

Record of Discussion on Article XXI

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

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

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

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

3. In particular, the Parties acknowledge that an assurance from the appropriate authority not to seek the death penalty would be considered as a 'relevant assurance' for the purpose of paragraph 2(c) above. The Party receiving such an assurance will give it serious consideration when considering whether the assistance under paragraph 5(a) of Article XXI of the Agreement would be inconsistent with its obligations under applicable international agreements existing at the time of entry into force of the Agreement.

4. (a) With regard to paragraph 6(a) of Article XXI of the Agreement, at this moment, Japan does not envisage any concrete situations where Japan would refuse the assistance in the carrying out of all necessary investigations into offences allegedly committed by a member of the Visiting Force or the Civilian Component, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence.

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

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

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

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

Tokyo and Canberra, 6 January, 2022