

National Interest Analysis [2024] ATNIA 14

with attachment on consultation

Agreement among the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for Cooperation Related to Naval Nuclear Propulsion

(Washington, 5 August 2024)

[2024] ATNIA 14

[2024] ATNIF 20

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement among the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for Cooperation Related to Naval Nuclear Propulsion* (“Agreement”). For the Agreement to enter into force, the Parties must notify each other of the completion of their necessary domestic procedures through an exchange of notes. The Agreement will enter into force between all Parties on the date of the last note in that exchange of notes (Article XIII(A)).

2. Australia will send its note as soon as practicable after the completion of domestic processes.

Overview and national interest summary

3. The purpose of the Agreement is to establish a legally-binding framework to facilitate the communication and exchange of naval nuclear propulsion information between and among Australia, the United Kingdom (UK), and the United States of America (US), and the transfer of nuclear material and equipment from the UK and the US to Australia for conventionally armed, nuclear-powered submarines, under the enhanced trilateral security partnership ‘AUKUS’.

4. On 15 September 2021, the leaders of Australia, the UK, and the US announced a new enhanced trilateral security partnership between Australia, the UK, and the US — called AUKUS. The first initiative under AUKUS (AUKUS Pillar I) was to support Australia’s acquisition of conventionally armed, nuclear-powered submarines for operation by the Royal Australian Navy. On 14 March 2023, AUKUS leaders announced the pathway to deliver a nuclear-powered submarine capability to Australia (“Optimal Pathway”).

5. Submarines are an essential part of Australia’s naval capability, providing a strategic advantage in terms of surveillance and protection of our maritime approaches. Conventionally armed, nuclear-powered submarines, when compared to conventional submarines, maintain superior characteristics of stealth, speed, manoeuvrability, survivability, and almost limitless endurance. Nuclear-powered submarines can operate with a lower risk of detection and deter actions against Australia’s interests. The Agreement is critical to achieving the Optimal Pathway.

6. The Agreement contributes to Australia’s national interest by allowing Australia to access critical naval nuclear propulsion information, nuclear material and equipment from the UK and the US not otherwise available to Australia. All naval nuclear propulsion reactors for

Australia's nuclear-powered submarine program will be provided by the UK or the US. This Agreement will provide the UK and the US the legal authority to enable the transfer of naval nuclear propulsion reactors and related items to Australia.

7. Upon entry into force, the Agreement will supersede the *Agreement between the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for the Exchange of Naval Nuclear Propulsion Information* ("ENNPIA") [2022] ATS 4. The ENNPIA currently remains in force, having automatically been extended on 31 December 2023 and on 30 June 2024, for an additional period of six months on both occasions (the first two of four automatic extensions of six months up to 31 December 2025).

8. The ENNPIA facilitates only the communication and exchange of naval nuclear propulsion information. The Agreement is required to support the transfer of material and equipment related to naval nuclear propulsion, as well as the continued exchange of naval nuclear propulsion information. Without the Agreement, Australia would not be able to receive naval nuclear propulsion information from either the UK or the US beyond 31 December 2025, nor receive the nuclear material or equipment from either the UK or the US that is required to build, operate, sustain and, in time, dispose of nuclear-powered submarines.

9. The Agreement supports Australia's commitment to the highest non-proliferation standards by setting several conditions that underline this commitment, including reinforcing the role of the International Atomic Energy Agency (IAEA) in meeting its technical objectives throughout the lifecycle of the naval nuclear propulsion program.

Reasons for Australia to take the proposed treaty action

10. The Agreement is critical to meeting Australia's national interest in achieving the Optimal Pathway for acquiring nuclear-powered submarines for the Royal Australian Navy. The Agreement will facilitate the transfer of nuclear information, material and equipment which is critical to Australia's nuclear-powered submarine capability. Specifically, the Agreement will enable the US to transfer at least three (and up to five) Virginia class submarines to Australia, as well as allow for the UK to transfer to Australia the naval nuclear propulsion plants required for use in Australia's SSN-AUKUS conventionally armed, nuclear powered submarines.

