

Hudson Institute

Breaking the Defense Trade Barrier

Defense Trade Cooperation
Treaties and the Future of the
U.S.-Japan Alliance

Hudson Institute

Breaking the Defense Trade Barrier

Defense Trade Cooperation
Treaties and the Future of the
U.S.-Japan Alliance

Dr. Arthur Herman
Senior Fellow



© 2018 Hudson Institute, Inc. All rights reserved.

For more information about obtaining additional copies of this or other Hudson Institute publications, please visit Hudson's website, www.hudson.org

ABOUT HUDSON INSTITUTE

Hudson Institute is a research organization promoting American leadership and global engagement for a secure, free, and prosperous future.

Founded in 1961 by strategist Herman Kahn, Hudson Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary studies in defense, international relations, economics, health care, technology, culture, and law.

Hudson seeks to guide public policy makers and global leaders in government and business through a vigorous program of publications, conferences, policy briefings and recommendations.

Visit **www.hudson.org** for more information.

Hudson Institute

1201 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20004

P: 202.974.2400
info@hudson.org
www.hudson.org

Table of Contents

Executive Summary	5
Introduction	8
Part I: The Defense Export Process	11
Part II: The U.K. and Australia DTCT's	14
Part III: Shortcomings of the Current DTCT's	19
Part IV: U.S.-Japan Defense Trade: Past, Present, and Future	22
Part V: The Path to a U.S.-Japan DTCT	27
Conclusion	29
List of Names and Acronyms	32
About the Author	33

Executive Summary

The key to strengthening and deepening the U.S.-Japan alliance in order to better meet regional threats is to increase defense trade and defense industrial cooperation between the two countries. A Defense Trade Cooperation Treaty (DTCT), a formal agreement between two countries which exempts their trade in certain specified defense and defense-related articles from the arms export regulations of both nations, would be an important way to achieve that goal.

Former U.S. ambassador to Japan Mike Mansfield once stated that the relationship with Japan is America's "most important bilateral relationship in the world, bar none." Finding a way to increase defense trade cooperation between Japan and the U.S. deserves a close and thoughtful look as it is a vital aspect of strategic cooperation.

The United States already has a DTCT with the United Kingdom and Australia, but dollar value U.S.-Japan bilateral defense trade dwarfs the United States' defense trade with these other allies. In FY 2014, for example, the federal government authorized over \$7 billion worth of U.S.-origin direct commercial sales of defense articles to Japan, almost twice the value of such sales to the U.K. and approximately four times the value of sales to Australia.

At base, however, it is not the dollar value of the defense trade between the United States and its allies which justifies the signing of a DTCT; it is the profound importance of the bilateral relationship to U.S. national security and protecting U.S. interests in the regions where its allies are present. A DTCT allows the United States to make a high-level determination that for certain classes of defense articles and services, America's answer to a request from the Japanese government to meet its collective security needs should default to "yes." The dollar value of the bilateral trade is merely a signal of the enormous efficiencies that could be gained in time and expense by eliminating individual license requests for appropriate items where licenses are almost never denied. Given such an important ally, and trade volumes at this level according to the normal rules and procedures, it makes good sense to enhance bilateral security by streamlining the bureaucratic process.

In the final analysis, requiring a license where the license is always approved serves no legitimate national security purpose. To the contrary, it harms national security by increasing cost and schedule risks with no obvious benefits.

The fact that previous DTCT's the United States has signed with the U.K. (2007) and Australia (2007) have not worked as well as envisioned should not be a barrier to creating a DTCT with Japan. On the contrary, drafters of a new DTCT can learn from the mistakes of the two previous DTCT's, and use a new improved treaty to fix its predecessors (see Part Three).

In addition, major changes in Japan's own defense and defense trade posture—revised interpretation of Article 9 of the Japanese constitution; revision of the Three Principles

regarding defense exports; revision of the U.S.-Japan Security Guidelines to encourage more co-development of defense equipment; and creation of the new Acquisition Technology and Logistics Agency within the Ministry of Defense—offer unprecedented opportunities for a new era of U.S.-Japan defense trade cooperation.

From that perspective, the value of a fully functioning and effective DTCT would be inestimable for the following reasons.

- While license requests for export to Japan are overwhelmingly approved, exempting U.S.-Japan defense trade from the normal export process (described in Part One) will significantly increase the speed, range, and impact of such trade.
- While Japan currently buys large amounts of defense equipment from the U.S., a DTCT would facilitate defense purchases from Japan, including components essential for advanced technologies.
- A treaty would also encourage discussions between Japanese companies and U.S. research laboratories. This in turn would help to support the U.S. in its development of advanced defense systems essential to its declared Third Offset strategy for creating the weapons of the future.
- In order to reap the full benefits of a DTCT, it will be necessary for Japan to revise, improve, and standardize its industrial security system to match that of other DTCT signatories. This will be an enormous boon to the bilateral relationship, significantly advancing Japan's efforts to more deeply integrate with the U.S. defense industrial base. With its superb technical capabilities in many sectors, Japan is well-positioned to rank among the United States' most important defense technology partners.
- Finally, an effective U.S.-Japan DTCT will serve as a model for revisions and improvements to the existing DTCT's with U.K. and Australia, which can advance defense industrial collaboration across the alliances.

From this perspective, a U.S.-Japan DTCT can inaugurate the creation of a defense trade Common Market among DTCT signatories, which also includes Canada, similar to the "Five Eyes" agreement on intelligence sharing. The resulting five-nation defense industrial community could speed the development of advanced defense technologies and systems in ways that would have been thought impossible in the past—and which cannot happen under the current export regimes of all five nations.

In order to draw up a U.S.-Japan DTCT, the Hudson Institute recommends the creation of a Presidential Independent Advisory Committee which will report to the Deputies Committee of the National Security Advisor and which, together with its Japanese counterpart, will have a two-fold mandate:

- 1) To study and report on the framework needed to draw up and execute an effective DTCT between the U.S. and Japan, as well as to secure the treaty's Congressional approval.
- 2) To oversee implementation of the U.S.-Japan DTCT according to the terms of the treaty, as well as to revise the existing treaties with the U.K. and Australia.

As part of its mission, this Treaty Advisory Council would also generate an annual report on the progress, or lack thereof, in the DTCT's positive impact on defense trade cooperation and industrial collaboration between the U.S. and Japan. It would submit that report to the Office of the President, the Secretary of Defense, and to Congress (with similar submission to their Japanese counterparts), which would serve as the basis for further reforms of U.S. defense trade regulations and their implementation.

Introduction

A Defense Trade Cooperation Treaty (DTCT) is a formal agreement between two countries which exempts their trade in certain specified defense and defense-related articles from the arms export regulations of both countries.

In 2007 then British Prime Minister Tony Blair proposed such a formal Defense Trade Cooperation Treaty with the United States President George W. Bush. A treaty was duly signed by both leaders in June 2007, followed by a similar treaty signed in September that year by President Bush with Australian Prime Minister John Howard.¹

The idea behind these DTCTs was to allow license-free defense trade between the United States and key allies. They aimed to address long-standing concerns raised by two of the United States' closest allies, and many in industry, that unnecessary regulations were slowing the transfer of vital defense technologies to Britain and Australia, especially technologies important to the War on Terror.

As originally formulated, the objective of a DTCT is threefold:

- a. To speed up the transfer of existing defense technologies, in order “to achieve fully interoperable forces” (as the text of the U.S.-U.K. treaty stated) and “a closer framework for security and defense cooperation,” by lowering existing arms control barriers between the two countries, including requirements for individual export licenses for defense articles.
- b. To leverage the strengths of both countries' defense industries and to create a permanent new avenue for facilitating defense industrial cooperation, including co-development of technologies and systems.
- c. To foster an atmosphere of mutual trust and information sharing on defense systems between two long-standing allies.²

Final approval of both treaties by the United States Senate came in 2010, and the last stages of implementation of exemptions from existing arms export control regimes by the State Department's Directorate of Defense Trade Controls (DDTC), went into place in 2013.

In 2007 Great Britain and Australia seemed the perfect candidates for this kind of information and technology-sharing, especially in the shadow of the War on Terror. Ten years later, Japan appears as another prime candidate. Indeed, given Japan's current shift to a more proactive strategic posture, including a more relaxed defense export policy, and the increasingly unstable security environment in East Asia, the time seems uniquely ripe for a DTCT.

