STRATEGIC INSIGHTS

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North Korea and the ANZUS Treaty

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Introduction

The Security Treaty between Australia, New Zealand, and the United States of America—universally known as the ANZUS Treaty—was signed in September 1951 and came into force in April 1952. This Strategic Insight traces the origins of the treaty, examines its substantive content, and considers whether and how it might apply in the event of a conflict between the US and North Korea.

Historical background

Security in the Pacific has long been of concern to Australia. Even before Federation, the colony of Queensland attempted to annex eastern New Guinea to prevent Germany from adding it to its growing collection of Southwest Pacific territories. Australia was especially wary of Japan, whose rising naval power and expansionism was illustrated by its invasion of China in 1894, victory over Russia in 1905 and annexation of Korea in 1910. Japan had been one of the most vocal critics of the White Australia Policy, and despite Australia deriving some reassurance from the Anglo-Japanese Alliance (1902–1923) and Japan's participation in World War I on the side of the Allies, many assumed that we might one day have to fight Japan in defence of our immigration policy.

North Korea victory day parade, Stefan Krasowski/flickr.

In the 1920s, Japan greatly increased its naval expenditure and continued its territorial acquisitions in Asia, while Britain informed its dominions that it could no longer afford to maintain a fleet necessary for the safety of the Empire. An early Australian proposal to discuss Pacific matters fell on deaf ears, in part because of deteriorating relations between Japan and the US, but the US did convene the Washington Conference in late 1921; this produced treaties on the reduction of naval armaments, limited respect for the territorial integrity of China, and respect for insular possessions in the Pacific. Through the disarmament treaty, Japan was effectively guaranteed naval superiority in the Pacific, and Australia lost its only battleship. With the US taking an isolationist stance, Australia was again acutely aware of its vulnerability.

The events of the 1930s exacerbated our insecurity. Not long after its invasion of Manchuria, Japan denounced the Washington naval treaty and began to fortify the Pacific islands it administered under the League of Nations mandate system. With no illusions that the League (or Great Britain) could preserve peace in the Pacific, Australia proposed a regional non-aggression agreement—a 'Pacific pact'—in 1937. We received lukewarm support from Britain and the other dominions, but the mounting distrust between the three major Pacific powers (the US, the USSR and Japan) ensured that the idea was doomed. Japan renewed its aggression in China, and our long-held fears were realised when Japan entered World War II on the side of the Axis powers in 1941.

Politicians in Australia and New Zealand continued to float proposals for some kind of Pacific security arrangement at various times during and immediately after the war.[1] HV Evatt, as the Australian External Affairs Minister, was particularly involved in negotiations with the US covering matters such as the reciprocal use of military bases in Manus (in the Australian Territory of New Guinea) and in US possessions in the Pacific. The US wouldn't agree to those arrangements for a host of reasons, including the potential duplication of the existing United Nations system, US reluctance to assume additional responsibilities in the region, and lack of any feeling of necessity on the US's part, given the friendly relations between the two countries. In 1948, in the light of the breakdown of the UN security system— the Security Council being paralysed by the use of the veto—the US appeared to embrace the idea of regional security arrangements. But this was directed primarily at creating NATO, and didn't alter the US aversion to a Pacific arrangement. In 1950, however, that attitude started to change in response to the apparent rise of communism, evidenced by the Sino-Soviet treaty of friendship and the communist victory in China, and the outbreak of the Korean War—and Australia's full commitment to that war as part of the US-led UN forces.

Meanwhile, Australia and the US were in disagreement on the terms of the peace settlement with Japan. The US saw Japan as a potential bulwark against communist expansion and therefore favoured a 'soft' peace treaty, enabling Japan to recover economically as quickly as possible. Australia's priority, on the other hand, was to prevent any recurrence of Japanese imperialism and militarism. Canberra felt that this would be more effectively guaranteed through fundamental social changes and the establishment of full democracy—not, as the US wanted, a non-restrictive peace treaty. A peace settlement that permitted Japan to rearm made it all the more important for Australia that there be a security arrangement for the Pacific, and in 1950 the two issues—the peace terms and a Pacific pact—began to converge in discussions between the US and Australia. Negotiations focused on a tripartite rather than a wider security agreement, and ultimately in 1951 the ANZUS Treaty was concluded. It was signed within days of a similar treaty between the US and the Philippines, and a security treaty between the US and Japan, as well as the multilateral peace treaty with Japan.