11. The Agreement also constitutes an enabling mechanism for the purposes of US law, and is a further demonstration of AUKUS partners' commitment to implementation of the Optimal Pathway. The disclosure by the US of naval nuclear propulsion information, and transfer of nuclear material and equipment, to foreign nations is restricted under US domestic law. The US can only disclose such information, and transfer such material and equipment to foreign nations, including Australia, in instances where an agreement, such as this Agreement, is in force. The UK is equally restricted in its ability to disclose such information, and transfer such material and equipment, to Australia due to its treaty obligations under the 1958 US-UK *Agreement for Co-operation on the Uses of Atomic Energy for Mutual Defense Purposes* ("US-UK MDA"). The Agreement will therefore provide the UK and the US with the necessary legal authority to share naval nuclear propulsion information, nuclear material and equipment, with Australia. The Agreement will also enable Australia to share necessary information with authorised Australian persons, both within government and industry, subject to the obligations set out in the Agreement.

12. The Agreement reinforces the commitment made by AUKUS leaders to setting the highest non-proliferation standard in Australia's acquisition of conventionally armed, nuclear-powered submarines. The Agreement will strengthen Australia's non-proliferation approach and is consistent with Australia's non-proliferation obligations, including under the *Treaty on the Non-Proliferation of Nuclear Weapons* ("NPT"), the South Pacific Nuclear Free Zone Treaty ("Treaty of Rarotonga") and our safeguards agreements with the IAEA. Further detail relating to non-proliferation and the NPT can be found at paragraphs 26-31 below.

13. Given the sensitivity of the nuclear technology, the Agreement also builds in robust security requirements.

Obligations

Scope

14. The Agreement facilitates the communication and exchange of naval nuclear propulsion information, and the transfer of nuclear material and equipment relating to naval nuclear propulsion. Such information may be communicated or exchanged, and nuclear material and equipment relating to conventionally armed, nuclear-powered submarines may be transferred, if the Originating Party (defined in the Agreement as the Party that originally communicated, exchanged or transferred information, material or equipment, pursuant to the Agreement, the ENNPIA or the US-UK MDA, as applicable) determines that such cooperation will promote, and will not constitute an unreasonable risk to its defence and security (Article I).

15. Naval nuclear propulsion information and other related technical data and technology necessary for the research, development or design of naval nuclear propulsion plants may be communicated or exchanged between or among the Parties (Article III). The UK or the US may transfer to Australia naval nuclear propulsion plants of conventionally armed, nuclear-powered submarines, including the nuclear material needed for such plants, and other related equipment (Article IV(A) and (B)).

16. Annex B to the Agreement details the nuclear material and equipment that may be transferred. Annex B provides that the nuclear material is to be transferred in complete, welded power units (Section I). It also details the equipment that may be transferred, including the training, services and program support associated with equipment provided under the Agreement (Section II).

17. Cooperation under the Agreement must be carried out by each Party in accordance with that Party's applicable laws and regulations (Article VI(A)). The Agreement also recognises Australia's international obligations under the NPT, the Treaty of Rarotonga, the *Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (CSA), and the *Protocol Additional to the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (AP) (Preamble).

Protection of Naval Nuclear Propulsion Information, Nuclear Material, and Equipment, and the Security Annex

18. Noting the sensitivity of naval nuclear propulsion information, the associated nuclear material and equipment, and the restrictions on use and dissemination of nuclear information, material and equipment under US law, the Agreement governs the use, dissemination, handling and protection of such information, material and equipment, and provides for the maintenance of mutually determined information security policies (Articles VIII, IX and X).

19. Each Party commits to maintaining security standards for protecting information, nuclear material and equipment communicated, exchanged or transferred under the Agreement that are no less restrictive than those set forth in the Agreement. Information communicated or exchanged pursuant to the Agreement is to be accorded at least the same level of protection as that afforded by the Originating Party (Article VIII(A) and (B)).

20. The specific requirements regarding the administrative and security controls applicable to accessing and communicating this information, including requirements on physical security, personnel security, and control of information, are further detailed in Annex A to the Agreement. Annex A also establishes an authority that is responsible for granting individual access to naval nuclear propulsion information and endorsing the nature and quality of information security controls.

