WebMemo
Published by The Heritage Foundation
No. 2836
March 18, 2010

Now Is the Time to Seek Ratification of the U.S.–Australia Defense Trade Cooperation Treaty

Ted R. Bromund, Ph.D.

The U.S.–Australia Defense Trade Cooperation Treaty would permit the U.S. to trade many defense articles with Australia without an export license or other written authorization. The treaty would advance American interests by:

- Reducing barriers to defense-related trade and so increasing exports;
- Improving the procurement process in both nations; and, most important of all
- Enhancing the already close defense and security partnership between the U.S. and Australia.

While the treaty was negotiated under the Bush Administration, it has the backing of the Obama Administration. But neither Administration has sought energetically to allay the U.S. Senate's reasonable concerns that have so far prevented it from ratifying the treaty or the similar treaty between the U.S. and the United Kingdom. The President should demonstrate his commitment to advancing the U.S.–Australian partnership by announcing his intention to work with the Senate to secure the rapid ratification of both treaties.

The Problem. The U.S.–Australia treaty was signed on September 5, 2007. The treaty would permit the U.S. to trade many defense articles with Australia without an export license. The U.S. ultimately refuses few export licenses for defense trade with either Australia or the U.K.: In a typical year, over 99.9 percent of requests are approved. The treaties, though an administrative innovation, would not open formerly restricted trade. Rather, they would reduce bureaucratic burdens on a well-established trade and thereby encourage it to grow to the benefit of all concerned.[1]

The treaties do not decontrol defense-related trade. Under the treaties, the U.S. has negotiated with the Australian and British governments an approved list of private-sector defense and counter-terrorism-related entities in these countries that are allowed end-user access to U.S. items. Both the U.K. and Australia would protect U.S.-origin items as classified and would require prior U.S. approval for the re-export of these items. The U.S. has also excluded certain particularly sensitive items from eligibility under the treaties.

Assessing the Risks and Benefits of the Treaties. In spite of these benefits, the treaties have not escaped criticism. For example, Australian observers argue that, because of the number of items excluded from it and the sunk costs associated with training staff to follow existing procedures, the U.S.–Australia treaty would mostly benefit Australian subsidiaries of U.S. firms.[2] Americans may fear that the relaxation of controls will pose risks.

It is true that any change in the U.S. export control system poses risks. But leaving the system as it

This paper, in its entirety, can be found at:
http://report.heritage.org/wm2836

Produced by the Margaret Thatcher Center for Freedom

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

is could be dangerous as well, both to American commercial interests and to its defense and security partnership with Australia and the U.K. The risks of action and inaction must be weighed against each other. Given the fact that almost all requests for export licenses for defense trade to Australia and the U.K. are approved, the risks of the proposed change are low, while strengthening the U.S.'s close ties with Australia and the U.K. would yield tangible benefits.

For example, the current Australian defense buildup will increase Australian purchases from foreign suppliers. The Obama Administration has emphasized its intention to promote American exports. Much of this emphasis has been misguided.[3] By contrast, ratification of the U.S.–Australia treaty would expand the market for U.S. defense-related exports to an ally that is preparing to increase defense spending. The seriousness of the Administration's export drive will be judged, in part, by the energy it devotes to opportunities such as the U.S.–Australia treaty.

Because the treaties would spur international collaboration, competition, and innovation, it is impossible to predict which firms would benefit from them. Even if most existing firms do not take advantage of the treaties, the treaties would create opportunities that new firms may find attractive: The defense market, like all markets, is not static. The case for the treaties is not that they would necessarily benefit existing firms but that they would provide additional avenue for the innovation on which the U.S. military in particular relies to retain its edge.

Roadblocks to Ratification. The principle of the treaties has widespread support. The Bush Administration deserves credit for negotiating the treaties, as does the Obama Administration for backing them. But so far, neither the Bush nor the Obama Administration has been willing to address the concerns that have delayed ratification by the Senate.