Such a treaty makes sense on numerous levels. In FY 2014, the Directorate of Defense Trade Controls (DDTC) authorized over \$7 billion worth of U.S.-origin direct commercial sales of defense articles to Japan, almost twice the value of such sales to the U.K. and approximately four times the value of sales to Australia. Given such an

important ally, and trade volumes at this level according to the normal rules and procedures, it makes good sense to enhance bilateral security by streamlining the bureaucratic process.

Requiring licenses for carefully identified defense articles and defense services between closely allied governments where, as a matter of policy, licenses would almost never be denied serves no national security purpose. To the contrary, it harms national security by imposing needless costs, schedule risks, red tape, and uncertainty. In effect, a DTCT establishes a general license for a specific government covering specified items and the parties may only have a reporting requirement of the items ordered.

The benefit of a DTCT would go well beyond direct commercial sales of defense articles, however. It would directly foster deeper integration between the defense industrial bases of both nations, *and* dramatically increase the quality and capabilities of the technologies available to both partners. Bolstering defense trade between the world's two most advanced high-tech industries would also be a major step forward in developing key "Sixth Generation" systems of the future, and in meeting the Pentagon's own objectives for a "Third Offset" strategy in the areas of unmanned aerial and undersea vehicles; advanced sea mines; high-speed strike weapons; advanced aeronautics from new engines electro-magnetic rail guns; and high energy lasers, as well as missile defense and cyber capabilities.³

On the one hand, creating a DTCT with Japan would seem to be a logical step, one that involves adapting the existing DTCT's with Australia and the U.K. to create a DTCT "with Japanese characteristics." In other words, the treaty language of a Japanese DTCT would reflect the cultural context of Japan's approach to reciprocal bilateral treaties.

On the other hand, the existing treaties with the U.K. and Australia have faced enormous challenges both in their operation and in their implementation. To the disappointment of all signatories, both treaties have hardly been used by the very companies who were supposed to be their chief beneficiaries (although as we will see that failure is not entirely the companies' fault). Far from speeding the transfer and co-development of defense technologies, the treaties have brought almost no marked improvement in the defense trade market.

Does this mean a DTCT with Japan would be a useless gesture? On the contrary, the argument is that drawing up such a treaty could be an opportunity to 1) create a truly effective DTCT by avoiding the errors and mistakes of the previous two treaties (see Part Five, below); and 2) to retrospectively correct the errors and mis-implementations of the U.K. and Australia treaties.

Both issues will be discussed in the fifth and final part of this report. Part One will summarize the normal defense export rules that apply to defense trade between the U.S. and Japan.

Part Two will describe how the U.K. and Australia DTCT's attempted to improve the defense trade process, and the justifications for making the changes. Part Three will

examine existing defense trade between the U.S. and Japan, and the possibilities for its expansion under a DTCT regime.

Part Four will then analyze the problems that have limited the existing DTCT's effectiveness. Part Five will set forth ways in which a more effective DTCT can be created, and how this will help with fixing the current treaties, incorporating changes that can be applied retrospectively to the previous agreements.

Our Conclusion will look ahead to how a correctly formulated and implemented DTCT regime can support and enhance defense trade and industrial cooperation between the U.S. and Japan. It will acknowledge the arguments of critics, particularly those who work within the existing system, that there is no urgent need for such a treaty; and those who insist that the current system works adequately in transferring technologies in a timely manner—even though the long, drawn-out process that was involved in signing a Reciprocal Defense Procurement Memorandum of Understanding (RDPMOU) between Washington and Tokyo, would suggest otherwise.⁴

Yet the strongest argument for a DTCT may not apply to U.S. export policy, but to Japan's. Completing the DTCT ratification process would encourage Japan to implement important reforms. Reform is especially needed in the areas of export restrictions and industrial security, so that Japan can meet the formal criteria for being a signatory to a DTCT, including creating the opportunity for direct investment in the U.S. defense market.

Furthermore, by creating a defense trade “community,” with four and five-way trade and co-development across the entire DTCT network, a U.S.-Japan DTCT may raise defense industrial cooperation between allies to levels not seen since World War II, reinforcing America's defense industrial base not only today, but in the future.

In short, a strong, functioning DTCT could inaugurate a new era for the alliance, and for peace and security in the region.

Part I: The Defense Export Process

The basis of all U.S. defense trade is the 1976 Arms Export Control Act (AECA). As passed by Congress, AECA gives the president the authority to control the import and export of defense articles and defense services, and requires governments that receive arms from the U.S. to certify that they will be used for legitimate self-defense, and not “contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict,” or violate or prejudice existing or future bilateral arms control agreements or multilateral nonproliferation treaties.⁵

The AECA also placed restrictions on American defense contractors and manufacturers. The AECA prohibits the sales of defense articles and defense services to certain governments and entities, and requires licensing for most of such transfers to trusted parties, including U.S. allies like Japan.

Three executive branch agencies oversee the licensing process for defense related exports. The Department of Commerce’s Bureau of Industry (BIS) authorizes the export of less sensitive military items and so called “dual-use” goods with both commercial and military applications. Although important in the bilateral relationship, ample authority already exists to do any desired streamlining of Japanese access to Export Administration Regulations (EAR) controlled items without a DTCT.

The Treasury Department’s Office of Foreign Assets Control (OFAC) also has jurisdictional authority over U.S. arms sales to countries subject to embargoes, boycotts, or trade sanctions—none of which of course apply in the case of Japan.

Accordingly, in considering the desirability of a DTCT, the primary focus should be on goods and services regulated by the State Department, which has had final say on all defense exports since 1935. Its Directorate of Defense Trade Controls (DDTC) examines all exports and imports of defense articles and defense services designated as such by the regularly updated United States Munitions List (USML), under the authority of the International Traffic in Arms Regulations (ITAR) Under ITAR, all companies that manufacture, export, or broker those listed defense articles or defense services are required to register with DDTC. Registered companies can then apply for an export license, which gives formal permission to proceed with that specific defense export item.

Given the size and complexity of the USML (42 pages in the official Code of Federal Regulations in 2017) annual changes to ITAR relating to specific countries and specific technologies; and the need to make sure that a specific sale will “protect [U.S.] national interest and those interests in peace and security of the broader international community,” the export license process can be daunting.⁶ Since decisions on whether to grant a particular license are often made on a case-by-case basis by low-level action officers, with sometimes lengthy delays and erratic results, the process can sometimes generate doubts as to whether the United States can be a reliable defense trade partner, even with close allies.

In addition, DDTC licenses temporary *importation* of similar defense articles into the United States, while the Bureau of Alcohol, Tobacco, and Firearms of the Department of Justice also licenses the permanent importation of items designated as defense articles. The resulting two-way regulation of defense trade, both imports and exports, by differing agencies, can add to the confusion and delays. For example, certain infrared sensors listed in the USML which happen to be manufactured in Japan may find themselves subject to U.S. import licensing requirements before they can come into this country.

For this reason, many companies and countries prefer to negotiate defense exports from the United States through the Foreign Military Sales process (FMS). Under AECA, there are two main avenues for selling on the international arms market: Direct Commercial Sales (DCS), which are subject to ITAR licensing requirements, and Foreign Military Sales (FMS), which are not. Since FMS is a government-to-government transfer, the process of sale is negotiated by the Department of Defense's Defense Security Cooperation Agency (DSCA), whereas DCS requires the customer to negotiate directly with the vendor. Even more important, FMS does not require the vendor to acquire an export license from the State Department or DDCT.⁷

Finally, in the FMS process, the federal government assumes some of the risk and liability for the transaction and guarantees payment by the customer, whereas a vendor in the DCS process must assume those responsibilities himself. In some cases, the U.S. government even advances the money itself.

Hence, there are distinct advantages to FMS vis a vis DCS. By far the bulk of U.S. defense exports are conducted as FMS and amount to between \$16 billion and \$30 billion a year. All the same, negotiating a FMS contract entails heavy involvement by both the Pentagon bureaucracy *and* the State Department (since State still retains final say on any and all arms transactions), not to mention the bureaucracy of the foreign customer's government. This can mean a lengthy and complicated process—even lengthier than a normal DCS of a simple defense article.

