

col on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, signed at Paris on August 28, 1952 (TIAS 2978; 5 UST 870), applies.

(3) The term “military region” means the geographical area of responsibility assigned to the commander of a unified combatant command (excluding Europe and adjacent waters).

(4) The term “transfer” means selling (whether for payment in currency, replacement-in-kind, or exchange of supplies or services of equal value), leasing, loaning, or otherwise temporarily providing logistic support, supplies, and services under the terms of a cross-servicing agreement.

(Added Pub. L. 96-323, §2(a), Aug. 4, 1980, 94 Stat. 1019, §2331; renumbered §2350, Pub. L. 99-145, title XIII, §1304(a)(3), Nov. 8, 1985, 99 Stat. 741; amended Pub. L. 99-661, div. A, title XI, §1104(f), Nov. 14, 1986, 100 Stat. 3965; Pub. L. 100-26, §7(k)(2), Apr. 21, 1987, 101 Stat. 284; Pub. L. 101-189, div. A, title IX, §931(e)(1), Nov. 29, 1989, 103 Stat. 1535; Pub. L. 103-337, div. A, title XIII, §1317(h), Oct. 5, 1994, 108 Stat. 2901; Pub. L. 105-85, div. A, title XII, §1222, Nov. 18, 1997, 111 Stat. 1937.)

REFERENCES IN TEXT

Section 38(a)(1) of the Arms Export Control Act, referred to in par. (1), is classified to section 2778(a)(1) of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

1997—Par. (1). Pub. L. 105-85, in second sentence, substituted “other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated” for “other items of military equipment not designated as part of the United States Munitions List”.

1994—Par. (1). Pub. L. 103-337, §1317(h)(1), inserted “(including airlift)” after “transportation”, “calibration services,” after “maintenance services,”, and “Such term includes temporary use of general purpose vehicles and other items of military equipment not designated as part of the United States Munitions List pursuant to section 38(a)(1) of the Arms Export Control Act.” at end.

Par. (4). Pub. L. 103-337, §1317(h)(2), added par. (4).

1989—Pub. L. 101-189 substituted “this subchapter” for “this chapter” in introductory provisions.

1987—Pub. L. 100-26 inserted “The term” after each par. designation and struck out uppercase letter of first word after first quotation marks in pars. (1) and (3) and substituted lowercase letter.

1986—Par. (3). Pub. L. 99-661 added par. (3).

1985—Pub. L. 99-145 renumbered section 2331 of this title as this section.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-337 applicable with regard to any acquisition or transfer of logistic support, supplies, and services under authority of this subchapter that is initiated after Oct. 5, 1994, see section 1317(j) of Pub. L. 103-337, set out as a note under section 2341 of this title.

SUBCHAPTER II—OTHER COOPERATIVE AGREEMENTS

Sec.
2350a. Cooperative research and development agreements: NATO organizations; allied and friendly foreign countries.
2350b. Cooperative projects under Arms Export Control Act: acquisition of defense equipment.

Sec.
2350c. Cooperative military airlift agreements: allied countries.
2350d. Cooperative logistic support agreements: NATO countries.
2350e. NATO Airborne Warning and Control System (AWACS) program: authority of Secretary of Defense.
2350f. Procurement of communications support and related supplies and services.
2350g. Authority to accept use of real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements.
2350h. Memorandums of agreement: Department of Defense ombudsman for foreign signatories.
2350i. Foreign contributions for cooperative projects.
2350j. Burden sharing contributions by designated countries and regional organizations.
2350k. Relocation within host nation of elements of armed forces overseas.
2350l. Cooperative agreements for reciprocal use of test facilities: foreign countries and international organizations.
2350m. Participation in multinational military centers of excellence.

AMENDMENTS

2008—Pub. L. 110-417, [div. A], title XII, §1232(a)(2), Oct. 14, 2008, 122 Stat. 4639, added item 2350m.

2001—Pub. L. 107-107, div. A, title XII, §§1212(e)(2), 1213(b), Dec. 28, 2001, 115 Stat. 1250, 1251, substituted “Cooperative research and development agreements: NATO organizations; allied and friendly foreign countries” for “Cooperative research and development projects: allied countries” in item 2350a and added item 2350l.

