

# Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity

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*[W]e are joining with allies and partners around the world to build their capacity to promote security . . . [T]he growing capabilities of allies and partners . . . create new opportunities for burden-sharing.<sup>1</sup>*

## I. Introduction

As dusk falls on Fort Campbell, you make your way to the brigade headquarters for an urgent mission analysis briefing.<sup>2</sup> Several hours earlier you learned your brigade was selected to serve as a task force headquarters deploying to Morocco.<sup>3</sup> Members of Al Qaeda in the Islamic Maghreb (AQIM) have crossed the Morocco-Algeria border and established several camps outside the city of Zag. From this base of operations, AQIM coordinates attacks, conducts training, and traffics weapons.<sup>4</sup> Thus far, Moroccan counterterrorism operations have failed and it now appears that local Moroccans are joining AQIM cells.<sup>5</sup> The task force's mission is to build the capacity of Moroccan forces to conduct successful counterterrorism operations and strengthen the border.<sup>6</sup> Having reviewed your higher headquarters' order and intelligence products, you identify your specified, implied, and essential tasks.<sup>7</sup> Additionally, you validate your mission analysis and funding source with

the Staff Judge Advocate.<sup>8</sup> The briefing begins.

The S-4's mission analysis reveals a resource-constrained environment and the potential for a logistics shortfall.<sup>9</sup> After evaluating the S-4's contingency plans, your commander asks, "Can we trade supplies with Moroccan forces? Can they provide us with billeting? Can we give them meals? What about loaning them our equipment?" The S-3, S-4, and Support Operations Officer (SPO) then discuss potential courses of action. Concerned about the legal implications, the Deputy Commanding Officer (DCO) asks, "Judge?" You brief that an Acquisition and Cross-Servicing Agreement (ACSA) *may* offer the commander the ability to exchange supplies, services, and support with the Moroccans. At the conclusion of the briefing, the DCO confirms your deliverable and you start your legal research.<sup>10</sup>

In an era of fiscal austerity, ACSAs offer commanders a critical means to engage multinational partners in support of tomorrow's strategic defense challenges. Acquisition and Cross-Servicing Agreements are uniquely suited to enable commanders to achieve the mission while navigating a resource-constrained environment. Acquisition and Cross-Servicing Agreements allow U.S. forces to exchange certain categories of supplies and services with eligible countries and international organizations.<sup>11</sup> Consequently, Judge Advocates (JAs) must understand both the capabilities and limitations of the ACSA program. To that end, this article explores the ACSA program and provides practitioners with a framework for analyzing ACSA transactions in support of multinational engagements.

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<sup>1</sup> President Barack Obama, *Introduction to U.S. DEP'T OF DEF., SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEF.*, at i (2012) [hereinafter 21ST CENTURY DEF. PRIORITIES], available at [http://www.defense.gov/news/Defense\\_Strategic\\_Guidance.pdf](http://www.defense.gov/news/Defense_Strategic_Guidance.pdf) (last visited Oct. 17, 2013).

<sup>2</sup> See U.S. DEP'T OF ARMY, ARMY DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 34 (17 May 2012); see also U.S. DEP'T OF ARMY, ARMY TACTICS, TECHNIQUES, AND PROCEDURES 5-0.1, COMMANDER AND STAFF OFFICER GUIDE para. 4-25 (14 Sept. 2011) [hereinafter ATTP 5-0.1].

<sup>3</sup> See ALEXIS ARIEFF, CONG. RESEARCH SERV., RS21579, MOROCCO: CURRENT ISSUES (30 June 2011), available at <http://fpc.state.gov/documents/organization/168105.pdf> (last visited Oct. 17, 2013) ("The United States government views Morocco as an important ally against terrorism and a free trade partner.").

<sup>4</sup> In 2010, Moroccan and European authorities disrupted cells linked to Al Qaeda in the Islamic Maghreb (AQIM) that were trafficking cocaine from Algeria through Morocco. *Id.* at 13.

<sup>5</sup> "Moroccans . . . have joined AQIM at camps in Algeria and elsewhere outside of the country." *Id.*

<sup>6</sup> See generally U.S. DEP'T OF ARMY, ARMY DOCTRINE REFERENCE PUB. 3-07, STABILITY (31 Aug. 2012); U.S. DEP'T OF ARMY, FIELD MANUAL 3-22, ARMY SUPPORT TO SECURITY COOPERATION (22 Jan. 2013).

<sup>7</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS, at II-10 (17 Aug. 2011) [hereinafter JOINT PUB. 1-04] (identifying the key mission analysis actions for Judge Advocates (JAs)).

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<sup>8</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1206, 119 Stat. 3456 (2005) as amended most recently by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §1201, 126 Stat. 1632 (2012) (authorizing the Secretary of Defense (SECDEF) to use operations and maintenance funds to "build the capacity of a foreign country's national military forces").

<sup>9</sup> See ATTP 5-0.1, *supra* note 2, para. 4-26 ("Since no amount of subsequent planning can solve a [mis-] understood problem, mission analysis is the most important step in the [Military Decision Making Process].").

<sup>10</sup> JOINT PUB. 1-04, *supra* note 7, at II-10 (stating JAs should identify "legal issues impacting operational limitations" and "research applicable international agreements" as part of mission analysis).

<sup>11</sup> 10 U.S.C. §§ 2341-2350 (2013). See U.S. DEP'T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS para. E2.1.5 (28 Apr. 2003) [hereinafter DODD 2010.9].

## II. An Overview

### A. The ACSA

Acquisition and Cross-Servicing Agreements enable deployed U.S. forces to acquire and exchange logistic supplies, services, and support (LSSS) with eligible foreign countries and international organizations on a reimbursable basis.<sup>12</sup> The purpose of an ACSA is to provide commanders with a flexible means to exchange logistic support with multinational forces, particularly during emergencies and unforeseen circumstances.<sup>13</sup> Without ACSA authority, U.S. forces would be required to use formal acquisitions procedures to secure LSSS, and they would be prohibited from transferring LSSS to foreign countries without reimbursement.<sup>14</sup> Through the ACSA program, Congress empowered deployed commanders to address unforeseen logistic needs by exchanging LSSS with multinational partners.<sup>15</sup>

### B. A Retrospective

During the 1970s, the United States dramatically decreased the number of troops stationed in foreign countries.<sup>16</sup> As troop levels decreased, U.S. forces became more dependent on contracting for their logistics support.<sup>17</sup> However, the burdensome processes of formal commercial contracting and foreign military sales impeded logistic support in the field and undermined foreign relations.<sup>18</sup> For example, if a U.S. commander wanted to “feed a company of U.S. troops in an allied mess hall (because they were

operating away from their own),” the commander was required to use commercial contracting procedures, and if that commander wanted to “help a nearby allied unit with some spare parts or ammunitions,” he was forced to “go through [foreign military sales] procedures.”<sup>19</sup>

Consequently, Congress enacted the North Atlantic Treaty Organization (NATO) Mutual Support Act (NMSA) of 1979, which simplified the process for exchanging LSSS among NATO countries and U.S. forces.<sup>20</sup> Congress streamlined LSSS transactions by exempting these NMSA acquisitions from numerous provisions of U.S. procurement law.<sup>21</sup> In the years that followed, Congress modified NMSA agreements into ACSAs by expanding the eligibility criteria, legislating additional methods of exchange, and broadening the categories of support permitted within the program.<sup>22</sup> In 1994, President Clinton signed Presidential Decision Directive 25, directing the U.S. government seek reimbursement for LSSS provided in combined exercises and operations.<sup>23</sup> Today, the United States has ACSAs with ninety-two countries.<sup>24</sup>

### C. ACSA Authorities

Acquisition and Cross-Servicing Agreement legislation provides two types of authority: acquisition-only authority (AoA) and cross-servicing agreement authority.

<sup>12</sup> 10 U.S.C. §§ 2341–2350 (2013); *see* DoDD 2010.9, *supra* note 11, para. E2.1.5.