The ANZUS treaty provisions

The obligation to act

The ANZUS Treaty was to a large degree based on the 1949 North Atlantic Treaty, which was the basis for NATO, but there are some notable differences. Most relevantly here, the NATO treaty contains a clearer collective defence obligation in Article 5, declaring an attack on one to be an attack on all, and requiring parties to assist the victim state:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them … will assist the Party or Parties so attacked by taking … such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

The ANZUS Treaty contains less specific language in Article IV:

> Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes …

The change of language was deliberate: the US Congress had been reluctant to ratify the NATO agreement because it appeared to bypass the constitutionally exclusive right of Congress to declare war. To avoid a repetition of those difficulties, less specific language was used in the ANZUS Treaty, and an express reference to internal constitutional processes was added. Essentially the same language was used in the mutual defence treaties that the US concluded with the Philippines in 1951 (Article IV), Korea in 1953 (Article III), and the Republic of China in 1954 (Article V), as well as in the 1954 Southeast Asia Collective Defense Treaty (Article IV), which was the basis for the Southeast Asia Treaty Organization (SEATO).

While Article IV of the ANZUS Treaty may seem to impose a weaker obligation than Article 5 of the NATO treaty, on closer examination the substance of the two provisions is virtually identical. The rules of treaty interpretation are well settled in customary international law, and are codified in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Treaty provisions must be interpreted in good faith, in accordance with their ordinary meaning in their context and in the light of the treaty's object and purpose. Thus we consider primarily the ordinary meaning of the words, taken in context.

Under Article 5 of the NATO treaty, if there's an armed attack on one NATO member, the other members are obliged to assist the victim state. But the obligation to assist is qualified: each party is required to take 'such action *as it deems necessary* … to restore and maintain the security of the North Atlantic area' (emphasis added). So it's expressly left to each party to determine subjectively whether any, and if so what, action is necessary in the circumstances. There's no hard, unqualified obligation to use force in defence of an attacked party, or indeed to take any action at all.

The ANZUS Treaty contains less direct language: the parties 'recognise' the danger of an armed attack on any of them, and each 'declares' that it 'would act' to meet the danger. The word 'declares' may sound less affirmative than 'agrees' (as in 'the Parties agree to …'), and the use of the conditional 'would' is softer than 'will'. However, looking at the ordinary meaning of the words and reading the phrase as a whole, it is difficult to interpret 'declares that it would act' as anything other than a clear undertaking by the parties, binding in international law in accordance with the principle of *pacta sunt servanda*—agreements are binding.

The real question here is: what is each party undertaking to do? Under Article IV, each party promises that it 'would act to meet the common danger …' There's no qualification or description of the kind of action contemplated, and in the absence of any such indication it's implicitly left to each party to determine what action it will take. Although the use of force isn't mentioned, it's evidently contemplated as a possibility, as Article IV goes on to stipulate that:

> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations.

This (and the identical wording in NATO Article 5) is clearly directed at the requirement in Article 51 of the UN Charter that any action taken in self-defence must be immediately reported to the Security Council.

The effect of NATO Article 5 is therefore that, if there's an armed attack against one of the parties, each of the others must decide what, if any, action to take to assist the victim state, which can include deciding to take no action at all. The effect of ANZUS Article IV is that, if there's an armed attack against one of the parties, the others must take action, the exact nature of such action being a matter for the state concerned. Put more bluntly, it could be said that under the NATO provision the parties *may* act, while under the ANZUS provision they *must* act, meaning that the ANZUS obligation is actually higher than that its NATO counterpart. Both, however, leave it to the individual states to determine what action to take, ranging from no action (NATO) or minimal action (ANZUS), through to armed force.

The geographical scope

The obligation to act in response to an armed attack arises only if the attack is 'in the Pacific Area'—a term that's not defined. It's therefore for each party to assess whether an attack falls within the scope of Article IV, although clearly an attack in, say, Europe couldn't be regarded as covered by Article IV. Some guidance is given in Article V, which specifies that Article IV applies to an armed attack on 'the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific'. Thus the treaty covers at least an armed attack on mainland Australia, New Zealand or the US, and islands such as Guam.

Other provisions

The ANZUS Treaty is very short and concise, with no elaborate provisions. In addition to the core obligations mentioned above, it establishes a council of the parties' foreign ministers to consider matters concerning the implementation of the treaty and able to meet at any time. The council has generally met at least annually and is now known as AUSMIN. In addition, there's a general commitment in Article III for the parties to consult together 'whenever … the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific'.