For example, once the Secretary of State has approved a sale and any required Congressional notifications are done, only then the Pentagon is able to present the official government-to-government agreement known as the Letter of Offer and Acceptance (LOR), which sets out the conditions under which the U.S. government agrees to the sale. In Japan's case, Congressional reporting thresholds are triggered by FMS contracts over \$25 million, other defense articles or services that total \$100 million, or \$300 million in design and construction services⁸. As a 2014 article in Defense Media Network noted, "A complex FMS case may take years to complete," and (as in the case of Saudi Arabia) can involve high-profile political issues that generate friction and controversy.⁹

In addition, the FMS process is biased toward large-ticket items, especially since the Pentagon gets to charge an additional 3.5% of the total to cover its expenses which, in the case of a high-end weapons system such as the F-35 Joint Strike Fighter, is a hefty

dividend. FMS also requires purchasers to deposit a “management reserve” as a percentage of total sale price, which can substantially raise the cost of large-ticket items. At the same time DSCA maintains an “enhanced end-use monitoring” program known as Golden Sentry. This program ensures that government-to-government transfers such as FMS get to the right purchasers and that defense articles and services provided by the U.S. government are used and protected under the terms and conditions for the transfers, including technology control requirements. In the case of certain countries, such safeguards make sense. In the case of an ally such as Japan, such supervision is not only unnecessary and cumbersome, but even potentially insulting.¹⁰

Perhaps more worrisome in the long term, relying on FMS strictly limits the possibilities for a company-to-company or company-to-government transaction that involves cutting-edge or innovative technologies. This is especially true if one of the companies is a relative start-up or newcomer to the defense market, but has a product that has huge potential for that market. FMS customers tend to look to tried and true technologies and weapons systems, “programs of record” within the Pentagon itself, and rarely venture into uncharted defense technology territory. And if some of that same product’s components happen to appear on the USML, then the normal DCS licensing process can be just as much a barrier to rapid innovation as FMS.

This becomes a particular challenge during an age when the defense market is becoming increasingly globalized. It is worth remembering that the AECA was instituted at a time when the United States was the primary supplier of arms and equipment to allied and friendly nations, and its defense industrial base was unequalled by another country in the world, not even the Soviet Union.

That situation began to change in the late 1980’s, as globalization overtook the Pentagon’s technological base and the “Made in the U.S.A.” supply chain that had once underpinned its industrial network.¹¹ The Defense Department tried to adjust to the new circumstances by adapting civilian technologies to military purposes instead of developing its own unique technologies to meet DoD needs (for example, in the area of computers).¹²

Nonetheless, the normal regulatory process embedded in AECA and ITAR failed to adjust to these changes; although successive administrations pushed export control reform initiatives (including most recently the Obama administration), most reforms were administrative rather than statutory, and failed to address the fundamental issue of a defense export process that had become too cumbersome, too inefficient, and took too long—even when it oversaw defense trade between the U.S. and its closest allies.

For that reason, in 2007 the George W. Bush administration decided to make a fundamental change in how the United States handled defense trade with allied nations, by turning away from the AECA-based process and implementing bilateral treaties instead. In this way, the first Defense Trade Cooperation Treaties were born.

Part II: The U.K. and Australia DTCT's

Although it was a phone call from then-Prime Minister Tony Blair that set-in motion the negotiation and signing of the first U.S.-U.K. Defense Trade Cooperation Treaty, Blair's call fit in with the Bush administration's determination that AECA, even a reformed AECA, would never be adequate to create the kind of modern defense trade system that would enable the U.S. to meet its post-Cold War needs.

Instead, the administration decided that the most effective way to expand the process was through bilateral treaties, especially with trusted allies like the United Kingdom.

As then-Secretary of State Condoleezza Rice noted in the letter for submittal of the U.S.-U.K. Treaty to President Bush, "For several years, the United States and the United Kingdom have sought to negotiate a legally binding agreement that would provide a mutually agreeable exemption for exports to the United Kingdom of defense articles controlled pursuant to the Arms Export Control Act (AECA)..." The Security Assistance Act of 2000 amended section 38 of the AECA to permit the President to exempt a foreign country from the AECA's export licensing requirements. In 2003, the U.S. reached agreements with Great Britain and Australia to exempt certain unclassified exports of defense articles and defense services from export requirements under ITAR.¹³

But there were problems with implementing the agreement. Great Britain could not under European Union rules give any blanket assurances about re-exports of U.S.-origin defense articles to third countries; Australia lacked the laws to put limits on the transfer of defense services and articles to companies inside Australia.¹⁴ The Bush administration hoped that Congress would act to permit the exemptions to remain in force; but Congress failed to act.

Therefore the Bush administration was willing to try a different approach. By the terms of the treaty, the United Kingdom and Australia would agree to treat defense articles and services imported from the U.S. as classified information, so that they came under those country's information security laws, rather than under their export control regimes.

Article 1 defined "Defense Articles" as "articles, services, and related technical data, including software, in tangible or intangible form, listed on the United States Munitions List of the International Traffic in Arms Regulations." It defined export as "the initial movement of Defense Articles from the United States Community to the United Kingdom Community," and re-export as "the movement of previously Exported Defense Articles by a member of the United Kingdom Community from an Approved Community to a location outside the Territory of the United Kingdom."

Article 2 stated the purpose of the treaty was to create "a comprehensive framework for Exports and Transfers, without a license or other written authorization, of Defense Articles," which under Article 3 applied to: 1) defense articles needed for combined military and counter-terrorism operations; 2) cooperative security and defense research

between the U.S. and Britain, as well as “development, production, and support programs” for those articles and research.

Article 3 also stated that U.S. Foreign Military Sales to the U.K. were exempt from the treaty, while “the treaty shall not prevent the issuance of a defense export license or other authorization should an entity eligible to Export or Transfer Defense Articles under this treaty seek to obtain an individual defense export license or other authorization for a particular transaction,” meaning that the treaty was meant to expedite and enhance the normal channels of defense trade between the two countries, not to replace them.

The heart of the treaty was Article 6, which stated that “the United States Community may Export Defense Articles within the scope of this Treaty without prior defense export licenses or other authorizations,” and that “the United States Government shall establish procedures to ensure that all Defense Articles to be Exported under this Treaty are clearly identified as Exported under this Treaty,” meaning that defense trade under the terms of the treaty would form a distinct and clearly defined category of U.S.-U.K. defense trade, one that did not require “prior written authorization by the United States Government” (Article 7).

For the U.K.’s part, “Her Majesty’s Government shall establish procedures to ensure that all Defense Articles identified as Exported under this Treaty shall, upon entry into the United Kingdom Community, be further identified, at a minimum, as “Restricted USML,” meaning the United States Munitions List. This provision was meant to make sure that the re-export or transfer of defense equipment imported from the United States by Britain remained subject to U.S. law regarding defense exports.

After articles covering re-exports and re-transfers (Article 9); protection of proprietary information (Article 10); and security, record-keeping, and enforcement (Articles 11, 12, and 13); the other important article was Article 15, which called on each party to the agreement “to designate an authorized agency to implement its obligations under this Treaty:” ie. the Ministry of Defence in the case of the U.K., the State Department in the case of the U.S. Without meaning to, this provision would become a major source of difficulty later on, since the authorized agencies were also to develop “a process by which entities in the Approved Community may move from the requirements of United States Government defense export licenses or other authorizations issued under the International Traffic in Arms Regulations to the processes established under this treaty.” In the event, the State Department’s processes for receiving exemption under the DTCT would turn out to be nearly as onerous and cumbersome as the normal process they were supposed to avoid: a clear contradiction of the very purpose of the treaty (see Part Three).¹⁵

In any case, rarely has a major comprehensive agreement on defense trade between two allies been as brief (only 21 separate articles) and as simple and succinct in both its language and its purpose as the 2007 U.S.-U.K. DTCT. Ironically, this may have been one of the key problems with the treaty.

Neither signatory foresaw the difficulties that would get in the way of the treaty's full implementation, and therefore did not include provisions to anticipate and avoid those difficulties. Instead, the agreement was duly signed by President Bush and Prime Minister Blair on June 21, 2007 and sent on to the Senate for ratification on September 21. The implementing arrangements for the treaty was signed on February 14, 2008.¹⁶

Still, it was not until 2010 that the Senate gave its advice and consent to the U.S.-U.K. agreement, and Congress passed the necessary legislation for its implementation. As for the implementation agreements, the last one finally passed its hurdle at the State Department in 2012—nearly five years after the original treaty had been signed.¹⁷ By then it was already apparent that there were problems with the U.S.-U.K. treaty that would sharply limit its use by both U.S. and British companies, as well as the Department of Defense and the U.K.'s Ministry of Defence.