21. The Agreement obligates each Party not to communicate, exchange or transfer information, nuclear material or equipment received from another Party to any unauthorised persons or beyond the jurisdiction or control of the Parties. However, where the Parties agree in writing, such information, material or equipment may be communicated, exchanged or transferred to another nation, foreign or international entity, or individual who is not a national of the Parties (Article IX).

Liability, Indemnity and Warranty

22. The Agreement requires Australia to indemnify the UK and the US against any liability, loss, costs, damage, or injury (including third party claims) arising out of, related to, or resulting from nuclear risks (risks attributable to the radioactive, toxic, explosive or other hazardous properties of materials) connected with the design, manufacture, assembly, transfer, or utilisation of any material or equipment, including naval nuclear propulsion plants, parts thereof, or spare parts transferred or to be transferred pursuant to the Agreement (Article IV(E)).

23. The indemnity shall not apply in relation to a conventionally armed, nuclear-powered submarine that has been in service with the US Navy until such time as it is transferred to Australia. The indemnity shall not apply to the extent that the UK or the US have received payment for the same liabilities from a third party (Article IV(F)).

24. The Agreement provides that arrangements relating to the management of nuclear risks to be indemnified by Australia, including measures to provide appropriate visibility of activities, may be mutually determined by the Parties. The Agreement further provides that other risks that are not nuclear risks may be addressed by the applicable Parties in separate agreements or arrangements (Article IV(G)).

25. The Agreement provides that the application or use of any information, nuclear material or equipment communicated, exchanged or transferred shall be the responsibility of the Recipient Party (defined in the Agreement as the Party that receives the communication, exchange or transfer of information, material, or equipment, as applicable, pursuant to the Agreement), and the other Parties do not provide any indemnity, and do not warrant the accuracy or completeness of the information, nor the suitability or completeness of such information, nuclear material or equipment for any particular use or application (Article V).

Nuclear Non-proliferation and Cooperation Related to the Application of Australia-IAEA Safeguards Agreements

26. The Agreement recalls AUKUS leaders' 15 September 2021 commitment to setting the highest non-proliferation standard in Australia's acquisition of conventionally armed, nuclear-powered submarines. In that regard, the Agreement prohibits the use of naval nuclear propulsion information, nuclear material and equipment communicated, exchanged or transferred pursuant to the Agreement for any nuclear explosive device, or for research on or development of any nuclear explosive device. It acknowledges that all Australian nuclear-powered submarines will be conventionally armed (Preamble, Article VI(C) and (K)).

27. The Agreement obligates Australia to only use nuclear material transferred under the Agreement for naval nuclear propulsion, to not enrich or reprocess any nuclear material received, and to be responsible for the management, disposition, storage and disposal of any spent nuclear fuel and radioactive waste resulting from naval nuclear propulsion plants that are transferred (Articles VI and IV(D)).

28. The Agreement also provides that cooperation under the Agreement requires the application of Australia's CSA, AP and the future arrangement to be negotiated by Australia with the IAEA pursuant to Article 14 of the CSA ("Article 14 Arrangement") to all nuclear activities within the territory of Australia, under its jurisdiction or carried out under its control anywhere in accordance with the provisions of those instruments (Article VII(A)). The requirements with respect to the application of the CSA, AP and the future Article 14 arrangement will be implemented within Australia's existing regulatory framework under the *Nuclear Non-Proliferation (Safeguards) Act 1987* and managed by the Australian Safeguards and Non-Proliferation Office.

29. The Agreement obligates Australia to have in place the Article 14 Arrangement, including any necessary implementing mechanisms, prior to the UK or the US transferring any nuclear material to Australia. The Agreement obligates Australia to consult with the UK and the US during the negotiations and ensure, through that consultation, that the Parties have a shared view that the Article 14 Arrangement protects defined categories of information, equipment and material; avoids unduly hampering, delaying or interfering with Australia's use of nuclear material and equipment; fulfils the Parties' commitment to the highest non-proliferation standard; and is consistent with the Agreement (Article VII(B)). The same consultation requirements apply in relation to any proposed amendments to the Article 14 Arrangement and the Australia-IAEA Safeguards Agreements that would relate to nuclear material or equipment transferred pursuant to the Agreement (Article VII(B)-(C)).