1996—Pub. L. 104-106, div. A, title XIII, §1332(a)(2), Feb. 10, 1996, 110 Stat. 484, added item 2350k.

1993—Pub. L. 103-160, div. A, title XIV, §1402(b), Nov. 30, 1993, 107 Stat. 1826, added item 2350j.

1991—Pub. L. 102-190, div. A, title X, §1047(b), Dec. 5, 1991, 105 Stat. 1468, added item 2350i.

Pub. L. 102-25, title VII, §704(a)(9), Apr. 6, 1991, 105 Stat. 119, made clarifying amendment to directory language of Pub. L. 101-510, div. A, title XIV, §1451(b)(2), Nov. 5, 1990, 104 Stat. 1693. See 1990 Amendment note below.

1990—Pub. L. 101-510, div. A, title XIV, §1452(a)(2), Nov. 5, 1990, 104 Stat. 1694, added item 2350h.

Pub. L. 101-510, div. A, title XIV, §1451(b)(2), Nov. 5, 1990, 104 Stat. 1693, as amended by Pub. L. 102-25, title VII, §704(a)(9), Apr. 6, 1991, 105 Stat. 119, added item 2350g.

§ 2350a. Cooperative research and development agreements: NATO organizations; allied and friendly foreign countries

(a) AUTHORITY TO ENGAGE IN COOPERATIVE R&D PROJECTS.—(1) The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more countries or organizations referred to in paragraph (2) for the purpose of conducting cooperative research and development projects on defense equipment and munitions.

(2) The countries and organizations with which the Secretary may enter into a memorandum of agreement (or other formal agreement) under paragraph (1) are as follows:

- (A) The North Atlantic Treaty Organization.
- (B) A NATO organization.
- (C) A member nation of the North Atlantic Treaty Organization.
- (D) A major non-NATO ally.

(E) Any other friendly foreign country.

(3) If such a memorandum of understanding (or other formal agreement) is with a country referred to in subparagraph (E) of paragraph (2), such memorandum (or agreement) may go into effect only after the Secretary submits to the Committees on Armed Services and on Foreign Relations of the Senate and to the Committees on Armed Services and on International Relations of the House of Representatives a report with respect to the proposed memorandum (or agreement) and a period of 30 days has passed after the report has been submitted.

(b) REQUIREMENT THAT PROJECTS IMPROVE CONVENTIONAL DEFENSE CAPABILITIES.—(1) The Secretary of Defense may not enter into a memorandum of understanding (or other formal agreement) to conduct a cooperative research and development project under this section unless the Secretary determines that the proposed project will improve, through the application of emerging technology, the conventional defense capabilities of the North Atlantic Treaty Organization or the common conventional defense capabilities of the United States and a country or organization referred to in subsection (a)(2).

(2) The authority of the Secretary to make a determination under paragraph (1) may only be delegated to the Deputy Secretary of Defense and to one other official of the Department of Defense.

(c) COST SHARING.—Each cooperative research and development project entered into under this section shall require sharing of the costs of the project (including the costs of claims) between the participants on an equitable basis.

(d) RESTRICTIONS ON PROCUREMENT OF EQUIPMENT AND SERVICES.—(1) In order to assure substantial participation on the part of countries and organizations referred to in subsection (a)(2) in cooperative research and development projects, funds made available for such projects may not be used to procure equipment or services from any foreign government, foreign research organization, or other foreign entity.

(2) A country or organization referred to in subsection (a)(2) may not use any military or economic assistance grant, loan, or other funds provided by the United States for the purpose of making the contribution of that country or organization to a cooperative research and development program entered into with the United States under this section.

(e) COOPERATIVE OPPORTUNITIES DOCUMENT.—(1) In order to ensure that opportunities to conduct cooperative research and development projects are considered at an early point during the formal development review process of the Department of Defense in connection with any planned project of the Department, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall prepare a cooperative opportunities document before the first milestone or decision point with respect to that project for review by the Defense Acquisition Board at formal meetings of the Board.