The evolution of the U.S.-Australia DTCT is even more instructive.

Nearly four months after the signing of the U.S.-U.K. treaty, on September 5, 2007, President Bush and Australian Prime Minister John Howard signed a nearly identical Defense Trade Cooperation Treaty in Sydney. As with the U.S.-U.K. pact, the U.S.-Australian treaty was aimed at overcoming the delays and restrictions inherent in the normal defense export process.

Australia's defense industry is by no means as large as Britain's; nor does it purchase as much U.S.-built defense equipment as Britain. Yet it is a long-standing, trusted, and important ally, and one of the "Five Eyes" or co-signatories of the U.K.-U.S. agreement on intelligence-sharing, a key foundation of the U.S.-U.K. Special Relationship. Nonetheless, as a 2012 article in the *Defense Industry Daily* noted, the normal U.S. defense trade process (see Part One) even "slows down any effort to do more maintenance and sustainment work locally, after Australia buys U.S. equipment or upgrades what it has. Which effectively encourages Australia *not* to buy from the USA in the first place."¹⁸

All the same, the U.S. considered Australia an important enough ally that in 2004 Congress passed legislation to try to expedite defense trade with both the U.K. and Australia, but without lasting effect. So instead the Bush administration reverted to the same DTCT model as it was using to expedite defense trade and defense technical cooperation with the U.K., in the agreement with Australia.

As with the U.K. treaty, the goal was to allow Australian defense firms and U.S. defense firms to bypass the normal licensing requirements for projects where Australia was going to be the end-user (an exception was the F-35 program, which brought its own set of multi-national agreements). Australian companies which were not part of the "Approved Community" defined by the treaty would still be able to use standard U.S. ITAR export procedures, and as with the U.K. treaty, certain highly sensitive exports would not be allowed except under the same standard procedures.

While proponents argued that the treaty would help Australia and the U.S. achieve greater interoperability between their two armed forces, as well as help defense industries of both countries to more directly support their militaries, it was also recognized that enacting the enabling legislation would take time, especially with a new Labour government coming to power in Canberra after the November 24, 2007 election. Details for implementing the treaty would also have to be worked out on both sides of the Pacific, in a form very similar to the one worked out between the U.S. and U.K.

On December 5, 2007, the Australian Department of Defense released the full text of the treaty into the public domain. However, it was not until December 2010—in other words, three months after the U.S. Senate had finally approved the U.S.-U.K. treaty—that the Australian government began a multi-stage consultation process with the Australian defense industry on the terms of the treaty. A Defence Trade Cooperation Treaty Industry Treaty Advisory Panel was set up in May 2011, followed by release of a draft of a Defense Trade Controls Bill in July.¹⁹

That bill would finally be introduced by the Labour government in November 2011. The bill set out the terms of certification as a member of the treaty's "Approved Community" of defense companies, and outlined the government's responsibility for implementing and monitoring the term's activities. Even when the bill passed, however, the regulations for the bill still had to undergo consultation with Australian industry. Canberra had to design a Pathfinder program to test and evaluate the Treaty architecture; while the U.S. still had to affirm and implement the system on its part.

Nothing about the progress of the U.S.-U.K. treaty suggested this would be a speedy process. The government's Minister for Defence Material Jason Clare was forthright about how important this treaty would be for Australia:

"About 50 percent of Australia's war-fighting assets are sourced from the United States...We will replace or upgrade up to 85 percent of our military equipment over the next 10 to 15 years. Strengthening this area of our Alliance cooperation is therefore clearly in our national interest...This will save the Australian Government and Australian industry time and money."²⁰

Proponents of both treaties also stressed that neither agreement would willy-nilly throw open the door to unrestricted exchange of military technologies. "The treaties, though an administrative innovation, would not open formerly restricted trade," wrote analyst Theodore Bromund in a March 18, 2010 paper for the Heritage Foundation. "Rather, they would reduce bureaucratic burdens on a well-established trade and thereby encourage it to grow to the benefit of all concerned."²¹

Critics pointed out that the current export process approved over 99% of requests for licenses, with over 2,361 licenses approved for Australia alone in 2006.²² Proponents of the DTCT responded that those approvals could take up to three to twelve months to complete, and the delays often deterred companies from seeking a license in the first place.

Ironically, the delays in approving export licenses were nothing compared to the delays in ratifying and implementing the treaty that was supposed to make those delays a thing of the past, at least as far as the U.K. and Australia were concerned. Finally, on November 13, 2012, the Defense Trade Controls Bill received full assent by Australia's House and Senate, and on May 13, 2013 the U.S.-Australia Defense Trade Cooperation Treaty came into full force in that country. A month earlier, on April 11, 2013, the U.S. State Department's DDTC issued its final ITAR-amending rule to the treaty with Australia (its final ruling on the U.K.-U.S. DTCT had come a year earlier).

In 2013 Australia purchased more than \$700 million in arms from the United States. Indeed, since the treaty's implementation the government in Canberra has bought more than \$2 billion in defense articles and services from the U.S. In 2016 Australia bought more weapons from the U.S. than any country outside of the Middle East: \$869 million worth including aircraft and missiles. Those purchases accounted for no less than 82% of Australia total arms imports from abroad.²³

Yet not one of these purchases was done under the terms of the DTCT treaty. The same is true of U.K.'s acquisitions from the U.S., which totaled \$217 million in 2016.²⁴ In short, from the days both treaties were signed in 2007 until today, not a single defense trade transaction has taken place using the terms of either treaty.

Part III: Shortcomings of the Current DTCT's

There is no question that the signing of the DTCT's with Australia and U.K. marked an important formal advance in facilitating an important sector in U.S. defense trade with both countries, namely Direct Commercial Sales and company-to-company transactions.

Yet things did not go as planned.

One reason was that the treaties never came into force until 2012, almost five years after they were signed—long after the first blush of enthusiasm for the treaties, and the rationale that had prompted their signatories to act, had passed. This delay was because the Senate Foreign Relations Committee set rigorous and detailed implementing regulations for the treaties, before ratifying them—while Australia and the U.K. did the same. The worry was that the processes set in motion by the treaties would obviate the case-by-case process of licensing preferred by State's DDTC (and by Congress), as well as bypass normal Congressional oversight under AECA—even though Britain and Australia were two of our closest allies.

The result was an administrative roadblock in the form of the Implementing Regulations (IR). Their complexity and prolixity effectively removed the incentive among defense and aerospace companies in the U.K. and Australia to pursue DTCT exemptions, and incentivized them instead to continue with the normal case-by-case licensing process (which, it must be admitted, was not a cause for chagrin within the bureaucracies at State, Commerce, and the Pentagon that oversaw the licensing process).

“The core problem is that Britain (and Australia) still need new or additional licenses for transfer of technologies to or from the United Nations,” noted a Heritage Foundation report on the shortcomings of the DTCT's in April 2017. “This is true even when the transfer does not change the end user of the technology in question or when a British (or Australian) firm is bound by obligations of confidence to the British (or Australian) government.”²⁵

Hence, defense firms of America's top allies found their hands tied by an entirely new set of bureaucratic requirements, that rendered the normal defense export (and import) process more attractive. As the Heritage report noted, there were also other problems with implementing the DTCT, including:

- The large number and kinds of technologies that were made exempt from the DTCT, and remained subject to ITAR requirements;
- The DTCT's own “onerous marking requirements” (i.e. labels and other information relating to patents, trademarks, country of origin, safety and other requirements)
- The Export Control Reform (ECR) launched by the Obama administration to move many articles from the USML to the Commerce Department's Commerce

Control List (CCL), which led to administrative confusion since the DTCT exemptions applied to USML items only

- The range of other defense trade transactions that still remained outside the DTCT's scope, including FMS and CP (Cooperative Programs).

Even more unfortunately, the list of articles eligible for DTCT exemption is different for the U.K. than it is for Australia, which is different from the list of ITAR exemptions for Canada. In other words, a U.S. defense company trying to do business under DTCT rules would have to work with four different exemption lists, and have to make sure that items or technologies which are ITAR exempt with one close ally, don't transfer to another close ally where they are not.