<sup>13</sup> CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 4-08, JOINT DOCTRINE FOR LOGISTICS SUPPORT OF MULTINATIONAL OPERATIONS app. C, para. 2 (21 Feb. 2013) [hereinafter JOINT PUB. 4-08]; *see also* U.S. DEP’T OF ARMY, DIR. 2012-12, INTERIM ARMY ACQUISITION AND CROSS-SERVICING AGREEMENTS, LIFT AND SUSTAIN, AND FOREIGN ASSISTANCE ACT AUTHORITIES ch. 1, para. 1 (30 Apr. 2012) [hereinafter AD 2012-12], available at [http://www.apd.army.mil/pdf/AD2012\\_12.pdf](http://www.apd.army.mil/pdf/AD2012_12.pdf).

<sup>14</sup> *See, e.g.*, 10 U.S.C. § 2304(a) (2013) (requiring full and open competition); 22 U.S.C. § 2761 (2013) (outlining requirements for foreign military sales (FMS)).

<sup>15</sup> *See generally* U.S. FORCES–AFG., PUB. 1-06, MONEY AS A WEAPON SYSTEM AFGHANISTAN 195 (13 Feb. 2012).

<sup>16</sup> H.R. REP. NO. 96-612, pt. 1, at 5 (1979) (stating reductions in “tooth-to-tail” ratio resulted in fewer U.S. logistics personnel supporting the North Atlantic Treaty Organization (NATO)).

<sup>17</sup> *Id.* (stating U.S. forces contracted support to fill the void left by the personnel reductions); *see also* Fred T. Pribble, *A Comprehensive Look at the NATO Mutual Support Act of 1979*, 125 MIL. L. REV. 187 (1989).

<sup>18</sup> S. REP. NO. 96-842, at 2 (1980) (concluding that the acquisition and cross-servicing agreement (ACSA) legislation will be an “important contribution to the smooth functioning of the NATO alliance and eliminate a needless source of friction between the [United States] and its allies”); H.R. REP. NO. 96-612, pt. 1, at 5 (“European allies now state unequivocally that . . . they will no longer provide support under [the existing system].”)

<sup>19</sup> S. REP. NO. 96-842, at 12. Robert W. Komer, the Under SECDEF for Policy, sent a letter to the U.S. Senate Committee on Foreign Relations supporting the NATO Mutual Support Act (NMSA) of 1979, stating that existing law burdened relations with allies by imposing inflexible procedures, mandating allies allow the U.S. to examine their records, and prohibiting allies from paying gratuities for favorable contractual treatment.

<sup>20</sup> NATO Mutual Support Act of 1979, Pub. L. No. 96-323, 94 Stat. 1016 (1980).

<sup>21</sup> 10 U.S.C. § 2343 (2013) (exempting ACSA acquisitions from a number of requirements); *see, e.g., id.* § 2304(a) (requiring full and open competition); *id.* § 2207 (prohibiting gratuities); *id.* § 2313 (requiring the examination of host nation contractor records).

<sup>22</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1104a(2), 100 Stat. 3816 (1986) (expanding eligibility from NATO countries to non-NATO countries and the UN); National Defense Authorization Act for Fiscal Year 1990, Pub. L. No. 101-189, § 938(a), 103 Stat. 1352 (1989) (authorizing equal value exchange (EVE)); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1317(h), 108 Stat. 2663 (1994) (authorizing ACSA loans and the exchange of airlift).

<sup>23</sup> PRESIDENTIAL DECISION DIR. 25 para. 9D (May 3, 1994), available at [http://www.clintonlibrary.gov/\\_previous/Documents/2010%20FOIA/Presidential%20Directives/PDD-25.pdf](http://www.clintonlibrary.gov/_previous/Documents/2010%20FOIA/Presidential%20Directives/PDD-25.pdf) (last visited Oct. 17, 2013) (offering a historical antecedent to the 2012 Def. Strategic Guidance directive to “share the burden” with allies).

<sup>24</sup> PowerPoint Presentation, J-4 Logistics, Joint Chiefs of Staff, Acquisition and Cross-Servicing Agreements Country List (20 Sept. 2013) [hereinafter J-4 ACSA PPT], available at [https://intellipedia.intelink.gov/wiki/Acquisition\\_and\\_Cross-Servicing\\_Agreements.%28ACSA%29](https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements.%28ACSA%29) (login required). For a current list of ACSAs, see Appendix A (List of Acquisition and Cross-Servicing Agreements).

Acquisition-only authority authorizes U.S. forces deployed outside the United States to *acquire* LSSS from eligible foreign sources.<sup>25</sup> The virtue of AoA is speed: this method of acquisition does not require the negotiation of a cross-servicing agreement.<sup>26</sup> Eligible entities include NATO countries, NATO subsidiary bodies, the United Nations (UN), and regional international organizations.<sup>27</sup> Additionally, LSSS may be acquired from non-NATO countries, provided the foreign country enjoys a defense alliance with the United States, stations or homeports U.S. forces or vessels, allows the United States to preposition materiel within its country, or hosts military exercises or other operations.<sup>28</sup>

Cross-servicing agreement authority, on the other hand, empowers the Secretary of Defense (SECDEF) to enter into international agreements with eligible foreign countries and international organizations for the *reciprocal exchange* of LSSS.<sup>29</sup> The SECDEF, after consultation with the Secretary of State, may enter into an ACSA with NATO countries, NATO subsidiary bodies, the UN, regional international organizations, or non-NATO countries designated by the SECDEF.<sup>30</sup> The SECDEF may only designate a non-NATO country as eligible when he determines such designation is in U.S. national security interests.<sup>31</sup> Once the agreement is in place, U.S. forces in foreign countries may exchange LSSS pursuant to the terms of that agreement. The SECDEF has delegated the eligibility determination to the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)) and the authority to conclude negotiations to Combatant Commanders (CCDR).<sup>32</sup>

<sup>25</sup> 10 U.S.C. § 2341 (2013); DoDD 2010.9, *supra* note 11, para. 4.2; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2120.01C, ACQUISITION AND CROSS-SERVICING AGREEMENTS encl. A, para. 3 (13 Feb. 2013) [hereinafter CJCSI 2120.01C], available at [https://intellipedia.intelink.gov/wiki/ACSA\\_Laws\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/ACSA_Laws_Directives_%26_Guidance) (login required).

<sup>26</sup> DoDD 2010.9, *supra* note 11, para. 4.2.3; CJCSI 2120.01C, *supra* note 25, encl. A, para. 3; JOINT PUB. 4-08, *supra* note 13, app. C, para. 2b (directing the use of acquisition-only authority in the absence of an ACSA).

<sup>27</sup> 10 U.S.C. § 2341(1) (2013); DoDD 2010.9, *supra* note 11, paras. 4.2.1.1–4.2.1.2; CJCSI 2120.01C, *supra* note 25, encl. A, para. 3a.

<sup>28</sup> 10 U.S.C. § 2341(2) (2013); DoDD 2010.9, *supra* note 11, para. 4.2.1.3; CJCSI 2120.01C, *supra* note 25, encl. A, para. 3b. *See, e.g.*, Acquisition-Only Agreement, U.S.–Morocco, Feb. 16, 2004 (enabling U.S. forces to order logistic supplies, services, and support while deployed to Morocco for Exercise African Lion 2013), available at [https://intellipedia.intelink.gov/wiki/ACSA\\_Country\\_Documents](https://intellipedia.intelink.gov/wiki/ACSA_Country_Documents) (last visited Oct. 17, 2013) (login required).

<sup>29</sup> 10 U.S.C. § 2342(a) (2013); DoDD 2010.9, *supra* note 11, para. 4.3.1; CJCSI 2120.01C, *supra* note 25, encl. A, para. 4.

<sup>30</sup> 10 U.S.C. § 2342(a)(1) (2013); DoDD 2010.9, *supra* note 11, para. 4.3.1; CJCSI 2120.01C, *supra* note 25, encl. A, para. 4.