(2) A cooperative opportunities document referred to in paragraph (1) shall include the following:

(A) A statement indicating whether or not a project similar to the one under consideration

by the Department of Defense is in development or production by any country or organization referred to in subsection (a)(2) or NATO organizations.

(B) If a project similar to the one under consideration by the Department of Defense is in development or production by one or more countries and organizations referred to in subsection (a)(2), an assessment by the Under Secretary of Defense for Acquisition, Technology, and Logistics as to whether that project could satisfy, or could be modified in scope so as to satisfy, the military requirements of the project of the United States under consideration by the Department of Defense.

(C) An assessment of the advantages and disadvantages with regard to program timing, developmental and life cycle costs, technology sharing, and Rationalization, Standardization, and Interoperability (RSI) of seeking to structure a cooperative development program with one or more countries and organizations referred to in subsection (a)(2) or NATO organizations.

(D) The recommendation of the Under Secretary as to whether the Department of Defense should explore the feasibility and desirability of a cooperative development program with one or more countries and organizations referred to in subsection (a)(2) or NATO organizations.

[~~(f) Repealed. Pub. L. 108-136, div. A, title X, § 1031(a)(17), Nov. 24, 2003, 117 Stat. 1597.~~]

(g) SIDE-BY-SIDE TESTING.—(1) It is the sense of Congress—

(A) that the Secretary of Defense should test conventional defense equipment, munitions, and technologies manufactured and developed by countries referred to in subsection (a)(2) to determine the ability of such equipment, munitions, and technologies to satisfy United States military requirements or to correct operational deficiencies; and

(B) that while the testing of nondevelopmental items and items in the late state of the development process are preferred, the testing of equipment, munitions, and technologies may be conducted to determine procurement alternatives.

(2) The Secretary of Defense may acquire equipment, munitions, and technologies of the type described in paragraph (1) for the purpose of conducting the testing described in that paragraph.

(3) The Assistant Secretary of Defense for Research and Engineering shall notify the congressional defense committees of the intent to obligate funds made available to carry out this subsection not less than 7 days before such funds are obligated.

(h) SECRETARY TO ENCOURAGE SIMILAR PROGRAMS.—The Secretary of Defense shall encourage member nations of the North Atlantic Treaty Organization, major non-NATO allies, and other friendly foreign countries to establish programs similar to the one provided for in this section.

(i) DEFINITIONS.—In this section:

(1) The term “cooperative research and development project” means a project involving

joint participation by the United States and one or more countries and organizations referred to in subsection (a)(2) under a memorandum of understanding (or other formal agreement) to carry out a joint research and development program—

(A) to develop new conventional defense equipment and munitions; or

(B) to modify existing military equipment to meet United States military requirements.

(2) The term “major non-NATO ally” means a country (other than a member nation of the North Atlantic Treaty Organization) that is designated as a major non-NATO ally for purposes of this section by the Secretary of Defense with the concurrence of the Secretary of State.

(3) The term “NATO organization” means any North Atlantic Treaty Organization subsidiary body referred to in section 2350(2) of this title and any other organization of the North Atlantic Treaty Organization.

(Added Pub. L. 101-189, div. A, title IX, §931(a)(2), Nov. 29, 1989, 103 Stat. 1531; amended Pub. L. 101-510, div. A, title XIII, §1331(4), Nov. 5, 1990, 104 Stat. 1673; Pub. L. 102-190, div. A, title X, §1053, Dec. 5, 1991, 105 Stat. 1471; Pub. L. 102-484, div. A, title VIII, §843(b)(1), Oct. 23, 1992, 106 Stat. 2469; Pub. L. 103-160, div. A, title IX, §904(d)(1), Nov. 30, 1993, 107 Stat. 1728; Pub. L. 103-337, div. A, title XIII, §1301, Oct. 5, 1994, 108 Stat. 2888; Pub. L. 104-106, div. A, title XV, §1502(a)(17), Feb. 10, 1996, 110 Stat. 504; Pub. L. 106-65, div. A, title IX, §911(a)(1), title X, §1067(1), Oct. 5, 1999, 113 Stat. 717, 774; Pub. L. 107-107, div. A, title X, §1048(b)(2), title XII, §1212(a)-(e)(1), Dec. 28, 2001, 115 Stat. 1225, 1248-1250; Pub. L. 107-314, div. A, title X, §§1041(a)(9), 1062(f)(2), Dec. 2, 2002, 116 Stat. 2645, 2651; Pub. L. 108-136, div. A, title X, §1031(a)(17), Nov. 24, 2003, 117 Stat. 1597; Pub. L. 110-181, div. A, title II, §237, title XII, §1251, Jan. 28, 2008, 122 Stat. 48, 401; Pub. L. 111-383, div. A, title IX, §901(j)(4), Jan. 7, 2011, 124 Stat. 4324.)