Application of the treaty

As is well known, the ANZUS Treaty has been formally invoked only once, following the terrorist attacks in the US in September 2001 (this is discussed in more detail below). There have been other occasions, however, when the potential application of the treaty was, or should have been, considered.

Indo-China, 1954

One of the earliest such occasions was the crisis in Indo-China in 1954. After eight years of fighting, colonial France was facing defeat by communist forces at Dien Bien Phu and sought international assistance; the US was minded to provide that assistance in order to stem the anticipated spread of communism throughout Southeast Asia. According to contemporary newspaper reports, the US 'invoked' the ANZUS Treaty in May 1954 when it called a meeting of the ANZUS Council under Article III, on the basis that the situation threatened the parties' territorial integrity, political independence and security.[2] However, there was no reference to Article IV; nor could there be, since there had been no armed attack on any of the parties. The US proposed joint military action with France, Britain, Australia and New Zealand, but the proposal was rejected by all except France: military action would compromise the political talks seeking a peaceful settlement of the Indo-China crisis then proceeding in Geneva, it would guarantee intervention by Beijing, it wouldn't have the support of the UN (particularly Asian countries), and would be futile anyway. A direct outcome of the crisis was the creation in 1954 of SEATO—the Southeast Asia Treaty Organization—to fill the perceived gap in Pacific security arrangements.[3] The SEATO treaty contained a provision similar to Article IV of ANZUS, but with slight variations and more detail. If there's an armed attack, each party 'agrees that it will … act' to meet the common danger; further, if the territorial integrity, sovereignty or political independence of any party is threatened, all parties must consult immediately 'to agree on the measures which should be taken for the common defence' (Article IV). In its geographical coverage, the treaty excluded all areas north of 21 degrees 30 minutes north, thereby ensuring the exclusion of Formosa (Taiwan) and Korea.

Formosa, 1954–55, 1958–59

After the 1949 retreat of the defeated Chinese nationalists to the island of Formosa (Taiwan), military clashes between the two sides continued sporadically. In 1954, the US announced that its 7th Fleet had been instructed to prevent the invasion of Formosa. This gave rise to speculation about Australia's obligations: if China attacked US ships or forces, that would trigger Article IV of the ANZUS Treaty and require Australia and New Zealand to take appropriate action. The situation was complicated by the nationalists' possession of the 'offshore islands'—a string of islands close to the mainland coast, which most states regarded as belonging unquestionably to mainland China. There was clearly no appetite in Australia for involvement in military action over Formosa generally, because of the US's unilateral undertakings to it, and still less over the offshore islands. This became even clearer after the conclusion of a separate US – Republic of China treaty at the end of 1954, in terms similar to ANZUS and the other treaties in the growing web of US mutual defence treaties in the Pacific. Fortunately, each crisis involving Formosa eased before reaching the point of testing the ANZUS Treaty.

West New Guinea, 1957–1962

The potential relevance of the ANZUS Treaty was raised in connection with Indonesia's independence conflict with the Netherlands. Australia supported Indonesia against the Netherlands generally, but not in relation to West New Guinea. Indonesian control of the western half of the island of New Guinea was opposed by Australia because of its proximity to the Australian territories of Papua and New Guinea. It was feared that Indonesia would eventually lay claim to those possessions, that communism would be a greater risk under Indonesian control, and (as a later consideration) that the people of West New Guinea had the right to self-determination. In 1962, for example, the ANZUS Council:

> 'called attention' to the fact that treaty obligations applied in the event of armed attack not only on the metropolitan territory of any of the parties but also on any island territory under its jurisdiction—presumably a warning to Soekarno that the methods used against West New Guinea could not be used against the eastern portion of the island.[4]

However, Australia subsequently made it clear that it had no military intentions in West New Guinea, and thus the question of any ANZUS obligations did not arise.

The Indonesian–Malaysian confrontation, 1963–1966

In 1961, discussion began on the formation of a federation—Malaysia—comprising Malaya and the British colonies of Singapore, North Borneo, Brunei and Sarawak. Indonesia vehemently opposed this, deriding it as a British neo-colonial project, and mounted an increasingly violent political and military campaign to prevent it, including by fuelling rebellions in the Borneo territories. The new state was created in 1963, without Brunei, and Indonesian aggression increased to include armed incursions. Britain declared that it would defend the independence of Malaysia and deployed significant forces; Australia followed suit, albeit with a far smaller contribution. While this was very much a Commonwealth response, the Australian Government publicly observed in 1964 that Malaysia came within the ANZUS purview; the US, on the other hand, studiously avoided any commitment.