<sup>31</sup> 10 U.S.C. § 2342(b) (2013) (requiring the SECDEF to consult with the SECSTATE and provide congressional notification when designating non-NATO countries eligible for ACSAs); DoDD 2010.9, *supra* note 11, para. 4.3.2.2; CJCSI 2120.01C, *supra* note 25, encl. A, para. 4a.

<sup>32</sup> DoDD 2010.9, *supra* note 11, paras. 5.1.2, 5.3.1.

## D. Reimbursable Exchanges

The virtue of the ACSA program is the flexibility it offers commanders when they or their allied partners encounter an unexpected logistic requirement. When an ACSA is in place, commanders can quickly exchange LSSS with allies in one of three ways: payment-in-kind (PIK), replacement-in-kind (RIK), and equal value exchange (EVE).<sup>33</sup>

### 1. Payment-In-Kind

Payment-in-kind allows the receiving party to purchase LSSS from the supplying party by payment in local currency.<sup>34</sup> For example, if Germany provides the United States with 30,000 liters of fuel valued at €50,000, the United States must transmit €50,000 to Germany within 30 days. Payment-in-kind transactions are ideal for governments who can access and transfer payment in a timely manner. Suppliers of LSSS should avoid PIK arrangements when the receiving party will require significant lead time to acquire or transfer currency. Practitioners should note the purchase of LSSS using PIK is generally subject to amount limitations.<sup>35</sup>

### 2. Replacement-In-Kind

Replacement-in-kind allows the receiving party to reimburse the supplying party with the same or substantially similar LSSS within one year of the transaction.<sup>36</sup> For example, if Germany provides the United States with 30,000 liters of fuel valued at €50,000, the United States must return 30,000 liters of fuel, or something substantially similar, to Germany within one year.<sup>37</sup> Should the United States fail to satisfy their obligation by the deadline, the exchange transaction will automatically convert to a reimbursement transaction, and the U.S. will be required to pay Germany

<sup>33</sup> 10 U.S.C. § 2344 (2013); DoDD 2010.9, *supra* note 11, para. 4.1.3; CJCSI 2120.01C, *supra* note 25, encl. A, para. 4d; *see also* JOINT PUB. 4-08, *supra* note 13, app. C, para. 2c (stating that the supplying party selects the form of reimbursement).

<sup>34</sup> U.S. DEP'T OF DEF., REG. 7000.14-R, DoD FIN. MGMT. REG., vol. 11A, ch. 7, para. 080202A (July 2010) [hereinafter DoD FMR] (requiring payment within thirty days; the parties may extend this deadline up to ninety days).

<sup>35</sup> 10 U.S.C. § 2347 (2013); DoD FMR, *supra* note 34, para. 080204 (stating that annual acquisitions from NATO countries are limited to \$200 million and from non-NATO to \$60 million; and annual transfers from NATO countries are limited to \$150 million and non-NATO countries to \$75 million). *But see* CJCSI 2120.01C, *supra* note 25, encl. A, para. 5h(1)–(3) (stating the limitations apply neither to replacement-in-kind (RIK) and equal value exchange (EVE) transactions, nor during active hostilities and contingency operations).

<sup>36</sup> DoDD 2010.9, *supra* note 11, para. E2.1.14; DoD FMR, *supra* note 34, para. 080202B.

<sup>37</sup> DoD-FMR, *supra* note 34, para. 080202B.

€50,000. When parties both possess substantially similar supplies (e.g., fuel), RIK transactions offer an efficient mechanism for mutual support. However, RIK should be avoided when the receiving party will lack the LSSS required to satisfy the obligation.

### 3. Equal Value Exchange

Equal Value Exchange enables the receiving party to repay the supplying party with different goods or services, equal to the value of the LSSS originally received, within one year.<sup>38</sup> For example, if Germany provides the U.S. with 30,000 liters of fuel valued at €50,000, the United States may satisfy their obligation by giving Germany €50,000 worth of ammunition, or other permissible LSSS, within one year. Equal Value Exchanges are preferred because they offer both parties tremendous flexibility. Commanders should consider an EVE when their trading partners are likely to face challenges securing currency (i.e., PIK) or similar LSSS (i.e., RIK).

### E. Parameters

The commander's ability to exchange LSSS has limitations.<sup>39</sup> Acquisition and Cross-Servicing Agreements only allow for the exchange of *permissible* LSSS: "food, water, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support . . . storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and air and sea port services."<sup>40</sup> Permissible LSSS also includes "temporary use of general purpose vehicles and other nonlethal . . . military equipment which are not designated as significant military equipment."<sup>41</sup> Moreover, Congress and the SECDEF have empowered Combatant Commands (CCMDs) to loan significant military equipment to allied partners for up to one year in certain circumstances.<sup>42</sup>

<sup>38</sup> DoDD 2010.9, *supra* note 11, para. E2.1.6; *id.* (requiring payment within one year for EVE transactions).

<sup>39</sup> 10 U.S.C. § 2342(a)(2) (2013).

<sup>40</sup> *Id.* § 2350(1); DoDD 2010.9, *supra* note 11, para. E2.1.10; CJCSI 2120.01C, *supra* note 25, glossary, at GL-4 (defining logistic supplies, services, and support (LSSS)); *id.* encl. A, app. (providing examples of LSSS); see also HEADQUARTERS, U.S. AFRICA COMMAND, MANUAL 4000.01, STANDARD OPERATING PROCEDURES FOR THE IMPLEMENTATION OF THE ACQUISITION AND CROSS-SERVICING AGREEMENT (ACSA) encl. A (29 Sept. 2009) [hereinafter ACM 4000.01] (providing categories and examples of LSSS), available at [https://intellipedia.intelink.gov/wiki/ACSA\\_Laws,\\_Directives,\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/ACSA_Laws,_Directives,_%26_Guidance) (login required).

<sup>41</sup> 10 U.S.C. § 2350(1) (2013); DoDD 2010.9, *supra* note 11, para. E2.1.10; CJCSI 2120.01C, *supra* note 25, glossary, at GL-4 (defining LSSS).

<sup>42</sup> John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1202, 120 Stat. 2083 (2006), amended by the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1203(a), 124 Stat. 4137 (2010), amended by the National

Additionally, ACSA authority is further constrained in a number of ways. First, ACSAs may not be used to circumvent the foreign military sales process.<sup>43</sup> Specifically, the Department of Defense (DoD) expressly prohibits U.S. forces from using ACSAs to acquire or transfer "weapons systems; [the] initial quantities of [certain] replacement and spare parts for [certain] major end items of equipment . . . ; and major end items of equipment."<sup>44</sup> Additionally, U.S. forces are prohibited from acquiring or transferring "guided missiles; naval mines and torpedoes; nuclear ammunition and included items . . . ; cartridge and propellant-actuated devices; chaff and chaff dispensers; guidance kits for bombs and other ammunition; and chemical ammunition (other than riot control agents)."<sup>45</sup> Second, U.S. forces may not use ACSAs to procure LSSS that is reasonably available from commercial sources in the United States.<sup>46</sup> Third, U.S. forces are prohibited from increasing inventory levels in anticipation of future ACSA transactions.<sup>47</sup> Fourth, practitioners must remain mindful of fundamental fiscal law limitations. U.S. forces may not order LSSS in the current year for use in a future year (i.e. time) and ACSA transactions must not exceed authorized thresholds (i.e., amount).<sup>48</sup> Finally, the international agreement itself may include additional limitations; practitioners must validate that the governing ACSA actually authorizes the contemplated exchange.<sup>49</sup>

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Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1202, 125 Stat. 1298 (2011) (authorizing ACSA lend authority in Afghanistan through 2014); see also AD 2012-12, *supra* note 13, ch. 2, para. 2a (delegating this authority to U.S. Central Command).