PRIOR PROVISIONS

Provisions relating to NATO countries were contained in Pub. L. 99-145, title XI, §1103, Nov. 8, 1985, 99 Stat. 712, which was set out as a note under section 2407 of this title, prior to repeal by Pub. L. 101-189, §931(d)(1).

Provisions relating to major non-NATO allies were contained in section 2767a of Title 22, Foreign Relations and Intercourse, prior to repeal by Pub. L. 101-189, §931(d)(2).

AMENDMENTS

2011—Subsec. (g)(3). Pub. L. 111-383 substituted “Assistant Secretary of Defense for Research and Engineering” for “Director of Defense Research and Engineering”.

2008—Subsec. (e)(1). Pub. L. 110-181, §1251(1), struck out subpar. (A) designation before “In order to ensure”, substituted “a cooperative opportunities document before the first milestone or decision point” for “an arms cooperation opportunities document”, and struck out subpar. (B) which read as follows: “The Under Secretary shall also prepare an arms cooperation opportunities document for review of each new project for which a document known as a Mission Need Statement is prepared.”

Subsec. (e)(2). Pub. L. 110-181, §1251(2), substituted “A cooperative opportunities document” for “An arms co-

operation opportunities document” in introductory provisions.

Subsec. (g)(3). Pub. L. 110-181, §237, amended par. (3) generally. Prior to amendment, par. (3) read as follows: “The Deputy Director, Defense Research and Engineering (Test and Evaluation) shall notify the Speaker of the House of Representatives and the Committees on Armed Services and on Appropriations of the Senate of the Deputy Director’s intent to obligate funds made available to carry out this subsection not less than 30 days before such funds are obligated.”

2003—Subsec. (f). Pub. L. 108-136 struck out subsec. (f) which required that, not later than Mar. 1 of each year, the Under Secretary of Defense for Acquisition, Technology, and Logistics was to submit to the Speaker of the House and the Committees on Armed Services and Appropriations of the Senate a report on cooperative research and development projects under this section, and that, not later than Jan. 1 of each year, the Secretary of Defense was to submit to the Committees on Armed Services and Foreign Relations of the Senate and Committees on Armed Services and International Relations of the House a report specifying the countries eligible to participate in a cooperative project agreement under this section and the criteria used to determine the eligibility of such countries.

2002—Subsec. (g)(1)(A). Pub. L. 107-314, §1062(f)(2), amended directory language of Pub. L. 107-107, §1212(a)(5). See 2001 Amendment note below.

Subsec. (g)(4). Pub. L. 107-314, §1041(a)(9), struck out par. (4) which read as follows: “The Secretary of Defense shall submit to Congress each year, not later than March 1, a report containing information on—

“(A) the equipment, munitions, and technologies manufactured and developed by countries referred to in subsection (a)(2) that were evaluated under this subsection during the previous fiscal year;

“(B) the obligation of any funds under this subsection during the previous fiscal year; and

“(C) the equipment, munitions, and technologies that were tested under this subsection and procured during the previous fiscal year.”

Subsec. (g)(4)(A). Pub. L. 107-314, §1062(f)(2), amended directory language of Pub. L. 107-107, §1212(a)(5). See 2001 Amendment note below.