Vietnam, 1962–1975

The relevance of ANZUS obligations was also raised in relation to Australia's long involvement in the Vietnam War. Successive Australian governments stressed that our contribution was in response to a request from South Vietnam, and that we had a direct interest in halting the spread of communism through Southeast Asia. There was no invocation of Article IV; but there was no need, since, as many saw it, 'Australian participation in Vietnam was her *quid* for the American *quo*: a continuing American interest in the ANZUS treaty as essential to Australian security.'[5]

11 September 2001

The first and, so far, only time that the ANZUS Treaty has been formally invoked was of course on 14 September 2001, three days after the terrorist attacks in the US that killed more than 3,000 people. John Howard, then Prime Minister, was on an official visit to the US at the time, and also happened to have a warm personal relationship with the then US President, George W Bush. Howard announced that:

> The Government has decided, in consultation with the United States, that Article IV of the ANZUS Treaty applies to the terrorist attacks on the United States. The decision is based on our belief that the attacks have been initiated and coordinated from outside the United States.
>
> This action has been taken to underline the gravity of the situation and to demonstrate our steadfast commitment to work with the United States in combating international terrorism.

Much was made, in the government's statements on the issue, of the attack having been on the metropolitan territory of the US, within the meaning of Article V of the treaty. A parliamentary motion confirming the invocation of the treaty was passed unanimously a few days later, and within a month Australia mounted Operation Slipper in support of the US's action against al-Qaeda and the Taliban in Afghanistan.

New Zealand and ANZUS

New Zealand actively opposed nuclear testing in the Pacific from the 1960s onwards, including by sending naval vessels to the French atmospheric testing grounds of Mururoa Atoll in the 1970s. The anti-nuclear sentiment extended to visiting nuclear-powered US warships in the early 1980s, particularly because it was feared they were also nuclear armed (US policy was to neither confirm nor deny this). The Labour Party under David Lange was elected in 1984 on an anti-nuclear platform; the country was declared nuclear-free, and access was denied to visiting ships unless the government was satisfied that the vessels weren't nuclear powered or armed. The US response was sharp, and in early 1985 it announced that it would no longer maintain its security guarantee to New Zealand. New Zealand's resolve was hardened, however, by the 1985 sinking of the *Rainbow Warrior* in Auckland harbour by French Government agents: the ship had been about to resume its protest voyages against French nuclear testing in the Pacific. Neither Great Britain nor the US condemned the French action, which was compounded by subsequent French Government conduct in not only failing to punish the agents concerned, as had been agreed in an arbitration with New Zealand, but promoting and decorating them.

In 1987, the New Zealand policy was formalised by the *New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987*, which remains in force. For over 30 years, there were no visits to New Zealand by US warships; the first in 33 years was in 2016 as part of the Royal New Zealand Navy's 75th anniversary celebrations. While the US maintained its policy of neither confirming nor denying the nuclear status of its vessels, the New Zealand Government was able to satisfy itself by other means that the vessel was non-nuclear.

Thus, since the 1980s the ANZUS treaty has remained in place, but its military commitments between the US and New Zealand have been suspended. There are currently, therefore, three sets of bilateral obligations: one set between Australia and New Zealand, one between Australia and the US, and another between the US and New Zealand.

ANZUS application to North Korea

The current tensions and mutual threats between the US and North Korea over the latter's nuclear program have direct implications for Australia under the ANZUS Treaty.

'Armed attack'

If North Korea were to make the first move and attack the US, then Article IV of the treaty would clearly be applicable, provided the attack qualified as an 'armed attack'. This term, and the treaty as a whole, must be interpreted in accordance with the parties' obligations under the UN Charter; this would be the case anyway, because of Article 103 of the charter (which says that a UN member's charter obligations prevail over any inconsistent treaty obligations), but is also confirmed by express references to the UN Charter in the preamble and Articles I and VI of the treaty. Most relevant are Article 2(4) of the charter, which prohibits the use of force, and Article 51, which recognises the right of self-defence if a state is the victim of an 'armed attack'.