<sup>43</sup> CJCSI 2120.01C, *supra* note 25, encl. A, para. 5f (directing use of FMS when appropriate); see also HEADQUARTERS, U.S. SOUTHERN COMMAND, HANDBOOK 700-6, ACQUISITION AND CROSS-SERVICING AGREEMENTS para. 2.3 (11 May 2012) [hereinafter SOUTHCOM HB 700-6], available at [https://intellipedia.intelink.gov/wiki/COCOM\\_ACSA\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/COCOM_ACSA_Directives_%26_Guidance) (login required) (stating that ACSAs are intended to complement, not replace, FMS); see also The Arms Export Control Act, 22 U.S.C. § 2761 (2013) (outlining FMS); DEF. SEC. COOPERATION AGENCY (DSCA) SEC. ASSISTANCE MGMT., MANUAL 5105.38-M, chs. 4-6 (14 Apr. 2013), available at <http://www.samm.dsca.mil/listing/chapters> (login required) (offering practitioners a guide on the FMS process).

<sup>44</sup> DoDD 2010.9, *supra* note 11, para. 4.5.1 (stating ACSAs may not be used when the replacement and spare parts are covered by tables of organization and equipment, tables of allowances and distribution, or equivalent documents); CJCSI 2120.01C, *supra* note 25, encl. A, para. 5b1.

<sup>45</sup> DoDD 2010.9, *supra* note 11, para. 4.5.2; CJCSI 2120.01C, *supra* note 25, encl. A, para. 5b2.

<sup>46</sup> 10 U.S.C. § 2342(c) (2013); DoDD 2010.9, *supra* note 11, para. 4.4.

<sup>47</sup> 10 U.S.C. § 2348 (2013); DoDD 2010.9, *supra* note 11, para. 4.6.

<sup>48</sup> 31 U.S.C. § 1502(a) (2013) ("The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."); *id.* § 1341(a)(1)(A) ("An officer or employee of the U.S. Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.")

<sup>49</sup> CJCSI 2120.01C, *supra* note 25, encl. A, para. 6g (stating the parties may not exchange LSSS beyond the geographic limitations of the ACSA or combatant command). For an explanation of how to research and find ACSAs, see *infra* Part III.B.

Returning to our hypothetical, the TF commander's intent was clear; he wants the flexibility to exchange supplies with Moroccan forces, should there be a logistics shortfall during the operation. Your research confirmed that ACSAs enable commanders to exchange LSSS with eligible countries to meet logistics shortfalls while deployed.<sup>50</sup> You also learned that ACSA transfers may be satisfied by PIK, RIK, and EVE.<sup>51</sup> Finally, you determined that ACSAs have limitations, including: supplies and services must be permissible LSSS, ACSAs may not be used to procure supplies commercially available in the United States, and certain items are expressly excluded from the ACSA program (e.g., weapons systems).<sup>52</sup>

### III. A Framework for Analysis

#### A. Introduction

You now analyze whether an ACSA would meet the commander's intent: (1) Does the commander's logistics needs concern *permissible* LSSS? and (2) Does the commander want the ability to *acquire* LSSS or does he desire the flexibility to *exchange* LSSS?<sup>53</sup> In this case, an ACSA is appropriate because the commander wants to exchange permissible LSSS. Your research continues—does the United States have an ACSA with Morocco?

#### B. Researching ACSAs

The United States enjoys ACSAs with approximately ninety-two countries and an additional eighty-one countries are eligible.<sup>54</sup> When researching ACSAs, practitioners have numerous resources, including: the U.S. Department of State (DoS) Treaties in Force,<sup>55</sup> the Intelink ACSA Portal,<sup>56</sup> and the JAGCNET International and Operational Law

Documents Library.<sup>57</sup> Practitioners should note their controlling ACSA's expiration date to ensure the exchange of LSSS throughout the operation.<sup>58</sup>

After researching the aforementioned resources, you learn that the United States does *not* have an ACSA in force with Morocco. You then brief the commander that an ACSA will meet his desired end-state, but the United States does not currently have an ACSA in place with Morocco. The commander asks, "How do we get one?"

#### C. Securing an ACSA

Acquisition and Cross-Servicing Agreements are international agreements.<sup>59</sup> Given this status, both law and policy greatly shape a servicemember's ability to secure an ACSA. Consequently, practitioners must know the laws, rules, and policies germane to international agreements.

As a preliminary matter, the DoS must be consulted prior to negotiating and concluding an international agreement.<sup>60</sup> To this end, the DoS established the Circular 175 procedure (C-175 procedure), which provides guidance to the Executive Branch concerning "the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements."<sup>61</sup>

Additionally, DoD personnel are prohibited from negotiating international agreements absent written approval from a DoD official with proper authority.<sup>62</sup> *Negotiation*

<sup>50</sup> 10 U.S.C. §§ 2341–2350 (2013); DoDD 2010.9, *supra* note 11, para. E2.1.5.

<sup>51</sup> 10 U.S.C. § 2344 (2013); DoDD 2010.9, *supra* note 11, para. 4.13; CJCSI 2120.01C, *supra* note 25, encl. A, para. 4d.

<sup>52</sup> DoDD 2010.9, *supra* note 11, paras. 4.4, 4.5.1, and E2.1.10.

<sup>53</sup> SOUTHCOM HB 700-6, *supra* note 43, app. D.

<sup>54</sup> J-4 ACSA PPT, *supra* note 24.

<sup>55</sup> U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES & OTHER INT'L AGREEMENTS OF THE U.S. IN FORCE ON JANUARY 1, 2012 (2012), available at <http://www.state.gov/s/l/treaty/tif/index.htm> (last visited Oct. 17, 2013) (login required) (providing a list of treaties and international agreements as of 1 January 2012).

<sup>56</sup> *Acquisition and Cross-Servicing Agreements*, INTELINK, [https://intellipedia.intelink.gov/wiki/Acquisition\\_and\\_Cross-Servicing\\_Agreements\\_%28ACSA%29](https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_%28ACSA%29) (last visited Oct. 17, 2013) (login required) (offering researchers ACSA country documents, education materials, and field references).

<sup>57</sup> *Int'l and Operational Law Division Documents Library*, JAGCNET, <https://www.jagcnet2.army.mil/IODOcLib> (last visited Oct. 17, 2013) (login required).

<sup>58</sup> See, e.g., Acquisition and Cross-Servicing Agreement, U.S.–Afg., para. IX, Feb. 16, 2004, available at [https://intellipedia.intelink.gov/wiki/ACSA\\_Country\\_Documents](https://intellipedia.intelink.gov/wiki/ACSA_Country_Documents) (login required) (terminating the ACSA ten years after the date the last party signs the agreement).

<sup>59</sup> CJCSI 2120.01C, *supra* note 25, glossary, at GL-3 (stating that cross-servicing agreements are international agreements under U.S. DEP'T OF DEF., DIR. 5530.3, INT'L AGREEMENTS para. E2.1.1 (11 June 1987) [hereinafter DODD 5530.3]). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 (1987) [hereinafter RESTATEMENT 3D FOREL] (defining an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law"); CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INT'L AGREEMENTS para. 5 (5 Oct. 2007).

<sup>60</sup> Case-Zablocki Act, 1 U.S.C. § 112b (2013). See also RESTATEMENT 3D FOREL, *supra* note 59, § 311 cmt. b (stating the SECSTATE enjoys full power to negotiate and conclude international agreements in the President's name; clarifying that other departments are required to *consult* with the SECSTATE even when granted authority to negotiate); DODD 5530.3, *supra* note 59, para. 7 (outlining the DoD implementation of the Case-Zablocki Act).

<sup>61</sup> U.S. DEP'T OF STATE, FOREIGN AFF. MANUAL VOLUME 11—POLITICAL AFFAIRS 720, 721 (Sept. 25, 2006) available at <http://www.state.gov/m/a/dir/regs/fam/11fam/index.htm>.

<sup>62</sup> Logan Act, 18 U.S.C. § 953 (2013); DODD 5530.3, *supra* note 59, para. 8.2.

includes forwarding a draft agreement or communicating an offer to a foreign government's representative with such specificity that acceptance would result in forming an agreement;<sup>63</sup> however, preliminary and exploratory discussions are not considered *negotiation*.<sup>64</sup> In sum, servicemembers risk violating federal law when they communicate to their foreign counterpart an interest in securing an ACSA.