The Heritage report concluded:

"Today, while the DTCT's are suitable for simple transactions, they are more problematic for complex capability-level transactions, which is where they were intended to produce the greatest gains. There are excellent reasons for the U.S. to control sensitive technologies to prevent them from reaching its adversaries, but in the case of the U.S.'s most trusted allies, the U.S. should be promoting collaboration, not making it more difficult."²⁶

An authoritative report on the DTCT's by the Defense Trade Advisory Group concurred. As one of the authors of that report, Dr. William Schneider of the Hudson Institute, wrote, "The administrative burden imposed by the Implementing Regulations diminished the incentive among the defense and aerospace firms in Australia and the U.K. to avail themselves of the provisions of the Treaties and instead continued the prior process of case-by-case licensing of defense trade and technology transactions." Likewise, "It was apparent to the U.S. defense industry that the Implementing Regulations prevented realization of the aims of the Treaties," and therefore decided to stick to the tried-and-true normal defense trade process.²⁷

The Implementing Regulations were only a symptom of a deeper problem. The root of the difficulty on the American side was the determination of Congress to maintain its control over the export process as defined by ITAR, even if it meant losing out on an opportunity for serious and substantive reform of that process—and even at the cost of damaging the fabric of defense trade between the U.S. and two of its closest allies. This was because in the end, the failure of the DTCT's to live up to expectations became a sore subject for defense officials and industry executives in both Australia and the U.K.; far from facilitating trust and cooperation on defense trade, the treaties were seen as setbacks for having promised more than they could actually deliver.

There is plenty of room, certainly, for improving the treaties, particularly by fixing their Implementation Regulations. In examining the DTCT with the U.S. and Australia, for example, the Defense Trade Advisory Group developed a list of recommendations for changes to the text of the DTCT. It recommended eliminating the special requirements of marking defense articles and reverting to standard ITAR marking requirements. It

also urged creating a single unified list for exempt articles under the DTCT's, instead of separate lists for Britain, Australia, and Canada.

Even more important, it found that the definition of the "approved community" was too restrictive for fruitful development of mutual defense trade. As the Advisory Group noted, "Participation in the approved community is small, entry into it is laborious, and U.S. industry does not have access to a list of all companies currently approved." Instead, it proposed simplifying the entry criteria to a level "analogous to U.S. and Canadian registration criteria." Moreover, since "Security Classification requirements apply to classified transfers only, and apply regardless of Treaty provisions," those requirements shouldn't be a prerequisite criterion for admission to the approved community in the first place as in Section 6, Paragraph 4 (a) of the IR.²⁸

The Advisory Group's 24 recommended changes to the treaty would of course require amending the treaty and IR article by article, with close coordination between the Australian and U.S. governments, as well as possible approval by the Senate and by the Australian parliament of the various changes.

A simpler and more efficient solution might be incorporating these and other recommendations into a brand-new treaty, for the U.S. and Japan, which could then be used as a model for new U.S.-U.K. and U.S.-Australia DTCT's. It is that option which we will explore in Part Four of this report.

Part IV: U.S.-Japan Defense Trade: Past, Present, and Future

The United States is one of the few countries in the world with a military large enough to support a private weapons industry on its own—indeed, the largest weapons manufacturing industry in the world. Of the five global companies with the highest weapons and defense revenue, four are U.S.-based. They also dominate the U.S. defense export market, which is the largest in the world.

Many of the nations that account for a high share of U.S. arms exports have demand for armaments, but have insufficient domestic arms production capabilities. Because starting up production for a major weapons system can be extremely expensive, countries like Saudi Arabia and Iraq, which have high military expenditure as a percent of GDP but few national arms manufacturers, have come to rely almost exclusively on U.S. imports. Other countries have a national defense production capacity, but turn to partners in the defense trade market to make up the difference, particularly with high-tech and complex weapons systems.

Historically, one of those countries has been Japan.

Over the last 10 years, Japan has imported over \$4 billion in arms, 93% of which came from the United States. More than half the nation's total weapons systems imports are in the form of military aircraft. In 2016, total arms imports from the U.S. amounted to \$307 million.²⁹

In 2017, given the growing threat of North Korea's nuclear and missile program, the Trump administration responded positively to a Japanese request for additional defense purchases. A Trump tweet on September 6, 2017 stated that, "I am allowing Japan & South Korea to buy a substantially increased amount of highly sophisticated military equipment from the United States." The Pentagon also released a statement saying that Defense Secretary James Mattis had called his Japanese counterpart to underscore that "the United States would work with Japan to enhance its ballistic missile defense capabilities."³⁰

Until very recently, U.S.-Japan defense trade was largely a one-way street. Official blanket prohibitions on arms sales and defense equipment to foreign countries, including the United States, was the rule for Japan's defense industry.³¹

After nearly forty years of banning all defense and defense-related exports from Japan, however, in 2014 the Abe administration promulgated Three Principles on Transfer of Defense Equipment and Technology, which have set the terms under which Japan's government and defense industry are allowed to transfer military technologies to other countries, including the United States.

Far from "lifting" or "ending" Japanese defense export controls, as some critics (and some supporters) claimed, these Three Principles merely clarify those cases where transfers of defense equipment from Japan to other countries, will be either prohibited or permitted. Under the three original headings, they can be summarized as follows:

- 1) Transfers of defense equipment are prohibited when:
 - a) they violate obligations under treaties and other international agreements of which Japan is a signatory, e.g. the Chemical Weapons Convention, the Convention on Cluster Munitions, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, known as the Ottawa Treaty, and provisions of the UN's Arms Trade Treaty, among others.
 - b) they violate obligations under UN Security Council resolutions, including those preventing arms transfers to sanctioned countries such as North Korea and Iran.
 - c) they are destined for a country that is party to a conflict regarding which the UN Security Council is taking measures to maintain or restore international peace and security.
- 2) Transfers are permitted when they contribute to "the active promotion of peace" and international cooperation; or when they contribute to Japan's own security, either by
 - a) implementing international joint development and production projects with its allies and partners; or
 - b) enhancing security and defense cooperation with its allies and partners; or
 - c) supporting Self Defense Forces activities including maintenance of equipment that enhances the safety of Japanese nationals.
- 3) Finally, transfers are permitted when there are appropriate formal guarantees regarding extra-purpose use and third-party transfers, guarantees which the recipient country's government must provide to the Japanese government prior to transfer, and to which the government of Japan must give its consent.

In addition, in the interest of both transparency and accountability, Japan's National Security Council is also supposed to receive an annual report concerning the overseas transfer of defense equipment, issued by the government agency that has statutory authority over all defense exports, namely the Ministry of Economy, Trade, and Industry (METI).³²

In June 2014, the Japan Ministry of Defense (JMOD) issued a landmark "Strategy on Defense Production and Technological Bases." That document followed the release of the Three Principles regarding defense exports, and acknowledged that the Three Principles would significantly change the direction and force of JMOD's own long-term goal to revivify Japan's defense industrial and technological base.

For example, the strategy paper noted that "Japan's defense industries must strengthen their international competitiveness to respond to changes" in a rapidly changing international defense market. It also pointed to the importance of building strong

relationships of defense equipment and technology cooperation with other countries, noting that Japan had concluded broad agreements to this effect with Great Britain in July 2013; with France in January 2014; and with Australia. Such cooperation, of course, presupposes defense transfers from Japan.³³

The country with which Japan would, of course, most wish to engage in a two-way defense trade is the United States. On the one hand, from an arms export perspective, Japan's defense companies have developed and produced a range of military hardware, from the Type 90 tank (produced by Mitsubishi Heavy Industries or MHI), OH-1 helicopter (Kawasaki Aerospace), and Komatsu Light Armored Vehicle (LAV), to *Hayabusa*-class patrol boats (MHI and Shimonoseki), *Atago*-class Aegis destroyers (MHI), *Osumi*-class tank landing ships (Mitsui), and *Izumo*-class helicopter-equipped destroyers (Japan Marine Ltd). All these systems are entirely manufactured in Japan, and all would very likely find customers, particularly in Asia—but unfortunately not in the U.S.

Virtually all the weapons systems Japan's defense companies would be prepared to sell to the U.S. are ones of which the U.S.'s much larger defense industry already supplies, in most cases in more advanced and sophisticated versions which are more interoperable with Pentagon systems.

There are, however, other areas in which Japanese companies have developed, and are developing, technologies that U.S. defense companies would be keenly interested in acquiring. This is particularly true of technologies that would buttress the Pentagon's announced Third Offset strategy for deploying advanced high-tech systems in order to "offset" Russian and Chinese anti-access/area denial strategies aimed at thwarting or displacing America's military predominance.³⁴

These technologies include laser research; robotics; advanced composite materials, advanced sensors, and high-end electronic components and sub-systems; while U.S. companies would also welcome joint development projects with Japan in areas such as artificial intelligence, miniaturization, and fiber-optic engineering.

