CHAPTER 5

INTERNATIONAL AGREEMENTS

A. INTRODUCTION

1. Various statutory and regulatory provisions, including 22 U.S.C. 2767 (Authority of the President to Enter into Cooperative Projects with Friendly Foreign Countries) *(reference b)*, 10 U.S.C. 2350a (Cooperative Research and Development Projects: Allied Countries) *(reference a)*, and DoD Directive 5530.3 *(reference cc)* require that arrangements for international cooperative programs must be set forth in a Memorandum of Agreement (MOA), a Memorandum of Understanding (MOU) or other equivalent international agreement.

2. This chapter will not cover the ramifications of international agreements except as they relate to information security, foreign disclosure and technology transfer. For a thorough understanding of international agreements relating to cooperative research and development programs, refer to DoD Directive 5530.3 and the DoD International Agreement Generator computer software program maintained by the Navy International Programs Office.[1] For a similar understanding of Letters of Offer and Acceptance (LOAs) and international agreements relating to coproduction programs, refer to the current edition of the SAMM *(reference d)*.

3. This chapter also does not cover Foreign Military Sales (FMS). The implementing LOAs, the means by which the U.S. Government offers to sell foreign government or international organization defense articles and services, are not international agreements under DoD Directive 5530.3. Therefore, both the Department of State (DoS) and the Department of Defense (DoD) consider LOAs as contracts and not international agreements.

B. DEFINITIONS

Certain definitions are critical to understanding the international agreement process. Therefore, they are provided here as a convenience to the reader.

[1] Access to the database is restricted to official U.S. Government use and is not releasable to foreign governments or their representatives.

1. **International Agreement.**[2] An international agreement is:

a. Any agreement concluded with one or more foreign governments (including their agencies, instrumentalities or political subdivisions) or with an international organization, that:

(1) Is signed or agreed to by personnel of any DoD Component or by representatives of the Department of State or any other Department or Agency of the U.S. Government;

(2) Signifies the intention of its parties to be bound by international law;

(3) Is denominated as an international agreement or as an MOU, MOA, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, note verbal, aide memoir, agreed minute, contract, arrangement, statement of intent, letter of intent, statement of understanding or any other name connoting a similar legal consequence.

b. Any oral agreement that meets the criteria of paragraph 1.a., above.

c. A North Atlantic Treaty Organization (NATO) Standardization Agreement (STANAG) under the NATO Mutual Support Act *(reference aaa)* that provides for mutual support or cross-servicing of military equipment, ammunition, supplies and stores or for mutual rendering of defense services, including training.

2. **Negotiation.** Communication by any means of a position or an offer, on behalf of the United States, the Department of Defense (DoD) or on behalf of any officer or organizational element thereof, to an agent or representative of a foreign government (including its agencies, instrumentalities or political subdivisions) or of an international organization, in such detail that

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[2] For the purposes of DoD Directive 5530.3 *(reference cc)* the following are not international agreements:

a. Contracts made under the Federal Acquisition Regulations (FAR) *(reference bbb)*.

b. Foreign Military Sales Credit Agreements.

c. FMS LOAs and Letters of Intent (LOI).

d. Standardization Agreements that record the adoption of like or similar military equipment, ammunition, supplies and stores or operational, logistic, administrative procedures.

e. Leases under 10 U.S.C. 2667, 2675, *(reference ccc)* and 22 U.S.C. 2796 (Pub. L. No. 94-329 (1976)).

f. Agreements solely to establish administrative procedures.

g. Acquisitions or orders under cross-servicing agreements made under the authority of the NATO Mutual Support Act *(reference aaa)* and DoD Directive 2010.9 *(reference ddd)*.

the acceptance in substance of such a position or offer would result in an international agreement.

a. The term "negotiation" includes any such communication even though conditioned on later approval by the responsible authority. The term also includes provision of a draft agreement or other document, the acceptance of which would constitute an agreement, as well as discussions of any U.S. or foreign government or international organization draft document whether or not titled "agreement."

b. The term does not include preliminary or exploratory discussions or routine meetings where no draft documents are discussed, so long as such discussions or meetings are conducted with the understanding that the views communicated do not and shall not bind or commit any side, legally or otherwise. See also Chapter 3, subsection E.6., False Impressions.