Returning to our hypothetical, you know the commander wants an ACSA; you also know task force personnel are not authorized to negotiate an international agreement—to do so would violate federal law.<sup>65</sup> Accordingly, you brief the staff sections regarding ACSA-related communications with the Moroccans. You then forward a request for assistance to the U.S. Africa Command (AFRICOM) Office of Legal Counsel. They advise “there is a two-part process for securing an ACSA: eligibility and negotiation.”

### 1. Eligibility

To secure an ACSA, the country or organization must first be declared eligible.<sup>66</sup> NATO countries and its subsidiary bodies, as well as the UN, are already eligible.<sup>67</sup> For non-NATO countries, the SECDEF is authorized to make an eligibility determination based on U.S. national security interests.<sup>68</sup> The Joint Staff/J-4 has established a process for securing eligibility determinations.<sup>69</sup> First, the task force must request their CCMD nominate the foreign country or international organization.<sup>70</sup> The CCMD will then review the request and nominate the foreign country or international organization for designation as eligible.<sup>71</sup>

After the CCMD forwards the nomination, the Joint Staff/J-4 forwards the request to the J-5 and the Office of the

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<sup>63</sup> DoDD 5530.3, *supra* note 59, para. E2.1.2 (stating the document's title is not dispositive: a document may still be an international agreement even when the title does not include the word “agreement”).

<sup>64</sup> *Id.*

<sup>65</sup> Logan Act, 18 U.S.C. § 953 (2013); DoDD 5530.3, *supra* note 59, para. 8.2.

<sup>66</sup> DoDD 2010.9, *supra* note 11, para. 4.1.

<sup>67</sup> 10 U.S.C. §§ 2342(a)(1)(A)–(C) (2013); DoDD 2010.9, *supra* note 11, para. 4.3.1.

<sup>68</sup> 10 U.S.C. §§ 2342(a)(1)(D), 2342(b) (2013).

<sup>69</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 5.

<sup>70</sup> DoDD 2010.9, *supra* note 11, para. 5.3 (delegating nominating authority from the SECDEF to the Chairman of the Joint Chiefs of Staff (CJCS)); CJCSI 2120.01C, *supra* note 25, encl. B, para. 2i(7) (delegating nominating authority to the Combatant Commanders (CCDRs)).

<sup>71</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 5 (outlining the requirements for Combatant Command (CCMD) nominations, including a CCMD legal review, and emphasizing the minimum processing time of sixty days).

Chairman's Legal Counsel.<sup>72</sup> The J-4 then sends the request to the Office of the USD (AT&L), who ultimately makes the ACSA eligibility determination.<sup>73</sup> After the USD (AT&L) reviews the request and coordinates with the Under Secretary of Defense for Policy and the DoD General Counsel, the USD (AT&L) consults with the DoS.<sup>74</sup> Provided the Office of the Secretary of Defense (OSD) supports the designation, the USD (AT&L) then notifies Congress.<sup>75</sup> If the 30-day congressional notification period expires without objection, the USD (AT&L) will notify the Joint Staff/J4, who then notifies the CCMD that the foreign government or international organization is designated eligible.<sup>76</sup>

Back at Fort Campbell, your request for assistance to AFRICOM yielded favorable results: Morocco was designated eligible in 1988.<sup>77</sup> Given that Morocco is eligible, the task force now only requires the negotiation of the international agreement. You brief your commander and recommend requesting AFRICOM negotiate and conclude an ACSA with Morocco. Additionally, you recommend requesting AoA to ensure the task force is able to purchase LSSS from the Moroccans in the event the ACSA is untimely.<sup>78</sup> The task force commander approves your recommendations to request ACSA and AoA, and reminds you, “The task force deploys in 120 days.”

### 2. Negotiation

Congress granted the SECDEF the authority to enter into ACSAs with eligible foreign countries and international organizations after *consultation* with the DoS.<sup>79</sup> In furtherance of congressional intent, the DoS authorized the

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<sup>72</sup> *Id.* encl. C, para. 5e.

<sup>73</sup> DoDD 2010.9, *supra* note 11, para. 5.1.2; CJCSI 2120.01C, *supra* note 25, encl. B, para. 2a(2).

<sup>74</sup> DoDD 2010.9, *supra* note 11, para. 5.1.2; CJCSI 2120.01C, *supra* note 25, encl. B, para. 2a(1); *supra* note 25, encl. C, para. 5f.

<sup>75</sup> DoDD 2010.9, *supra* note 11, para. 4.3.2 (stating the USD(AT&L) notifies the Senate Armed Services and Foreign Relations Committees; and the House Armed Services and International Relations Committees); CJCSI 2120.01C, *supra* note 25, encl. B, para. 2a(1) & encl. C, para. 5f.

<sup>76</sup> CJCSI 2120.01C, *supra* note 25, encl. C, paras. 5d, 5g (stating practitioners should allow a minimum of sixty days for the eligibility determination).

<sup>77</sup> Memorandum from Frank Carlucci, SECDEF, to the Chairman of the Joint Chiefs of Staff and Assistant SECDEF, subject: NATO Mutual Support Act (NMSA) Designations (29 Mar. 1988), *available at* [https://www.intelink.gov/inteldocs/action.php?kt\\_path\\_info=ktcore.actions.document.view&fDocumentId=194870](https://www.intelink.gov/inteldocs/action.php?kt_path_info=ktcore.actions.document.view&fDocumentId=194870) (last visited Oct. 10, 2013) (declaring Morocco eligible for ACSA negotiations) (login required).

<sup>78</sup> 10 U.S.C. § 2341 (2013); DoDD 2010.9, *supra* note 11, para. 4.2; CJCSI 2120.01C, *supra* note 25, encl. A, para. 3.

<sup>79</sup> 10 U.S.C. § 2342(a) (2013) (requiring consultation with, but not concurrence by, the SECSTATE).

SECDEF to negotiate and conclude ACSAs.<sup>80</sup> The SECDEF then delegated this authority to the Chairman of the Joint Chiefs of Staff (CJCS), who further delegated the authority to CCDRs.<sup>81</sup>

ACSA negotiations start with the CCMD preparing a draft agreement.<sup>82</sup> When the DoS empowered the DoD to negotiate and conclude ACSAs, they required the DoD use a model agreement when drafting the ACSA.<sup>83</sup> If the draft ACSA substantially deviates from the model agreement, the Joint Staff, OSD, and DoS will likely review the draft document.<sup>84</sup> Consequently, deviating from the model agreement will result in delays.

After drafting the agreement, the CCMD ACSA Program Manager (PM) organizes a negotiating team, consisting at a minimum of the ACSA PM (who serves as the lead negotiator) and legal counsel.<sup>85</sup> The ACSA PM then coordinates with the U.S. country team, forwards a draft agreement to his foreign counterpart, and conducts negotiations.<sup>86</sup> If the foreign country or international organization requests substantive changes to the draft agreement, the ACSA PM will note the specific reasons for modification and contact the Joint Staff/J-4.<sup>87</sup> After negotiations conclude, each party will staff the draft agreement for approval within their respective organizations

(i.e., CCMD review).<sup>88</sup> The ACSA PM may request the Joint Staff informally review the draft agreement.<sup>89</sup> The parties then agree to the ACSA *ad referendum*.<sup>90</sup>

The ACSA PM then forwards the agreement to the Joint Staff/J-4 *formally* requesting authority to conclude the agreement.<sup>91</sup> The Joint Staff/J-4 forwards the request to the OUSD (AT&L) directorate for International Cooperation (OUSD (AT&L)/IC), who in turn sends the request through the OSD for legal, policy, and financial reviews.<sup>92</sup> The OUSD (AT&L)/IC then forwards the request to the DoS for consultation and issues a memorandum to the Joint Staff either granting or declining the request to conclude the agreement.<sup>93</sup> If the USD (AT&L)/IC grants authority to conclude the agreement, the Joint Staff/J4 will delegate this authority to the CCDR.<sup>94</sup>