For example, current work on an electromagnetic railgun would be greatly enhanced by giving its American makers access to Japanese firms that produce high-capability capacitors for generating and storing high levels of electricity. Similarly, under an effective DTCT, Japanese companies working on high-energy laser systems would be able to share their research and data more easily with American companies who are working to develop high-energy laser as a component of ballistic missile systems.

It is worth noting that the 2015 U.S.-Japan Security Guidelines clearly opened the door to this kind of joint effort in its "Defense Equipment and Technology Cooperation," document which stated that: "In order to enhance interoperability and to promote efficient acquisition and maintenance, the two governments will: • cooperate in joint research, development, production, and test and evaluation of equipment and in mutual provision of components of common equipment and services;

- strengthen the basis to repair and maintain common equipment for mutual efficiency and readiness;
- facilitate reciprocal defense procurement to enhance efficient acquisition, interoperability, and defense equipment and technology cooperation; and
- explore opportunities for cooperation with partners on defense equipment and technology.”³⁵

Now, some of these products would come under the heading of “dual-use technologies” in U.S. export policy which makes their import easier; many others, however, do not. In an age where defense technologies have come to rely on innovations in the commercial sector, rather than vice versa, the very term “dual-use” may be one whose relevance has passed. A DTCT would allow companies to decide what components or materials are desirable for their defense-related projects, and to purchase and import them as they see fit.³⁶

On the Japanese side, a DTCT would require some adjustment of the government’s current Defense Export Three Principles. It can be argued that too many technologies and devices cannot pass a very narrow interpretation of the Three Principles, i.e. that they must be either directly supportive of Japan’s self-defense and the Japan Self Defense Forces (JSDF), *or* directly supportive of defense cooperation between Japan and its allies, i.e. the United States. For example, exports would not be allowed for articles or equipment that was going to be used by U.S. forces exclusively. At the same time, such a narrow view would force the United States government to stipulate that the technologies that companies are buying from Japan will not be transferred to countries or parties that Japan regards as undesirable defense trade partners—a stipulation which, in a complex world, the United States might not be able to give. Instead, the issue should be focused on who is the end-user of a given system or joint development project, such as the United States, Japan’s DTCT partner.

If there are roadblocks to expanding defense trade between the U.S. and Japan on the Japanese side, roadblocks (or at least speed bumps) apply to the U.S. side, as well. Today the overwhelming majority of requests for licenses to export defense items to Japan under ITAR are approved—as are the overwhelming majority of requests for sale to Australia and the U.K. However, the time it takes for approval can be prohibitive—just as it is for Australia and the U.K. Moreover, Japan’s requests for some of the most sensitive U.S. technologies, for example the Spy-6 advanced radar system, have been denied in the past.³⁷ There is no doubt that Japan has been barred access to the most advanced U.S. military technologies, including ones that would be imperatively helpful in today’s increasingly dangerous security environment in East Asia.

The key argument for changing the defense trade status quo between the U.S. and Japan is the threat posed by China and North Korea. The rise of an aggressive militarized China and the danger of a missile and nuclear-armed North Korea militate in favor of the U.S. helping Japan acquire all the defense systems and equipment it needs.

The rise of Chinese as well as Russian A2/AD strategies and technologies; the need to reach out to a globalized tech base for systems and components to support the American military; the imperative to develop “sixth generation” offset technologies for the future; also militate in favor of Japan working with the U.S. government and U.S. companies on as many advanced projects as possible.

There remains one more important objective for U.S.-Japan defense trade, which a DTCT could accomplish. Despite having signed a General Security of Military Information Agreement (GSOMIA) with the United States in 2007, it is widely recognized that the Japanese government lags behind the U.S. in terms of industrial and cyber security for its defense industrial base, and behind trusted allies like Australia and U.K.³⁸

In order for Japan to be considered for a DTCT, its government and industry would be required to raise their industrial security standards to a level acceptable for intimate co-development projects and important technology transfers and technology-sharing. These improvements, which currently take place at an incremental level (as for example in the F-35 Joint Strike Fighter program), would become general, giving Japan for the first time a modern comprehensive industrial security regime. In other words, a DTCT can not only stimulate a new level of defense trade. It can also achieve a new level of security for protecting sensitive data and technologies that will encourage other allies like the U.K., Australia, and Canada to share their most sensitive defense information with Japanese companies.

In conclusion, all these are goals that a Defense Trade Cooperation Treaty could strive to meet, even though a DTCT that is the same as the current U.K. and Australia treaties, cannot.

The solution is to devise a comprehensive agreement that avoids the pitfalls that have caused the previous agreements to stumble, while also providing a model for correcting the existing DTCT’s—in short, a DTCT that lays the foundation for a new defense export approach to Japan *and* our other closest allies.

Part V: The Path to a U.S.-Japan DTCT

A strong DTCT that can achieve the goals outlined in Part Four, and that stand the test of time, will require:

Strong and continuous executive action. Defense trade and export reform, like defense acquisition reform, is never self-executing. That assumption has undercut previous reforms in the past, including previous DTCT's. Strong leadership from the top is required, not only at the start of the process, as George W. Bush and Tony Blair displayed in 2007; and not only in securing agreement on the treaty from both executive agencies and legislative authorities. Such leadership must continue from the highest levels of the White House and Office of the Prime Minister as the treaty is implemented and executed, with an independent body overseeing the entire process and reporting back to the President and the Prime Minister.

Without executive strong support, no DTCT will be able to expedite defense trade.

Strong continuous legislative consultation. This will also be needed in order to make sure that: key lawmakers understand the purpose and importance of the DTCT; will approve the terms of the treaty in a timely fashion; and will work to correct existing treaties as well as make sure an effective U.S.-Japan DTCT is ratified without undue procedural delays or substantive modifications.

Goal-oriented and effective bureaucratic implementation. The goal of a DTCT is to expedite defense trade, not to slow or to hamper it. Unfortunately, much of the normal export process is designed to have the opposite effect. It sees its role as examining every export license and defense trade transaction on a case-by-case basis, in order to make sure that no sensitive technology or third-party transfers take place that might injure national security.

With regard to defense trade with certain countries, including some formal allies, such care and scrutiny is justified and laudable. With others, especially close and long-standing allies like the U.K. and Japan, it is not. While there may be overriding national security reasons why certain highly sensitive technologies should not be shared, the vast majority of defense trade and future defense trade with an ally like Japan does not fall into that category. Yet the normal impulse of regulatory agencies like DDTC and DTSA will be to avoid categorical exemptions, and to use a DTCT's implementation framework to seek exemptions from the exemptions, so to speak, in order to retain as much control over the normal export process as possible—even if it runs counter to the larger purposes of the treaty. No doubt DDTC and DTSA's Japanese counterparts will tend to feel the same way.

Something similar what happened with the U.K. and Australia treaties. This is what must not be allowed to happen to a U.S.-Japan agreement.

Instead, what will be required will be not only:

- 1) self-executing rules for implementation (which were missing from the earlier treaties) but
- 2) creation of an independent authority to oversee both the designing and ratification of the new treaty, *and* the entire process of implementation and execution of the treaty. In addition, an independent body should have authority to review any regulatory changes in the implementation of the treaty to make sure they are consistent with the purposes and terms of the agreement.

Conclusion

A number of preliminary steps would also be desirable, in order to encourage and develop the habit of consultation on U.S.-Japan defense trade cooperation at the highest levels. A useful model is the Defense Trade and Technology Initiative (DTTI) signed in 2012 between the Department of Defense and the government of India. In the words of the agreement, the aims of the DTTI are to:

- “Transform the bilateral defense relationship into one that is limited only by independent strategic decisions, rather than bureaucratic obstacles or inefficient procedures;
- Strengthen India’s defense industrial base by moving away from the traditional “buyer-seller” dynamic toward a more collaborative approach
- Explore new areas of technological collaboration from science and technology cooperation through co-development and co-production
- “Expand U.S.-Indian business ties” in ways that would facilitate future defense industrial and trade cooperation.