3. **Agreements Having Policy Significance.** Policy significant agreements include those agreements that:

a. Specify disclosure of classified information, technology sharing or work sharing arrangements, coproduction of military equipment or offset commitments as part of an agreement for international cooperation in the research, development, test, evaluation or production of defense articles, services or technology.

b. Because of their intrinsic importance or sensitivity, would directly and significantly affect foreign or defense relations between the United States and another government.

c. By their nature would require approval, negotiation or signature at the Office of the Secretary of Defense (OSD) or diplomatic level.

d. Would create security commitments currently not assumed by the United States in existing mutual security or other defense agreements or arrangements, or which would increase U.S. obligations with respect to the defense of a foreign government or area.

C. POLICY AND PROCEDURES

1. The typical types of international agreement are the memorandum of agreement (MOA) and memorandum of understanding (MOU). Persons contemplating an initiative with a foreign government or international organization that requires an international agreement should seek guidance from the appropriate General Counsel or Staff Judge Advocate.

2. The Under Secretary of Defense (Policy), (USD (P)), has the responsibility within DoD for authorizing the negotiation and conclusion (signing) of all categories of international agreements. The USD (P), in DoD Directive 5530.3 (*reference cc*), has delegated some of this authority to other officials within the Department of Defense.

3. DoD Directive 5530.3 authorizes various DoD Component officials to approve negotiations and the conclusion of certain categories of international agreements. This authority does not relieve the officials from the coordination requirements of the Directive, however. Moreover, the USD (P) reserves approval authority for all proposed agreements having policy significance as described in subsection B.3. above. These agreements involve, among other things, international cooperation in RDT&E or production of defense articles, services or technology and which specifically involve either:

a Disclosure of classified information;

b Technology-sharing or work-sharing arrangements;

c Coproduction of military equipment; or

d Offset commitments.

4. DoD Directive 5530.3 also requires the coordination of security provisions for agreements likely to involve the release of Classified Military Information (CMI), classified technology or classified material with the Deputy Under Secretary of Defense for Technology Security Policy and National Disclosure Policy (DUSD (TSP&NDP), before making any commitment to a foreign government or international organization. This is to ensure that security provisions are consistent with national and DoD disclosure policies, and that they are consistent with pertinent international security agreements (See Chapter 3). DoD Directive 5230.11 *(reference dd)* prohibits the disclosure of classified information or commitments to do so pending a disclosure decision by an appropriate disclosure authority. (See DoD Directive 5530.3 for required coordination for matters other than the disclosure of CMI.)

5. Proponents of an agreement must request authority to develop (RAD) the agreement from the official having the authority to approve the agreement, before beginning negotiations.

6. Of the various actions that can support the RAD process, the most important from a security and technology control standpoint is the Technology Assessment/Control Plan (TA/CP). Its purpose is:

a. To assess the feasibility of foreign participation in the program and to assist the official with disclosure authority in reaching decisions on the potential disclosure of CMI and Controlled Unclassified Information (CUI);

b. To assist in the development of negotiating guidance and instructions;

c. To assist in the development of a Delegation of Disclosure Authority Letter (DDL);

d. Identify security arrangements for the program;

e. Support the acquisition review process; and

f. Assist in making decisions on such subsequent issues as Foreign Military Sales, commercial sales, and co-production or licensed production of the system.

Security agreements were discussed in Chapter 3. The TA/CP and DDL are discussed in detail in Chapter 8.

7. **International Agreements Generator.** The OSD has adopted an automated International Agreements Generator (IAG). This generator stores, updates and assembles standard provisions for certain agreements. These provisions serve as a baseline for drafting international agreements by type and country (ies). The generator includes policy and rationale for choosing one provision over another in a particular agreement. The Navy International Programs Office (Navy IPO) is the executive agent for the data base.