2001—Pub. L. 107-107, §1212(e)(1), substituted “Cooperative research and development agreements: NATO organizations; allied and friendly foreign countries” for “Cooperative research and development projects: allied countries” in section catchline.

Subsec. (a)(1). Pub. L. 107-107, §1212(a)(1)(A), (B), designated existing provisions of subsec. (a) as par. (1) and substituted “countries or organizations referred to in paragraph (2)” for “major allies of the United States or NATO organizations”.

Subsec. (a)(2). Pub. L. 107-107, §1212(a)(1)(C), added par. (2).

Subsec. (a)(3). Pub. L. 107-107, §1212(b), added par. (3).

Subsec. (b)(1). Pub. L. 107-107, §1212(a)(2), struck out “(NATO)” after “North Atlantic Treaty Organization” and substituted “a country or organization referred to in subsection (a)(2)” for “its major non-NATO allies”.

Subsec. (b)(2). Pub. L. 107-107, §1212(c), substituted “Deputy Secretary of Defense and to one other official of the Department of Defense” for “Deputy Secretary of Defense or the Under Secretary of Defense for Acquisition, Technology, and Logistics”.

Subsec. (d)(1). Pub. L. 107-107, §1212(a)(3)(A), substituted “countries and organizations referred to in subsection (a)(2)” for “the major allies of the United States”.

Subsec. (d)(2). Pub. L. 107-107, §1212(a)(3)(B), substituted “country or organization referred to in subsection (a)(2)” for “major ally of the United States” and “the contribution of that country or organization” for “that ally’s contribution”.

Subsec. (e)(1)(A). Pub. L. 107-107, §1048(b)(2), substituted “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

Subsec. (e)(2)(A). Pub. L. 107–107, § 1212(a)(4)(A), substituted “any country or organization referred to in subsection (a)(2)” for “one or more of the major allies of the United States”.

Subsec. (e)(2)(B). Pub. L. 107–107, §§ 1048(b)(2), 1212(a)(4)(B), substituted “countries and organizations referred to in subsection (a)(2)” for “major allies of the United States or NATO organizations” and “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

Subsec. (e)(2)(C). Pub. L. 107–107, § 1212(a)(4)(C), substituted “countries and organizations referred to in subsection (a)(2)” for “major allies of the United States”.

Subsec. (e)(2)(D). Pub. L. 107–107, § 1212(a)(4)(D), substituted “countries and organizations referred to in subsection (a)(2)” for “major allies of the United States”.

Subsec. (f)(1). Pub. L. 107–107, § 1048(b)(2), substituted “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

Subsec. (f)(2). Pub. L. 107–107, § 1212(d), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The Secretary of Defense and the Secretary of State, whenever they consider such action to be warranted, shall jointly submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on International Relations of the House of Representatives a report—

“(A) enumerating those countries to be added to or deleted from the existing designation of countries designated as major non-NATO allies for purposes of this section; and

“(B) specifying the criteria used in determining the eligibility of a country to be designated as a major non-NATO ally for purposes of this section.”

Subsec. (g)(1)(A), (4)(A). Pub. L. 107–107, § 1212(a)(5), as amended by Pub. L. 107–314, § 1062(f)(2), substituted “countries referred to in subsection (a)(2)” for “major allies of the United States and other friendly foreign countries”.

Subsec. (h). Pub. L. 107–107, § 1212(a)(6), substituted “member nations of the North Atlantic Treaty Organization, major non-NATO allies, and other friendly foreign countries” for “major allies of the United States”.

Subsec. (i)(1). Pub. L. 107–107, § 1212(a)(7)(A), substituted “countries and organizations referred to in subsection (a)(2)” for “major allies of the United States or NATO organizations”.

Subsec. (i)(2) to (4). Pub. L. 107–107, § 1212(a)(7)(B), (C), redesignated pars. (3) and (4) as (2) and (3), respectively, and struck out former par. (2) which read as follows: “The term ‘major ally of the United States’ means—

“(A) a member nation of the North Atlantic Treaty Organization (other than the United States); or

“(B) a major non-NATO ally.”