An indication of the high value placed on the U.S.-India DTTI is the fact that that the initiative was led by the third ranking official in the U.S. Defense Department (DoD), then-Undersecretary of Defense for Acquisition, Technology, and Logistics Mr. Frank Kendall. In addition, a joint U.S.-India DTTI Interagency Task Force (DIATF) co-chaired by the Director for International Cooperation, Office of the Undersecretary of Defense for Acquisition, Technology, and Logistics Mr. Keith Webster.³⁹

The DTTI also spawned an India Rapid Response Cell (IRRC) in January 2015, which is the only country-specific cell of its kind inside the Pentagon. The cell’s purpose is to examine ways to move away from the bureaucratic obstacles of the traditional buyer-seller dynamic to a more collaborative approach, as well as explore new areas of technological collaboration and expand U.S.-India business ties in the defense sector.⁴⁰

These steps in the case of U.S.-Japan defense trade collaboration, then, would prepare the way for both the framework of a U.S.-Japan DTCT and for the most crucial step: creation of a Presidential Independent Advisory Committee.

Presidential Independent Advisory Committee on Defense Trade

Such a Committee would be made up of industry representatives and Special Government Employees who will regularly report to the Deputies Committee of the National Security Council. Its charter would be usefully based on that of another federal advisory committee, the Regulations and Procedures Technical Advisory Committee at the Department of Commerce (see Appendix 1).

This committee, together with its Japanese counterpart, would have a two-fold mandate:

- 1) To study and report on the framework needed to draw up and execute an effective DTCT between the U.S. and Japan, as well as to secure the treaty's Congressional approval.
- 2) To oversee implementation of the U.S.-Japan DTCT according to the terms of the treaty, as well as to revise the existing treaties with the U.K. and Australia.

As part of its mission, this Treaty Advisory Council would also generate an annual report on the progress, or lack thereof, in the DTCT's positive impact on defense trade cooperation and industrial collaboration between the U.S. and Japan. It would submit that report to the Office of the President, the Secretary and Undersecretary of Defense, and to Congress (with similar submission to their Japanese counterparts), which would serve as the basis for further reforms of defense trade regulations and their implementation.

For drafting an effective treaty, its members must be focused on four goals:

- 1) Implementing Regulations need to be reduced to a minimum, and written to support, not undermine, the purpose of the treaty, which is to expand and expedite defense trade.
- 2) All changes outlined by the previous Defense Trade Advisory Group for making existing treaties more effective (see Part Three), will need to be incorporated into the language of the U.S.-Japan treaty. Further reductions in the IR's also need to be considered in order to arrive at an implementation process that is faster and more efficient than the normal export process.
- 3) The treaty must be as self-executing as possible. That means any implementing regulations need to be included within the treaty itself, not imposed by bureaucratic agencies afterwards.
- 4) The Treaty Advisory Council's charter, as stated in the treaty, must include authority to review all future statutory implementations and all regulating proposals regarding the DTCT, prior to publication in the federal register. While the Council will consult regularly with the relevant regulatory agencies, including the State Department (DDTC and Foreign Military Assistance); Defense Department (DTSA and DSS); and Commerce Department (Bureau of Industry and Security (BIS)); its authority and advice shall remain independent of those bodies.

In addition to these goals, which would pertain to any DTCT between the United States and an important ally, a U.S.-Japan DTCT must incorporate four additional and specific objectives.

First, it must aim to create new defense capabilities, especially on a company-to-company basis, and not just share production or maintenance of products operated by both nations (as has happened with current agreements on the joint F-35 program between the U.S. and Japan).

Second, the ability to systematically upgrade and/or enhance existing systems and equipment through collaboration at the scientific and engineering level between U.S. and Japan companies, and between Japanese companies and U.S. research labs, must be incorporated into the implementation process.

Third, the export control and industrial security regimes of the U.S. and Japan must be substantially more harmonized, even if administrative and institutional processes differ.

Yet in the end, the creation of a DTCT for U.S. and Japan, and the revision of the existing U.K. and Australian treaties, can set its sights even higher. Since the terms of the DTCT permit the same exemption from normal export licenses between DTCT signatories as between the signatories and the U.S., the possibility arises for a DTCT community of five nations—the U.S., the U.K., Australia, Japan, and Canada—which can facilitate the rapid exchange of defense technology as well as the development of new technologies through the sharing of expertise and resources—as well as secure and protect controlled technology on a common basis.

The result will be a kind of defense trade Common Market, serving common interests through a five-way network of researchers, contractors, and production facilities, not unlike the “Five Eyes” countries (Australia, Canada, New Zealand, the U.S., and Great Britain) who routinely share intelligence information thanks to the U.K.-U.S. agreement signed more than seventy years ago.⁴¹

Where will an effective DTCT between the U.S. and Japan lead in ten or twenty years, let alone seventy years? It is difficult to predict. However, the time is ripe the need is urgent; and the means to craft an effective treaty, and to keep it effective, are all at hand. Given Ambassador Mansfield’s observation that the U.S.-Japan bilateral relationship is our most important—bar none, creating a strong DTCT and a robust DTCT oversight regime will be a fitting tribute to that alliance’s past and present, as well as a signal contribution to its future.

List of Names and Acronyms

Arms Export Control Act	AECA
Direct Commercial Sales	DCS
Directorate of Defense Trade Controls	DDTC
Defense Trade and Technology Initiative	DDTI
Defense Security Cooperation Agency	DSCA
Defense Trade Cooperation Treaty	DTCT
Export Administration Regulations	EAR
Foreign Military Sales	FMS
International Traffic in Arms Regulations	ITAR
Japan Ministry of Defense	JMOD
Letter of Offer and Acceptance	LOR
Reciprocal Defense Procurement Memorandum of Understanding	RDPMOU
United States Munition List	USML

About the Author

Dr. Arthur Herman (Ph.D. Johns Hopkins, 1985) is the author of nine books, including the *New York Times* bestselling *How the Scots Invented the Modern World* (2001); the Pulitzer Prize Finalist *Gandhi and Churchill* (2008); *To Rule the Waves: How the British Navy Shaped the Modern World* (nominated for the UK's Mountbatten Prize); and the highly acclaimed *Freedom's Forge: How American Business Produced Victory in World War II*, which *The Economist* magazine picked as one of the Best Books of 2012.

His most recent book, *1917: Lenin, Wilson, and the Birth of the New World Disorder*, was published by Harper in November of 2017. His previous book, *Douglas MacArthur: American Warrior*, was published by Random House in June of 2016.

He is also the author of *Pacific Partners: Forging the U.S.-Japan Special Relationship*, published by the Hudson Institute in December 2017.

Educated at the University of Minnesota and Johns Hopkins University in history and classics, Dr. Herman is a frequent contributor on defense, energy, and technology issues to *Commentary* magazine, the *New York Post*, *National Review*, and the *Wall Street Journal*. He was also the first non-British citizen to be named to the Scottish Arts Council from 2007 to 2009.

¹ "Defense Trade Cooperation Treaties & Resources," United States Department of State, Directorate of Defense Trade Controls, 2017, Washington, DC.

² "The Canada-U.S. Defence Relationship," Government of Canada, National Defence and the Canadian Armed Forces, 2014, BG 13.055, Canada.

³ Arthur Herman, "The Pentagon's 'Smart' Revolution," Hudson Institute, 2016, accessed October 2, 2017, <https://www.hudson.org/research/12579-the-pentagon-s-smart-revolution>.

⁴ Tim Kelly and Nobuhiro Kubo, "U.S. agrees to waive restrictions on Japanese military component imports," *Reuters*, 2016, accessed October 2, 2017, <http://www.reuters.com/article/japan-usa-defense/u-s-agrees-to-waive-restrictions-on-japanese-military-component-imports-idUSL4N18V26G>.

⁵ The Arms Export Control Act, 22 U.S.C. § 2778 (1976) https://www.pmdtcc.state.gov/regulations_laws/aeca.html.

⁶ The United States Munition List, Title 22: Foreign Relations, § 121.1 (1993) <https://www.ecfr.gov/cgi-bin/text-idx?node=pt22.1.121>

⁷ "Foreign Military Sales vs. Direct Commercial Sales," *LMDefense*, accessed October 2, 2017, <http://lmdefense.com/foreign-military-sales/fms-vs-dcs/>.

⁸ GAO-17-682, "Foreign Military Sales: Expanding Use of Tools to Sufficiently Define Requirements Could Enable More Timely Acquisitions," August 2017, 7, n.4

⁹ J.R. Wilson, "DSCA: Foreign Military Sales," *Defense Media Network*, 2014, accessed October 2, 2017, <https://www.defensemedianetwork.com/stories/foreign-military-sales/>.