8. **Reviewing International Agreements.**

a. Competent personnel must review international agreements. The Office of the Department of Defense (General Counsel) and the Office of the Department of Defense (Comptroller) must review all agreements. As noted earlier, the ODUSD (TSP&NDP) must review all agreements that involve classified information or that have security implications. Security, foreign disclosure and technology transfer personnel should carefully review the following articles (sections) of all international agreements:

(1) Definition of Terms and Abbreviations. The IAG provides a list of the most commonly used terms and their definitions. The use of the terms should be consistent throughout the agreement; care must be exercised when modifying them to avoid unintended interpretations in other sections of the agreement;

(2) Objectives. This article provides a brief description of what the project intends to achieve. The concern here is that it is easy to promise something that may not be permissible under the applicable disclosure policy. The objective also should be compatible with the legal memorandum supporting the proposed agreement and the TA/CP;

(3) Management. The provisions of this article could inadvertently authorize the project manager to transfer or otherwise dispose of U.S. CMI or CUI in a manner contrary to U.S. law or policy, that is inconsistent with other articles of the agreement, or that exceeds the delegated authority of the project manager;

(4) Contractual Provisions. This article of the agreement should require that any contracts let by the project manager, participating governments or contractors contain suitable provisions to impose in contracts and subcontracts the provisions of the articles on Disclosure and Use of Program Information, Controlled Unclassified Information, Security, and Third-Party Sales and Transfers;

(5) Disclosure and Use of Program Information. The principal concern in this section centers on the disclosure and use of both government and contractor developed background information (information used in but not generated in the performance of the program) and foreground information (project information generated in the performance of the program). There should be a cross-reference to the article on Third-Party Sales and Transfers to ensure that provisions on use do not lead to third-party transfers without

prior written consent of the participants. Particular care must be exercised to ensure that this article does not contradict the provisions in the article on Security;

(6) Controlled Unclassified Information. The concerns are that provisions in this article must:

(a) Limit the use of CUI to the uses specified in the article on Disclosure and Use of Project Information;

(b) Limit access to persons who have a need to know;

(c) Limit the transfer of CUI to those described in the provisions of the agreement on Third-Party Sales and Transfers;

(d) Require that further disclosures are prohibited unless the originator consents to its release and the originating Party is notified of unauthorized release or probable release under a legislative provision;

(e) Provide for the identification and marking of the information; and

(f) Ensure that contractors are legally bound to control CUI in accordance with applicable laws and regulations. The elements of information that are CUI must be identified in the contract.

(7) Visits to Establishments. Areas of concern are that the Parties must authorize the visits, provide certification of security clearances and need to know, provide a security assurance, require visitors to comply with the security procedures of the host and treat information provided as if supplied to the visitors' government. Channels and/or special procedures for requesting visits should be specified. Authorization for recurring visits should be established to facilitate exchanges and preclude the need for emergency visits;

(8) Security. This article must cover the following points:

(a) The use, transmission, storage, handling and safeguarding of CMI;

(b) The transfer of CMI via government-to-government channels or by methods agreed to by each of the Parties' Designated Security Authority (DSA). Provision must be made for marking the CMI with the classification level, country of origin, conditions of release and the identification of the program;

(c) Prohibitions on the release of CMI to third parties except as provided for in the agreement unless the originator first agrees in writing;

(d) The reporting of known or suspected unauthorized disclosures or compromises and notification to the originator of the information;

(e) Access by contractors under third party control or influence;

(f) The appointment of a person at each government or contractor facility where CMI is to be used to exercise the responsibilities for protecting CMI;

(g) A requirement that only properly cleared persons with a need-to-know for participation in the program will have access to CMI;

(h) A statement providing the classification level applicable to the existence of the agreement, and the classification level of the CMI contained therein;

(i) A requirement to bind contractors to the provisions of the agreement relating to the CMI;

(j) Consideration of or requiring the program or project manager to develop a Program Security Instruction (PSI) to expand on the above issues or cover any areas not already covered; and

(k) For unclassified programs, a simple statement, such as, "It is the intent of the Parties that the project (program) carried out under this Agreement shall be conducted at the unclassified level." or "No classified information shall be provided or generated under this Agreement" will suffice.