After receiving authority, the ACSA PM will forward the approved English and translated versions of the agreement to the foreign country or international organization.<sup>95</sup> At this point, practitioners should note that the foreign country may require internal approval or an exchange of diplomatic notes.<sup>96</sup> Generally, the ACSA PM will conduct a signing ceremony where the CCDR and foreign representative sign and conclude the ACSA.<sup>97</sup> While neither the DoS nor DoD have mandated a minimum signature level, the United States and foreign signatories should be of “approximately equal rank or position.”<sup>98</sup> Finally, practitioners must refer to their CCMD’s local policies governing signing ceremonies.<sup>99</sup>

In sum, negotiating an ACSA is a process that requires significant lead time (i.e., more than 100 days) because the ACSA PM must both negotiate laterally with his foreign

<sup>80</sup> Memorandum from John Hillen, Assistant Sec’y of Political-Military Affairs, to Robert Joseph, Under Sec’y of State for Arms Control & Int. Sec. Affairs (July 11, 2006) [hereinafter DoS Joseph Memo] (granting the Assistant Secretary of Political Military Affairs the authority to empower the DoD to conclude ACSAs, provided the DoD does not deviate from the model template).

<sup>81</sup> DoDD 2010.9, *supra* note 11, para. 5.3.1 (delegating the authority to negotiate and conclude ACSAs to the CJCS); DoDD 2010.9, *supra* note 11, para. 5.6.2 (authorizing the CJCS to delegate the authority to negotiate and conclude ACSAs to the CCDRs); CJCSI 2120.01C, *supra* note 25, encl. B, paras. 2d(2), 2i(2) (directing CCDRs to negotiate ACSAs when authorized by the CJCS). *See also* AD 2012-12, *supra* note 13, ch. 2, para. 3 (30 Apr. 2012) (prohibiting CCDRs from further delegating authority).

<sup>82</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 6a(1).

<sup>83</sup> DoS Joseph Memo, *supra* note 80, tab 1 (enclosing the ACSA 2006 negotiation template).

<sup>84</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 6a(2). *See also* DoS Joseph Memo, *supra* note 80, at 2 (requiring approval by the Under Secretary of State for Arms Control and International Security Affairs when a draft ACSA substantially deviates from the model agreement).

<sup>85</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 6b (stating the ACSA Program Manager (PM) may also seek support from the CCMD J5, Joint staff, service component commands, or the U.S. country team).

<sup>86</sup> *Id.* encl. C, para. 6c. *See also* Roger S. Golden, Office of Int’l Cooperation, Under Sec’y of Def. for Acquisition, Tech., and Logistics, Address at the 2012 ACSA Worldwide Conference: Negotiation Issues (June 4, 2012) [hereinafter Roger Golden Address], *available at* [https://intellipedia.intelink.gov/wiki/ACSA\\_Conf\\_2012\\_Briefs](https://intellipedia.intelink.gov/wiki/ACSA_Conf_2012_Briefs) (found on website under Briefs, OSD) (recommending the ACSA team maintain accurate records of all negotiations because the process can take years, forcing negotiators to leave actions to their successors).

<sup>87</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 6c(2).

<sup>88</sup> *Id.* encl. C, para. 6c(4).

<sup>89</sup> *Id.* encl. C, para. 6d–e (directing ACSA PMs to resubmit agreements to foreign governments when the Joint Staff directs modifications).

<sup>90</sup> *Id.* encl. C, para. 6c(3) (stating *ad referendum* means “the agreement . . . is subject to staffing and approval”).

<sup>91</sup> *Id.* encl. C, para. 6f(1) (requiring a CCMD J-4 memorandum requesting authority to conclude the agreement, a copy of the agreement noting departures from the template, and a CCMD legal review).

<sup>92</sup> *Id.* encl. C, para. 6f(2).

<sup>93</sup> *Id.* encl. C, para. 6f(3) (requiring consultation, not concurrence).

<sup>94</sup> *Id.* encl. C, para. 6g.

<sup>95</sup> *Id.* encl. C, para. 6h.

<sup>96</sup> Roger Golden Address, *supra* note 86.

<sup>97</sup> CJCSI 2120.01C, *supra* note 25, encl. C, para. 6i.

<sup>98</sup> *Id.* encl. C, para. 6i(1).

<sup>99</sup> *See, e.g.,* HEADQUARTERS, U.S. AFRICA COMMAND, INSTR. 4000.01, UTILIZING ACQUISITION AND CROSS-SERVICING AGREEMENTS encl. C, para. 2(a)(2) (29 Sept. 2009) [hereinafter ACI 4000.01], *available at* [https://intellipedia.intelink.gov/wiki/COCOM\\_ACSA\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/COCOM_ACSA_Directives_%26_Guidance) (login required) (withholding signature authority to the commander, U.S. AFRICOM).

counterpart and staff the agreement vertically through the CCMD, Joint Staff/J-4, OSD, and DoS.<sup>100</sup> Logisticians and JAs should identify ACSA requirements as early as possible.<sup>101</sup>

Returning to our hypothetical, AFRICOM is acting on your request for assistance. First, AFRICOM confirms with the Joint Staff/J-4 that they have the authority to negotiate with the Moroccans. The AFRICOM ACSA PM then coordinates the drafting of an ACSA using the DoS model agreement. The ACSA PM forwards the draft agreement to the Moroccans and, with the assistance of his ACSA team, conducts negotiations. After both the CCDR and the Moroccans approve the draft agreement *ad referendum*, the ACSA PM forwards the agreement through Joint Staff/J-4 to OUSD (AT&L)/IC. The USD (AT&L)/IC grants authority to conclude the agreement and the Joint Staff/J-4 delegates this authority to the CCDR. Subsequently, the CCDR concludes the agreement at the signing ceremony. Approximately 100 days after receiving the request, AFRICOM secures your ACSA just prior to the deployment.

#### D. Exchanging LSSS: Orders and Transfers

You are now deployed to a cooperative security location (CSL) east of Tan Tan airport. While attending a battle update brief, the S-4 informs the commander that Moroccan forces have requested our support. Given their strained supply lines, the Moroccans request meals, fuel, and several anti-tank guided missile systems (i.e., BGM-71 TOWs). The S-4 also advises that a number of our task force vehicles are in need of maintenance services beyond what the task force can provide. The S-4 recommends leveraging the ACSA to provide the requested support to the Moroccans in exchange for maintenance services to our vehicles. The commander turns to you and says, “Judge?” You advise that the BGM-71 TOWs are guided missile systems and may not be transferred under the ACSA.<sup>102</sup> You then recommend approval of the remaining portion of the exchange. The commander approves your recommendation.

Once the ACSA is in place, the parties generally have all the authority necessary to exchange LSSS.<sup>103</sup> An ACSA order is “a written request, in an agreed upon format and signed by an authorized individual, for the provision of

LSSS pursuant to an ACSA.”<sup>104</sup> Unlike ACSAs, the orders themselves are not international agreements.<sup>105</sup> While ACSAs enable parties to exchange LSSS, they do not *require* parties to fill orders received from one another.<sup>106</sup> Generally, LSSS transfers occur on an individual basis, but orders may be open-ended when the quantity or time frame is undefined.<sup>107</sup> Additionally, practitioners should familiarize themselves with local policy, as each CCDR has published authority governing ACSA orders within their areas of responsibility.<sup>108</sup> There are three types of orders: transfer for cash (i.e., PIK), exchange of similar or different LSSS (i.e., RIK or EVE), and loans.

##### 1. Transfer for Cash (i.e., PIK)

When exchanging currency for LSSS, logisticians first define the type, timing, and quantity of the requirement.<sup>109</sup> The CCMD ACSA PM, in coordination with legal and contracting, will validate that the governing ACSA allows for the transfer of the contemplated LSSS.<sup>110</sup> When acquiring LSSS, the ACSA PM must ensure that the desired “goods or services are not reasonably available from U.S. commercial sources,” and that the transaction supports U.S. national interests and the commander’s end-state.<sup>111</sup> The ACSA PM and their foreign counterpart then negotiate the terms of the order.<sup>112</sup> Negotiations should address “type, quantity, delivery location and schedule, billing information,

<sup>104</sup> CJCSI 2120.01C, *supra* note 25, glossary, at GL-4.