The International Court of Justice has affirmed in several cases that an armed attack is more than the mere use of force: it must be of sufficient scale and effects to amount to the 'most grave' use of force. There's inevitable uncertainty as to whether certain kinds of action, such as cyberattacks, would amount to an armed attack for this purpose; and, despite the 9/11 attacks being apparently regarded as 'armed attacks', there's still no international consensus on whether attacks by non-state actors can qualify as armed attacks for the purposes of self-defence. In the North Korean context, however, a missile attack would almost certainly be characterised as an armed attack—a nuclear attack obviously so.

The geographical scope

To engage Article IV, the attack must be on a party's 'metropolitan territory … the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific' (Article V). This covers, first, the whole of the US mainland. Although the possibility of an attack on, for example, the eastern seaboard of the US would scarcely have been uppermost in the parties' minds when the treaty was being negotiated, the wording of the treaty is clear, and its invocation after the 9/11 attacks on New York and Washington DC confirms this. The Pacific island territories under US jurisdiction include Guam, the Northern Mariana Islands and American Samoa, along with many uninhabited reefs, atolls and islands. Its former possessions of Micronesia, the Marshall Islands and Palau are now independent states, but the US guarantees their defence under the Compact of Free Association, which grants the US extensive rights. While this doesn't amount to full 'jurisdiction' over the islands, whether the US or Australia would nevertheless regard the islands as also falling under the ANZUS umbrella is a nice point. Any US forces stationed there (there's a major US facility in the Marshall Islands), and indeed anywhere in the 'Pacific area', are explicitly covered by Article V of the ANZUS Treaty.

Article IV

In the event of an armed attack, Australia would be under a legal obligation to act under the treaty. As discussed above, the nature of any action would be a matter for Australia to determine, and need not involve military support. In August 2017, Prime Minister Malcolm Turnbull caused a media stir by pledging that, if there were an attack on the US by North Korea, Australia would invoke the ANZUS Treaty and 'come to the aid' of the US, but he refrained from specifying what form that aid would take.

A pre-emptive strike?

More problematic is the effect on ANZUS of a pre-emptive strike on North Korea by the US, as has been obliquely threatened from time to time. If the US were to launch such a strike, and North Korea were to retaliate by attacking the US or its facilities in the Pacific, would the ANZUS Treaty apply? Clearly, the situation would constitute a threat to 'the territorial integrity, political independence or security of any of the Parties … in the Pacific' under Article III, requiring the parties to consult together. But it is at least questionable whether North Korea's defensive response would be an 'armed attack' under Article IV. North Korea would claim that it was acting in lawful self-defence against an unlawful act of aggression—an armed attack—by the US.

The US could try to argue that it was acting in pre-emptive self-defence to forestall a potential future nuclear strike by North Korea. Unfortunately for the US, pre-emptive self-defence is almost universally condemned as contrary to international law, as it isn't one of the two recognised exceptions to the fundamental prohibition on the use of force, those exceptions being lawful self-defence and action authorised by the UN Security Council. By 'lawful' self-defence is meant action taken that's (a) in response to an armed attack, and (b) both necessary and proportionate in the circumstances. One of the main arguments against pre-emptive self-defence, apart from its wholly subjective character and propensity to escalate a conflict, is that by definition there hasn't yet been an armed attack—indeed, there may never be an attack—and it's therefore impossible to judge what action is necessary and proportionate to respond to the attack.

North Korea, on the other hand, would have some justification in claiming lawful self-defence: it would have been subjected to an armed attack. Whether it could also show that the response was both necessary and proportionate would depend on the circumstances and the nature of the response. A nuclear strike in response to a limited use of conventional weapons would almost certainly be disproportionate; a single missile, probably not. If the North Korean response did satisfy those requirements, then its action would be legally characterised as lawful self-defence and could not constitute an armed attack for the purposes of the ANZUS Treaty. Australia would therefore have not only no legal obligation, but no legal right, to assist the US in a further military response.

Conversely, if the North Korean response didn't satisfy the requirements of necessity and proportionality, and its use of force were sufficiently grave, then its action would itself constitute an armed attack and Article IV would be applicable. If its use of force were not sufficiently grave, North Korea would be guilty of the illegal use of force, but the US (and therefore Australia, under Article IV) would have no right to respond to it in self-defence because there would have been no 'armed attack'.