(9) Third-Party Sales and Transfers. This article should contain provisions that prohibit the transfer by any means of program information, and products developed therefrom, to any third party without the written consent of the originator (for background information and material) or the consent of all parties (for foreground information and material). This article must be compared carefully with the articles on Disclosure and Use of Program Information and Security to ensure that they are consistent and compatible;

(10) Participation of Additional Nations. This article requires a conscious decision on the part of the U.S. team as to whether the admission of new members in the future is desirable, given CMI and CUI technology transfer concerns. Among the points to consider are other likely participants, the NDP-1 *(reference s)* limits on those countries, their record(s) on protecting CMI and CUI, and their willingness to adhere to established security requirements; and

(11) Amendment, Withdrawal, Termination, Entry into Force, and Duration. The important point in this article is that the responsibilities and rights of the Parties with respect to the transfer, use and protection of information in the articles on Disclosure and Use of Project Information, Controlled Unclassified Information, Security, Third-Party Sales and Transfer, shall continue despite withdrawal from, termination of or expiration of the Agreement.

b. NATO security regulations should not be cited in an agreement unless the following conditions for a "NATO program" are met: the program usually will be commonly funded by a NATO organization; all of the information in the program is authorized for release to all NATO nations; a NATO organization will manage the project, and NATO regulations, not national regulations, apply. The MOU generator database should be consulted for the appropriate MOU clauses. In those cases when there may be participation by a NATO

organization, and both national and NATO rules apply, the PSI should be developed to reconcile differences in procedures.

9. **Security and Technology Transfer Support.**

a. DoD Components should give serious consideration to assigning a security and foreign disclosure expert to the program team for those international programs and projects that will involve the transfer of classified and other critical technology. If such personnel cannot be assigned to the team, they nevertheless must be involved in the development of the program. This should be accomplished early on to assist in the development of negotiation and disclosure guidance, to participate in the negotiations and to develop security arrangements for the program.

b. During preparation of the TA/CP, the security or foreign disclosure expert can assist in developing appropriate security and disclosure related negotiating guidance. This guidance should identify those classified and unclassified technologies that will not be shared as well as those that will be shared under the program and whether the sharing is on a limited or restricted basis. The guidance should also address time- or event-phased release of technology, possible provision of some technology in a modified form to protect U.S. interests and arrangements for technology transfer and protection. The Delegation of Disclosure Letter (DDL) which results from this analysis will form the basis for U.S. disclosures during the life of the project. The TA/CP and DDL are dynamic documents and likely will require updating as a program matures, particularly for those that begin as cooperative research and development programs. Preparation of the TA/CP should commence concurrently with the decision that could lead to foreign participation. (See Chapter 8.)

10. **Security Arrangements.**

a. The success of an international program is highly dependent on the efficient flow of information among the participants. Therefore, security and technology transfer representatives from the participating countries should meet as soon as possible to establish information transfer channels and other security procedures. These procedures can be included in the agreement, in an annex, or the program office can be tasked with developing a separate Program Security Instruction (PSI). See also Chapter 9, Multinational Industrial Security Working Group (MISWG) Documents.

b. Consideration must be given to the procedures for controlling foreign representatives who participate in meetings or who work in U.S. Government or contractor facilities during the program. The presence of foreign representatives in DoD facilities will require that control procedures be included in a DDL; in the case of foreign persons assigned to contractor facilities, a Technology Control Plan (TCP) is required in accordance with the International Traffic in Arms Regulations (ITAR) *(reference c)* and the National Industrial Security Program Operating Manual (NISPOM) *(reference y)* respectively.

11. **Concluding an Agreement.**

a. At the conclusion of the negotiation process, the agreement should be forwarded to the official who granted the authority to begin negotiations. There are four aspects of the draft agreement and negotiation process that are of interest to the security, foreign disclosure, and technology transfer person(s).

(1) The draft agreement must be carefully examined to ensure that the U.S. negotiating team adhered to the security and technology control guidelines in the approved RAD and the TA/CP;

(2) The TA/CP must be updated to reflect any changes brought about by negotiations, time or other influences;

(3) A DDL must be in place. It must conform to Parts 3 and 4 of the TA/CP. This DDL provides detailed guidance regarding the releasability of all CMI (and may include CUI) under the agreement and delegate the authority to approve the releases. It will be used to develop conditions and limitations for subsequent export authorizations; and

(4) Preparation of the PSI, if required, and the development of security classification guidance should be initiated concurrently with development of the RAD to ensure that its preparation does not delay the program. As soon as foreign participants accept the provisions of the governing agreement, they must participate in the preparation of the PSI, since it pertains to all participants.

b. Since there can be no promised or actual release of CMI and CUI until the DDL is approved, it must be in place at the time discussions are initiated with likely foreign participants. The DDL is discussed in Chapter 8.