<sup>105</sup> DoDD 5530.3, *supra* note 59, para. E2.1.1.3.7; CJCSI 2120.01C, *supra* note 25, encl. D, para. 4b(3)(a) (stating orders are binding international commitments).

<sup>106</sup> AD 2012-12, *supra* note 13, ch. 2, para. 5.

<sup>107</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 5a, 5c (reminding practitioners to not obligate funds beyond the period of availability for open-ended orders).

<sup>108</sup> See ACI 4000.01, *supra* note 99; HEADQUARTERS, U.S. CENTRAL COMMAND, REG. 700-1, MULTINATIONAL LOGISTICS SUPPORT BETWEEN THE U.S. AND GOVERNMENTS OF COUNTRIES WITHIN THE USCENCOM AREA OF RESPONSIBILITY (19 Apr. 2006), *available at* [https://intellipedia.intelink.gov/wiki/COCOM\\_ACSA\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/COCOM_ACSA_Directives_%26_Guidance) (last visited Oct. 17, 2013) (login required); U.S. EUROPEAN COMMAND, DIR. 60-8, LOGISTICS SUPPORT USING ACQUISITION AND CROSS-SERVICING AGREEMENTS (19 Sept. 2001) [hereinafter ED 60-8], *available at* [https://intellipedia.intelink.gov/wiki/COCOM\\_ACSA\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/COCOM_ACSA_Directives_%26_Guidance) (last visited Oct. 17, 2013) (login required); HEADQUARTERS, U.S. PACIFIC COMMAND, INSTR. 0602.1, MUTUAL LOGISTIC SUPPORT BETWEEN THE U.S. AND THE GOVERNMENTS OF OTHER ELIGIBLE COUNTRIES (7 Oct. 2007), *available at* [https://intellipedia.intelink.gov/wiki/COCOM\\_ACSA\\_Directives\\_%26\\_Guidance](https://intellipedia.intelink.gov/wiki/COCOM_ACSA_Directives_%26_Guidance) (login required); SOUTHCOM HB 700-6, *supra* note 43.

<sup>109</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4a(1).

<sup>110</sup> *Id.* encl. D, para. 4a(1)(a).

<sup>111</sup> *Id.* encl. D, para. 4a(1)(b) (stating practitioners should consider timeliness, costs, purpose, and location when determining if LSSS is reasonably available from U.S. commercial sources).

<sup>112</sup> *Id.* encl. D, para. 4a(2).

<sup>100</sup> James A. Teaford, Multinational & Interagency Division, J-4 Logistics, Joint Chiefs of Staff, Address at the 2012 ACSA Worldwide Conference: ACSA 101 (May 22, 2012), *available at* [https://intellipedia.intelink.gov/wiki/ACSA\\_Conf\\_2012\\_Briefs](https://intellipedia.intelink.gov/wiki/ACSA_Conf_2012_Briefs) (login required).

<sup>101</sup> JOINT PUB. 4-08, *supra* note 13, ch. III, para. 4b.

<sup>102</sup> The BGM-71 TOW, a guided missile system, is expressly excluded from the ACSA program. DoDD 2010.9, *supra* note 11, para. 4.5.2; CJCSI 2120.01C, *supra* note 25, encl. A, para. 5b(2).

<sup>103</sup> AD 2012-12, *supra* note 13, ch. 2, para. 3.

and price of LSSS to be transferred.”<sup>113</sup> Generally, parties should agree to a firm fixed price.<sup>114</sup>

The parties begin the transaction by populating the required order form as directed by the governing ACSA.<sup>115</sup> The ACSA Global Automated Tracking and Reporting System (AGATRS) enables ACSA PMs to order, track, manage, and report their ACSA transactions.<sup>116</sup> After the order form is completed and signed by both parties, a binding international commitment is formed.<sup>117</sup> Having completed the ACSA order, the supplying organization then coordinates for the LSSS.<sup>118</sup> For U.S.-provided support, the ACSA PM will coordinate with the subordinate commands for LSSS from the supply system or private vendors.<sup>119</sup> The ACSA PM then validates delivery and acceptance by the foreign country or international organization.<sup>120</sup> The ACSA PM forwards the completed ACSA order form to the subordinate command’s resource managers (RM) for billing and collection.<sup>121</sup>

## 2. Transfer for Similar LSSS (i.e., RIK) or Different LSSS (i.e., EVE)

When providing LSSS in exchange for RIK or EVE, a similar process is followed. Logisticians first define the requirement, and the ACSA PM and their foreign

<sup>113</sup> *Id.*; DoD FMR, *supra* note 34, para. 0806 (outlining reciprocal and non-reciprocal pricing methods).

<sup>114</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4a(2)(a) (stating the ACSA PM should include a “not to exceed” amount when the parties are unable to agree on a firm fixed price).

<sup>115</sup> *Id.* encl. D, para. 4a(3)(a). See Appendix B (Standard ACSA Order Form).

<sup>116</sup> CJCSI 2120.01C, *supra* note 25, encl. A, para. 5k (stating the ACSA Global Automated Tracking and Reporting System is the DoD ACSA system of record for the OSD, Joint Staff, and CCMDs); see also DoDD 2010.9, *supra* note 11, para. 5.6.8 (requiring CCMDs to submit quarterly ACSA reports to the CJCS); DoD FMR, *supra* note 34, para. 080403A (requiring CCMDs to provide “not later than the 15 days after the end of the preceding fiscal quarter, a detailed report, by fiscal year, for each . . . agreement entered into . . . itemized by transaction”).

<sup>117</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4a(3)(a) (stating these actions form a binding international commitment, not an international agreement). When the United States receives LSSS for payment-in-kind (PIK), the service component must secure a fund certification *before* signing the ACSA order form. *Id.* encl. D, para. 4a(3)(b). When the United States transfers LSSS for PIK, the order form must contain the fund site of the burdened account for reimbursement. *Id.* encl. D, para. 4a(3)(b).

<sup>118</sup> *Id.* encl. D, para. 4a(4)(a).

<sup>119</sup> *Id.* encl. D, para. 4a(4) (directing practitioners consult U.S. DEP’T OF DEF., REG. 4500.9-R, DEF. TRANSPORTATION REG. (Nov. 2010) when seeking support from U.S. Transportation Command).

<sup>120</sup> *Id.* encl. D, para. 4a(5)(a); encl. D, app. A.

<sup>121</sup> *Id.* encl. D, para. 4a(6) (stating the RM will forward the action to the organization identified in the ACSA for billing and collection; and the billing element will forward a bill to the foreign country’s payment office).

counterparts negotiate the ACSA transaction.<sup>122</sup> In contrast to the terms negotiated in PIK transactions, the parties negotiate *value* rather than price and the form of reimbursement.<sup>123</sup> Again, the parties initiate the ACSA transaction by completing an ACSA order form.<sup>124</sup> The ACSA PM must ensure the order contains an estimate of the value of the LSSS to be transferred.<sup>125</sup> For U.S.-provided support, the ACSA PM will coordinate with a subordinate command for the LSSS, who will then deliver the LSSS from the logistics elements inventory or contracted vendor.<sup>126</sup> After validating delivery and acceptance of the LSSS, the ACSA PM will forward the completed form to the resource element of the subordinate command pending reimbursement by the foreign government.<sup>127</sup> Upon receipt of the RIK or EVE reimbursement, the ACSA PM will annotate the order and notify the RM.<sup>128</sup> In the event the receiving party defaults, the order is processed as a cash reimbursement transaction.<sup>129</sup>

## 3. Loan of LSSS for Cash, RIK, or EVE

Finally, LSSS may be loaned in exchange for cash, RIK, or EVE.<sup>130</sup> Again, the process is similar. After defining the requirement, the parties negotiate the terms.<sup>131</sup> Unlike other exchanges, parties seeking to loan LSSS must address “the value of LSSS to be loaned or leased, and the costs and terms of the loan or lease.”<sup>132</sup> The ACSA PM will initiate the transaction, order the LSSS, coordinate delivery, verify acceptance, and ensure reimbursement.<sup>133</sup> The ACSA PM completes the transaction by verifying that the loaned items are returned in sound condition.<sup>134</sup> If the returned LSSS is serviceable, the ACSA PM will contact the RMs and

<sup>122</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4b(1).