1999—Subsec. (b)(2). Pub. L. 106–65, § 911(a)(1), substituted “Under Secretary of Defense for Acquisition, Technology, and Logistics” for “Under Secretary of Defense for Acquisition and Technology”.

Subsec. (f)(2). Pub. L. 106–65, § 1067(1), substituted “and the Committee on Armed Services” for “and the Committee on National Security”.

1996—Subsec. (f)(2). Pub. L. 104–106 substituted “submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on National Security and the Committee on International Relations of the House of Representatives” for “submit to the Committees on Armed Services and Foreign Relations of the Senate and to the Committees on Armed Services and Foreign Affairs of the House of Representatives”.

1994—Subsecs. (a), (e)(2)(A) to (D), (i)(1). Pub. L. 103–337, § 1301(a), inserted “or NATO organizations” after “major allies of the United States”.

Subsec. (i)(4). Pub. L. 103–337, § 1301(b), added par. (4).

1993—Subsecs. (b)(2), (e)(1)(A), (2)(B), (f)(1). Pub. L. 103–160 substituted “Under Secretary of Defense for Ac-

quisition and Technology” for “Under Secretary of Defense for Acquisition”.

1992—Subsec. (c). Pub. L. 102–484 inserted “(including the costs of claims)” after “the project”.

1991—Subsec. (g)(1)(A), (4)(A). Pub. L. 102–190 inserted “and other friendly foreign countries” after “major allies of the United States”.

1990—Subsec. (g)(4). Pub. L. 101–510 amended introductory provisions generally, substituting “submit to Congress each year, not later than March 1, a report containing” for “include in the annual report to Congress required by section 2457(d) of this title”.

CHANGE OF NAME

Committee on International Relations of House of Representatives changed to Committee on Foreign Affairs of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by Pub. L. 111–383 effective Jan. 1, 2011, see section 901(p) of Pub. L. 111–383, set out as a note under section 131 of this title.

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–314, div. A, title X, § 1062(f), Dec. 2, 2002, 116 Stat. 2651, provided that the amendment made by section 1062(f)(2) is effective as of Dec. 28, 2001, and as if included in Pub. L. 107–107 as enacted.

TERMINATION DATE OF 1992 AMENDMENT

Section 843(c) of Pub. L. 102–484, as amended by Pub. L. 103–35, title II, § 202(a)(7), May 31, 1993, 107 Stat. 101, provided that, effective Oct. 23, 1994, subsections (a) and (b) of section 843 of Pub. L. 102–484 (amending sections 2350a and 2350d of this title and section 2767 of Title 22, Foreign Relations and Intercourse) were to cease to be in effect, and section 27(c) of the Arms Export Control Act (22 U.S.C. 2767(c)) and sections 2350a(c) and 2350d(c) of this title were to read as if such subsections had not been enacted, prior to repeal by Pub. L. 103–337, div. A, title XIII, § 1318, Oct. 5, 1994, 108 Stat. 2902.

§ 2350b. Cooperative projects under Arms Export Control Act: acquisition of defense equipment

(a)(1) If the President delegates to the Secretary of Defense the authority to carry out section 27(d) of the Arms Export Control Act (22 U.S.C. 2767(d)), relating to cooperative projects (as defined in such section), the Secretary may utilize his authority under this title in carrying out contracts or obligations incurred under such section.

(2) Except as provided in subsection (c), chapter 137 of this title shall apply to such contracts (referred to in paragraph (1)) entered into by the Secretary of Defense. Except to the extent waived under subsection (c) or some other provision of law, all other provisions of law relating to procurement, if otherwise applicable, shall apply to such contracts entered into by the Secretary of Defense.

(b) When contracting or incurring obligations under section 27(d) of the Arms Export Control Act for cooperative projects, the Secretary of Defense may require subcontracts to be awarded to particular subcontractors in furtherance of the cooperative project.

(c)(1) Subject to paragraph (2), when entering into contracts or incurring obligations under section 27(d) of the Arms Export Control Act outside the United States, the Secretary of Defense may waive with respect to any such con-