12. **Coproduction and Licensed Production Projects.**

a. Coproduction and licensed production were introduced in Chapter 2. Coproduction or licensed production may be arranged through a government-to-government agreement, or a commercial manufacturing license agreement, or both. In any case, the foreign country receives not only the defense article and its "onboard" technology; it also may receive certain manufacturing know-how or technology. This may range from simple assembly of completed components and a few locally produced parts (i.e., "build to print"), to a major manufacturing effort requiring the transfer of U.S. manufacturing data. Therefore, proposed coproduction or licensed production arrangements should receive close scrutiny in the process leading up to a decision to verify the type and sensitivity of U.S. technical data to be released.

b. The U.S. Government response to a request for coproduction or licensed production also must be fully coordinated within the Government to ensure that the project will serve the best interests of the United States. Specific issues that must be addressed include:

(1) Nature and scope of the project and supporting rationale;

(2) Technology transfer implications to include the design and/or manufacturing technology that will leave the United States;

(3) CMI disclosure implications, possible NDP exceptions and the scope and limitations on these exceptions;

(4) Impact on U.S. industry, including both prime and subcontractors involved in manufacturing the item(s), as well as their views on the project; and

(5) Impact on the U.S. industrial base and other authorized foreign production of the same item(s).

c. Consideration must also be given to the choice of an implementing vehicle for the project. In most cases, the Department of Defense has no preference whether the production is carried out under a government-to-government or commercial program. In some cases it may be in the United States' interest to negotiate and conclude an international agreement or a Letter of Offer and Acceptance (LOA) to support a commercial or government-to-government project. Among the factors which may warrant such an agreement are:

(1) Size and complexity of the project (i.e., it would take a combination of LOAs and commercial munitions licenses for implementation; involves articles designated as major defense equipment; or the project is considered sensitive by the U.S. Government or industry);

(2) The U.S. Government owns the rights to the technical data involved;

(3) The system contains classified or otherwise sensitive components, and/or the release of classified data is essential;

(4) Extensive clarification and delineation of the responsibilities, duties and authorities is necessary;

(5) The prospective foreign participant has requested the implementation of the project be by international agreement;

(6) The need for detailed security arrangements; and

(7) There are no security agreements with the other government, existing agreements may not apply, or they are not adequate.

d. A key element in a coproduction or licensed production project is the technical data or technical data package (TDP). The TDP normally includes technical design and manufacturing information to enable the construction or manufacture of a defense article or component or to enable the performance of maintenance or production processes. The U.S. Government will release U.S. Government-owned technical data and TDPs only under FMS procedures in response to a request by a foreign government for the data for its indigenous defense requirements. The U.S. Government also prefers to transfer privately owned

technical data and TDPs for which it holds unlimited or government purpose rights of use, on a government-to-government basis. However, it may permit the U.S. firm holding associated rights in the technical data or TDP to transfer the data through the export licensing process. The U.S. Government will permit the transfer of all other unclassified technical data and TDPs on a direct commercial basis provided the firm obtains an export license. The U.S. Government will not release technical data for study purposes unless it is also willing to release the technical data to the requesting government for production purposes.

e. TDPs must be edited before release to exclude information that is beyond that authorized for release.

f. TDPs should be marked prominently as to the purpose for which they are to be used in accordance with Chapter 2 above.

13. **Distribution Limited Information.**

a. DoD Directive 2000.3 *(reference eee)* requires all distribution limited information released to a foreign government, whether privately- or Government-owned, classified or unclassified, must be marked with the following restrictions:

(1) "This information shall be accorded substantially the same degree of security protection as such information has in the United States;" and

(2) "This information shall not be disclosed to another country without the prior written consent of the United States."

b. When technical information that might be privately owned is released, the marking must contain the following additional notations:

(1) "This information is accepted upon the understanding that it might be privately owned;"

(2) "This information is accepted solely for the purpose of information and shall accordingly be treated as being disclosed in confidence. The recipient government shall use its best endeavors to ensure that the information is not dealt with in any manner likely to prejudice the rights of the private owner, thereof, to obtain patent or other likely statutory protection, therefore;" and

(3) "The recipient government must agree to obtain the prior written consent of the United States if it desires that this information be made available for manufacture, or use, for defense purposes or any other purposes."