These concerns have arisen because of the treaties' complicated structure. The treaties are supplemented by arrangements negotiated between the U.S., Australia, and the U.K. that govern the scope and effect of the treaties. In the U.S., the treaties would require changes in domestic regulations. The Senate is therefore concerned that:

- Neither Administration has submitted the internationally negotiated arrangements for the advice and consent of the Senate. This has left the Senate in the position of having to consider treaties that have not been presented in full. This, in turn, implies that the scope and effect of the treaties could be changed at a later date without Senate approval.
- The treaties have been presented by both Administrations as self-executing—they would take effect as soon as ratified by the Senate. As a result, Congress would not have an opportunity fully to consider the regulations that the executive branch would issue to give effect to the ratified treaties, regulations that would establish criminal liabilities. In written testimony in December, James A. Baker, Associate Deputy Attorney General in the Department of Justice, could assert no more than that "it is the Department's understanding that these regulations [establishing criminal penalties] will track those to be promulgated under the Treaties."[4] Such a vague and non-committal "understanding" will not meet the concerns of the Senate.

1. For a fuller assessment of the advantages of the treaties, see Ted R. Bromund, "The U.S.–U.K. Defense Trade Cooperation Treaty Merits Early Consideration," Heritage Foundation *WebMemo* No. 2542, July 13, 2009, at *http://www.heritage.org/Research/Reports/2009/07/The-US-UK-Defense-Trade-Cooperation-Treaty-Merits-Early-Consideration*; Baker Spring, "Defense Trade Cooperation Treaties with Australia and the U.K. Will Improve Security," Heritage Foundation *Backgrounder* No. 2107, February 8, 2008, at *http://www.heritage.org/Research/Reports/2008/02/Defense-Trade-Cooperation-Treaties-with-Australia-and-the-UK-Will-Improve-Security.*
2. Robert Wylie, "Facilitating Defence Trade Between Australia and the United States: A Vital Work in Progress," *Security Challenges*, Spring 2008, p. 127, at *http://www.securitychallenges.org.au/ArticlePDFs/vol4no3Wylie.pdf* (March 12, 2010).
3. Daniella Markheim, "An Agenda That Fails to Promote Trade," Heritage Foundation *WebMemo* No. 2825, March 4, 2010, at *http://www.heritage.org/Research/Reports/2010/03/An-Agenda-That-Fails-to-Promote-Trade*.

What the Administration Should Do. The U.S.–Australia Defense Trade Cooperation Treaty, like its U.S.–U.K. counterpart, is in the American interest. In keeping with its constitutional duties of providing advice and consent on treaties, the Senate has the right and obligation to consider all relevant factors related to the treaty in question. In this case, that includes the internationally negotiated arrangements and the Administration's proposed regulations for giving domestic enforcement effect to the treaties. The Senate is unlikely to act until it has, at a minimum, considered both the arrangements and the proposed regulations.

The constitutional issues posed by self-executing treaties will not be resolved in the course of this ratification process. If the Senate does decide to ratify these particular treaties as self-executing, it should adopt an amendment to the resolutions of ratification making it clear that, broadly, it does not look favorably on self-executing treaties and that nothing in or associated with these treaties can limit Congress in any way from enacting legislation in the future that is related to the subject matter of these treaties.

Ultimately, the Senate must be the judge of whether it is right to ratify these treaties as self-executing or whether the treaties must be accompanied by implementing legislation passed by Congress that would define the regulations necessary to give effect to a ratified treaty.

The Administration's responsibility is to work energetically with the Senate to satisfy its concerns. If the Senate judges implementing legislation to be necessary, the Administration must work with both the House and the Senate to pass legislation that gives full effect to the intention of the treaties and secures for the U.S., Australia, and the U.K. the benefits that would result from them.

Closer Defense Ties Within Reach. The ball is now where it has been since 2007: in the Administration's court. With the President's postponement of his previously announced visit to Australia, it is all the more important for his Administration to demonstrate its commitment to the U.S.–Australia partnership. The energy with which it pursues this opportunity of closer defense ties with Australia and the U.K. will speak to its commitment to defense procurement reform, sensible export promotion, and firmer ties with America's closest allies.

—Ted R. Bromund, Ph.D., is Senior Research Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

4. Statement of James A. Baker, Associate Deputy Attorney General, Department of Justice, before the Committee on Foreign Relations, U.S. Senate, December 10, 2009, pp. 4–5, at *http://foreign.senate.gov/testimony/2009/BakerTestimony091210a.pdf* (March 16, 2010).