommends that binding treaty action be taken.**

A

Appendix A – Submissions

Treaties tabled on 11 and 12 December 2013

2 Australian Taxation Office

Treaties referred on 15 January 2014

2 Australian Taxation Office

Treaties presented on 20 January 2014

1 Department of Industry

B

Appendix B– Witnesses

Monday, 10 February 2014 - Canberra

Australian Taxation Office

Mr Grant Goodwin, Executive Director, Exchange of Information Unit, Transparency Practice, Internationals, Public Groups and International

Department of Foreign Affairs and Trade

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Department of Infrastructure and Regional Development

Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Gilon Smith, Acting Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division

The Treasury

Mr Gerry Antioch, General Manager, Tax System Division, Revenue Group

Ms Lynette Redman, Senior Adviser, Tax Treaties Unit, Tax System Division, Revenue Group

Mr Gregory Wood, Manager, Tax Treaties Unit, Tax System Division

Monday, 3 March 2014 - Canberra

Attorney-General's Department

Ms Anne Sheehan, Acting Assistant Secretary, International Law Trade and Security Branch, Office of International Law

Department of Defence

Ms Gabrielle Burrell, Assistant Secretary, Defence Export Control Office, Strategic Policy Division

Department of Foreign Affairs and Trade

Dr Gregory French, Assistant Secretary, Legal Division, International Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Mr Jeff Robinson, Assistant Secretary, Arms Control and Counter-Proliferation Branch, International Security Division

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Dr Michael Green, Acting Head of Industry Division

Ms Lisa Schofield, General Manager, Research Collaboration and International Engagement Branch, Science, Research and Innovation Division