¹⁰ "End Use Monitoring (EUM) Division," Defense Security Cooperation Agency, accessed February 12, 2018, <https://www.dsca.mil/about-us/end-use-monitoring-eum>.

¹¹ Richard A. McCormack, "U.S. Military Enters A New Era Defined By Globalization Of Its Technology Supply Chain," *Manufacturing & Technology News*, 2015, accessed October 2, 2017, <http://www.manufacturingnews.com/news/2015/New-Era-For-Defense-Industry-0520151.html>.

¹² Christopher S. Robinson, "Beyond the 'Buy America' Debate: Sustaining America's Industrial and Technological Edge amid the Challenges of Globalization," The Brookings Institution - Foreign Policy

Studies, 2007, accessed October 2, 2017, <https://www.brookings.edu/wp-content/uploads/2016/06/robinson20070731.pdf>.

¹³ United States Congress, 111th Congress, 2nd Session, Defense Trade Cooperation Treaties with United Kingdom and Australia, Ex. Rept. 111-5, Washington, DC: Committee on Foreign Relations, 2010, accessed October 3, 2017, <https://www.congress.gov/111/crpt/erpt5/CRPT-111erpt5.pdf>.

¹⁴ J.R. Wilson, "DSCA: Foreign Military Sales," *Defense Media Network*, accessed February 12, 2018, <https://www.defensemedianetwork.com/stories/foreign-military-sales/>.

¹⁵ United States Congress, 110th Congress, 1st Session, Treaty with United Kingdom Concerning Defense Trade Cooperation, Ex. Rept. 111-5, Washington, DC: Committee on Foreign Relations, 2007, accessed October 3, 2017, <https://www.congress.gov/110/cdoc/tdoc7/CDOC-110tdoc7.pdf>.

¹⁶ United States Department of State, Directorate of Defense Trade Controls, Treaty Between The Government of The United States of America and the Government of Australia Concerning Defense Trade Cooperation, Washington, DC: Bureau of Political-Military Affairs, 2007, p. 2, n. 1. http://pmdrtc.state.gov/treaties/documents/Australia_Treaty.pdf.

¹⁷ "Implementation of the Defense Trade Cooperation Treaty between the United States and the United Kingdom," 77 FR 16592, March 12, 2012, <https://www.pmdrtc.state.gov/FR/2012/77FR16592.pdf>.

¹⁸ Defense Industry Daily Staff, "The Australia-USA Defense Trade Cooperation Agreement," *Defense Industry Daily*, 2012, accessed October 2, 2017, <http://www.defenseindustrydaily.com/australia-signs-defense-trade-agreement-with-usa-03758/>.

¹⁹ Bruce Vaughn, The U.S.-Australia Treaty on Defense Trade Cooperation, Order Code RS22 772, Washington, DC: Congressional Research Service, 2007, accessed October 2, 2017, <https://fas.org/sgp/crs/natsec/RS22772.pdf>.

²⁰ Defense Industry Daily Staff, "The Australia-USA Defense Trade Cooperation Agreement," *Defense Industry Daily*, 2012, accessed October 2, 2017, <http://www.defenseindustrydaily.com/australia-signs-defense-trade-agreement-with-usa-03758/>.

²¹ Theodore R. Bromund, "Now Is the Time to Seek Ratification of the U.S.–Australia Defense Trade Cooperation Treaty," The Heritage Foundation, 2010, accessed October 2, 2017, <http://www.heritage.org/asia/report/now-the-time-seek-ratification-the-us-australia-defense-trade-cooperation-treaty>.

²² United States Department of State, Directorate of Defense Trade Controls, Treaty Between The Government of The United States of America and the Government of Australia Concerning Defense Trade Cooperation, p. 2.

²³ Curtis Brown, Ryan Browne, Zachary Cohen, "Here's who buys the most weapons from the U.S.," *CNN*, 2016, accessed October 3, 2017, <http://www.cnn.com/2016/05/24/politics/us-arms-sales-worldwide/index.html>.

²⁴ "U.S. arms exports 2016, by country," chart, *Statista*, <https://www.statista.com/statistics/248552/us-arms-exports-by-country/>

²⁵ Theodore R. Bromund, "How to Expand Defense Trade Cooperation Between the U.S., the United Kingdom, Australia, and Canada," The Heritage Foundation, 2017, accessed October 2, 2017, <http://www.heritage.org/defense/report/how-expand-defense-trade-cooperation-between-the-us-the-united-kingdom-australia-and>.

²⁶ *Ibid.*, 2.

²⁷ Bryon Angvall, Sandra Cross, Andrea Dynes, Larry Fink, Greg Hill, Beth Mersch, Bill Schneider; DTAG Defense Trade Cooperation Treaty Working Group, Washington, DC: U.S. Department of State, 2014 http://pmdrtc.state.gov/DTAG/documents/plenary_Jan2014_Tasking2_whitepaper.pdf.

²⁸ *Ibid.*, 1.

²⁹ Michael S. Sauter and Samuel Stebbins, "Countries Buying the Most Weapons From the US Government," *MSN*, 2017, accessed February 12, 2018, <https://www.msn.com/en-us/money/markets/countries-buying-the-most-weapons-from-the-us-government/ar-AAhTh3>.

³⁰ Julian Borger, "Trump offers to sell 'sophisticated' military gear to Japan and South Korea," *The Guardian*, 2017, accessed October 2, 2017, <https://www.theguardian.com/world/2017/sep/06/donald-trump-north-korea-arms-deal-japan-south-korea>.

³¹ Arthur Herman, "The Awakening Giant: Risks and Opportunities for Japan's New Defense Export Policy," The Hudson Institute, 2016, accessed October 2, 2017, <https://www.hudson.org/research/13145-the-awakening-giant-risks-and-opportunities-for-japan-s-new-defense-export-policy>.

³² “Three Principles on Transfer of Defense Equipment and Technology,” Ministry of Economy, Trade, and Industry, 2014, accessed October 2, 2017, <http://www.meti.go.jp/english/>.

³³ “Strategy on Defense Production and Technological Bases,” Ministry of Defense, Japan, 2014, 1-22.

³⁴ Arthur Herman, “Pacific Partners: Forging the U.S.-Japan Special Relationship,” Hudson Institute, 2017, accessed October 3, 2017, <https://www.hudson.org/research/13902-pacific-partners-forging-the-us-japan-special-relationship>.

³⁵ “The Guidelines for Japan-U.S. Defense Cooperation,” Ministry of Defense, http://www.mod.go.jp/e/d_act/ampo/shishin_20150427e.html.

³⁶ This is in fact what Prime Minister Abe’s father, Abe Sentano, hoped would happen in a memo to then-Ambassador Mike Mansfield in November 1983, stating that the transfer of defense-related articles, other than actual military equipment from Japan to the United States, should be encouraged.

³⁷ Tim Kelly and Nobuhiro Kubo, “Exclusive: Japan seeks new U.S. missile radar as North Korea threat grows - sources,” Reuters, 2017, accessed October 2, 2017, <https://www.reuters.com/article/us-northkorea-missiles-japan-radar-exclu/exclusive-japan-seeks-new-u-s-missile-radar-as-north-korea-threat-grows-sources-idUSKCN1BA0TS>.

³⁸ Hudson Institute, “Science, Technology, and the U.S.-Japan Alliance,” 26-7.

³⁹ “U.S.-India Defense Technology and Trade Initiative (DTTI),” <https://www.acq.osd.mil/ic/dtti.html>.

⁴⁰ Josy Joseph, “Pentagon cell to push India trade ties,” *The Hindu*, 2015, <http://www.thehindu.com/news/pentagon-creates-india-rapid-reaction-cell/article7655766.ece>.

⁴¹ Richard Norton-Taylor, “Not so secret: deal at the heart of U.K.-U.S. intelligence,” *The Guardian*, 2010, accessed October 2, 2017, <https://www.theguardian.com/world/2010/jun/25/intelligence-deal-uk-us-released>.

Hudson Institute is a research organization promoting American leadership and global engagement for a secure, free, and prosperous future.

Founded in 1961 by strategist Herman Kahn, Hudson Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary studies in defense, international relations, economics, health care, technology, culture, and law.

Hudson seeks to guide public policy makers and global leaders in government and business through a vigorous program of publications, conferences, policy briefings and recommendations.

Hudson Institute

1201 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20004

P: 202.974.2400
info@hudson.org
www.hudson.org