Conclusion

In short, Article IV of the ANZUS Treaty will be enlivened if North Korea uses sufficient force against US territory (whether on the mainland or in the Pacific), or against US troops, vessels or aircraft in the Pacific. It won't be enlivened if that use of force is either in lawful self-defence against an armed attack by the US or of insufficient gravity to amount to an 'armed attack'.

Even if Article IV were applicable, it might not follow that it must be invoked. There's been only one precedent for its formal invocation in nearly 70 years, and several occasions when it perhaps should have been invoked (requiring action by the US) but was not, and those occasions didn't lead to public rebuke or complaint. However, the Australian Government has recently made it clear that the article would be invoked if North Korea were to attack the US.

The key question is what this means or requires. For all the drama and media speculation about ANZUS 'commitments', the only legal obligation under Article IV is to 'act': Australia could satisfy this obligation in a range of ways, from informal representations through to the full-blown use of force. What's clear is that, if force is used, the parameters of self-defence dictate that the force used be no more than is necessary and proportionate in the circumstances. Quite what that might entail in a nuclear conflict is impossible to assess in advance. The International Court of Justice has said that even the use of a nuclear weapon could be proportionate in extreme circumstances in which the very existence of the state using it were in jeopardy. Let's hope that we don't get to the point where we have to determine whether that could be said of the US—or Australia.

Notes

1 For a detailed account of the origins of ANZUS, see, for example, JG Starke, *The ANZUS Treaty alliance*, Melbourne University Press, 1965, and W David McIntyre, *Background to the ANZUS pact*, St Martin's Press / Canterbury University Press, 1995.

2 'US invokes ANZUS Treaty', *Sydney Morning Herald*, 4 May 1954, 1.

3 Although different proposals had contemplated various potential members, ultimately the parties to the SEATO pact were Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the UK and the US.

4 TB Millar, 'Australian defence, 1945–1965', in G Greenwood, N Harper (eds), *Australia in world affairs 1961–1965*, FW Cheshire, 1968, 282.

5 Norman Harper, 'Australia and the United States', in G Greenwood, N Harper (eds), *Australia in world affairs 1966–1970*, FW Cheshire, 1974, 290.

Acronyms and abbreviations

NATO North Atlantic Treaty Organization
SEATO Southeast Asia Treaty Organization

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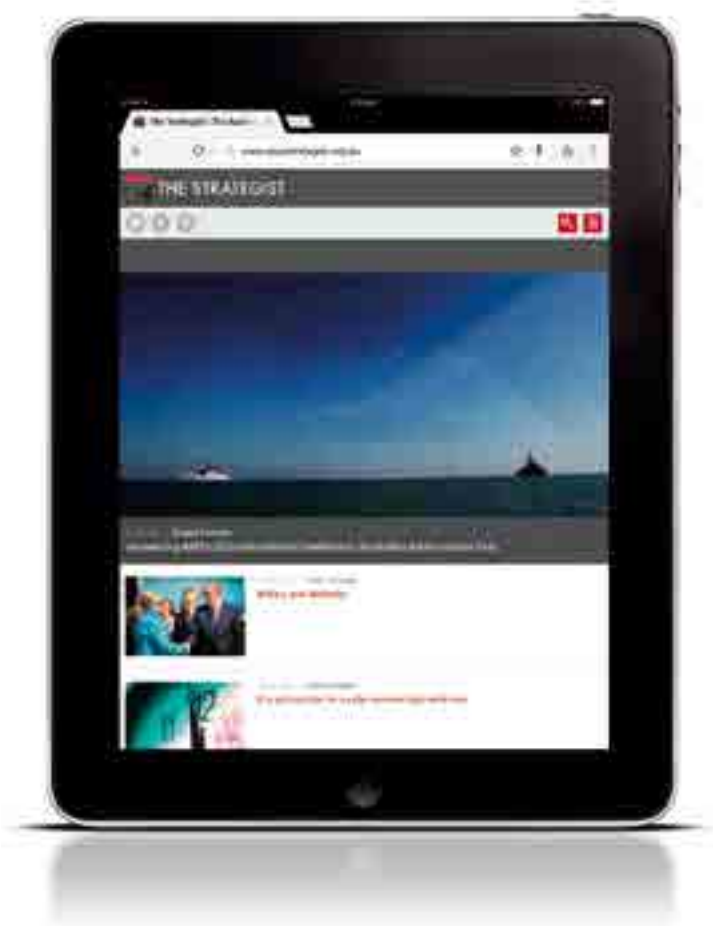

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