<sup>123</sup> *Id.* encl. D, para. 4b(2)(a).

<sup>124</sup> *Id.* encl. D, para. 4b(3)(a).

<sup>125</sup> *Id.* encl. D, para. 4b(3)(b).

<sup>126</sup> *Id.* encl. D, para. 4b(4)–(5).

<sup>127</sup> *Id.* encl. D, para. 4b(5), 4b(6) (stating the receiving party is generally required to reimburse the responsible command within one year of delivery).

<sup>128</sup> *Id.* encl. D, para. 4b(6).

<sup>129</sup> *Id.* encl. D, para. 4b(7). Accordingly, practitioners should secure a fund site even though RIK and EVE transactions do not require one. *Id.* encl. D, para. 4b(3)(b).

<sup>130</sup> *Id.* encl. D, para. 4c.

<sup>131</sup> *Id.* encl. D, para. 4c(1)–(2).

<sup>132</sup> *Id.* encl. D, para. 4c(2).

<sup>133</sup> *Id.* encl. D, para. 4c(3); *id.* encl. D, para. 4a(3)–(6) (stating the ACSA PM will implement the PIK process, outlined above in Part II.D.1, when loaning LSSS for cash); *id.* encl. D, para. 4b(3)–(6) (stating the ACSA PM will implement the RIK or EVE process, outlined above in Part II.D.2, when loaning LSSS for RIK or EVE).

<sup>134</sup> *Id.* encl. D, para. 4c(4).

document the return.<sup>135</sup> If the returned items are not serviceable, the ACSA PM will build an estimate to repair or replace the LSSS, and the RMs will generate a bill and collect reimbursement.<sup>136</sup>

Back at the CSL near Tan Tan airport, the commander has made his decision: coordinate the trade—provide meal and fuel support to the Moroccans in exchange for vehicle maintenance. First, the S-4 forwards the requirement to the AFRICOM ACSA PM, addressing the type, timing, and quantity of vehicle maintenance.<sup>137</sup> The ACSA PM, in coordination with legal, then validates that the U.S.-Moroccan ACSA allows for the exchange of food, fuel, and vehicle maintenance.<sup>138</sup> Additionally, the ACSA PM ensures that U.S. commercial sources are not reasonably available to provide vehicle maintenance in light of timeliness, cost, and location.<sup>139</sup> Next, the ACSA PM confirms that the required vehicle maintenance promotes the commander's desired end-state and promotes U.S. interests.<sup>140</sup> The ACSA PM, on behalf of the task force, then negotiates the terms of the order with the Moroccans, addressing "type, quantity, delivery location and schedule, billing information, and value of LSSS to be transferred."<sup>141</sup>

The ACSA PM builds the order in AGATRS, using the *value* of the LSSS rather than price.<sup>142</sup> He then signs and forwards the order to his Moroccan counterpart for signature.<sup>143</sup> The ACSA PM also secures a fund site in the event of default.<sup>144</sup> After both parties have signed the order, it becomes a binding international *commitment*.<sup>145</sup> The ACSA PM orders the fuel and meals from AFRICOM.<sup>146</sup> He then tracks delivery, receipt, and acceptance of the

supplies.<sup>147</sup> Finally, the ACSA PM completes the order form in AGATRS documenting delivery and acceptance.<sup>148</sup> You met the commander's desired end-state: the task force successfully exchanged LSSS with the Moroccans to address a logistics shortfall.

#### IV. Conclusion

As the United States navigates an era of fiscal austerity, national security threats continue to emanate from states with "[w]eakened or diminished counterterrorism capabilities, border control mechanisms, [and] internal security priorities . . ."<sup>149</sup> As a result, the U.S. national defense strategy requires a leaner force that develops partner capacity and promotes burden-sharing.<sup>150</sup> ACSAs are critical to this endeavor.

Thus, ACSAs enable commanders to meet U.S. national defense goals in a fiscally constrained environment by exchanging support with multinational partners. The JA familiar with ACSAs is uniquely situated to support the commander's desire to satisfy logistics requirements in a legal, flexible, and efficient manner. To that end, this article outlined the purpose and limitations of ACSAs, and provided practitioners with an overview of the ACSA process from negotiation to acquisition. Acquisition and Cross-Servicing Agreements offer a critical burden-sharing opportunity at a moment in history when the United States says to her allies, "We can share what we got of yours, 'cause we done shared all of mine."<sup>151</sup>

<sup>135</sup> *Id.* encl. D, para. 4c(4)(a).

<sup>136</sup> *Id.* encl. D, para. 4c(4)(b); AD 2012-12, *supra* note 13, ch. 1, para. 6a.

<sup>137</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4b(1) (citing encl. D, para. 4a(1)(a)–4a(1)(c)).

<sup>138</sup> *Id.* encl. D, para. 4a(1)(b) (requiring validation that the ACSA authorizes the proposed LSSS); *id.* encl. A, app. (stating food, fuel, and vehicle maintenance are permissible LSSS).

<sup>139</sup> *Id.* encl. D, para. 4a(1)(b) (directing practitioners to consider timeliness, costs, purpose, and location when determining if "the goods are reasonably available from U.S. commercial sources").

<sup>140</sup> *Id.* encl. D, para. 4a(1)(b).

<sup>141</sup> *Id.* encl. D, para. 4b(2). *See also* DoD FMR, *supra* note 34, para. 0806; SOUTHCOM HB 700-6, *supra* note 43, at 5 (stating LSSS should be valued using the pricing guidance in the DoD FMR and, in light of market surveys, compared with previous purchases and with independent U.S. Government estimates).

<sup>142</sup> ACM 4000.01, *supra* note 40, encl. B; CJCSI 2120.01C, *supra* note 25, encl. D, para. 4b(3)(b).

<sup>143</sup> CJCSI 2120.01C, *supra* note 25, encl. D, para. 4b(3)(a).

<sup>144</sup> *Id.* encl. D, para. 4b(3)(b).

<sup>145</sup> *Id.* encl. D, para. 4a(3)(a) (an order is not an international agreement).

<sup>146</sup> *Id.* encl. D, para. 4b(4)(a).

<sup>147</sup> *Id.* encl. D, para. 4b(5)(b).

<sup>148</sup> *Id.* encl. D, para. 4b(5)(b). The ACSA PM sends the completed order form to the USARAF resource managers (RMs) for filing pending reimbursement. *Id.* encl. D, para. 4b(5)(b). As the Moroccans provide maintenance services, the ACSA PM notifies the RMs and updates the invoice. *Id.* encl. D, para. 4b(6).

<sup>149</sup> *Worldwide Threat Assessment of the U.S. Intelligence Cmty: Statement for the Record Before the S. Select Comm. on Intelligence*, 113 CONG. 4 (Mar. 12, 2013), available at <http://www.dni.gov/index.php/newsroom/testimonies/194-congressional-testimonies-2013/816-statement-for-the-record-worldwide-threat-assessment-of-the-u-s-intelligence-community> (statement of James R. Clapper, Dir. of National Intelligence).

<sup>150</sup> 21ST CENTURY DEF. PRIORITIES, *supra* note 1, at 3 ("Building partnership capacity [around] the world [is] important for sharing the costs and responsibilities of global leadership.").

<sup>151</sup> GRATEFUL DEAD, *Jack Straw*, on EUROPE 72 (Warner Brothers Records 1972).