30. The Agreement imposes obligations on the Parties regarding collaboration in relation to the development of measures to support the IAEA to implement the Australia-IAEA Safeguards Agreements and the Article 14 Arrangement to meet its objectives with respect to material and equipment transferred pursuant to the Agreement (Article VII(D)). These

objectives include enabling the IAEA to continue to verify that there is no diversion of declared nuclear material, that there is no misuse of nuclear facilities, and that there is no undeclared nuclear material or activity in Australia.

31. The Agreement obligates the Parties to ensure that Australia can provide the IAEA with information and access necessary to fulfil its obligations to the IAEA, while also ensuring the protection of naval nuclear propulsion information and related classified information (Article VII(F)).

Intellectual Property

32. The Agreement provides for the management of intellectual property rights generated from information, nuclear material or equipment communicated, exchanged or transferred under the Agreement (Article XI).

33. Under the Agreement, where a Recipient Party (including its contractors) generates an invention that employs or is derived from information, material or equipment communicated, exchanged or transferred pursuant to the Agreement, that Party must obtain, and then transfer and assign to the Originating Party, all right, title and interest in the invention. The Originating Party will then provide a royalty-free, non-exclusive, irrevocable, perpetual, worldwide license to use that invention for government and mutual defence and security purposes. The Originating Party shall then grant a similar license to the other Party to the Agreement (Article XI(B)).

34. The Agreement provides that Australia will indemnify the UK and the US for patent infringement that occurs in relation to information transferred under the Agreement (Article XI(D)). The Agreement also provides that the Parties waive all legal claims against any other Party for compensation, royalty, or award with respect to any invention, including any patent application or patent, licence or sub-licence covered under relevant provisions of Article XI (Article XI(E)).

35. The Agreement also provides that the Parties may establish a licensing regime for other forms of intellectual property that may arise under the Agreement (Article IX(F)).

Disagreement

36. Any disagreement that may arise between the Parties in the implementation or interpretation of the Agreement must be resolved through mutual consultations without recourse to any other dispute settlement mechanisms (Article XIII(C)).

Accompanying Documents

37. The Agreement will be accompanied by the *Understanding among the Governments of Australia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America* (“Understanding”), which is intended to publicly memorialise the Parties’ discussions on their intended approach to certain provisions and guide implementation, although it does not form an integral part of the Agreement.

38. The Understanding re-affirms that Australia, the UK and the US intend to jointly cooperate to facilitate Australia’s effective integration into, and use by, its naval nuclear propulsion program of any information communicated or exchanged under Article III of the

Agreement (Understanding, paragraph 1). It also provides assurance that the UK and the US should make best efforts to transfer material and equipment in a timely manner to Australia (Understanding, paragraph 2).

39. The Governments also reaffirm their commitment to setting the highest non-proliferation standard in connection with their cooperation pursuant to the Agreement (Understanding, paragraph 5).

40. Under the Understanding, the UK and the US should not unreasonably withhold information, nuclear material or equipment from Australia. The governments are also expected to take all reasonable steps to facilitate in a timely manner any communication and exchange of information or transfers of nuclear material and equipment that may be authorised pursuant to the Agreement (Understanding, paragraph 6).

41. The Understanding also provides assurances that the UK and US intend to apply their respective standards and quality control processes that they would apply for similar material and equipment for their own governmental uses (Understanding, paragraph 7).

Implementation

42. Australia's implementation of the Agreement will be led by the Australian Submarine Agency, in consultation with the Department of Defence, the Department of Foreign Affairs and Trade, the Australian Safeguards and Non-Proliferation Office, the Attorney-General's Department, and other relevant Commonwealth departments and agencies. For obligations under the Agreement covered by the *Nuclear Non-Proliferation (Safeguards) Act 1987*, the Australian Safeguards and Non-Proliferation Office will be the responsible regulatory authority.

43. The Agreement provides the ability for the Parties to enter into implementing instruments to implement the provisions of the Agreement, as may be required (Article XIII(G)).

44. New legislation will not be required to implement the Agreement. No amendments to existing legislation, regulations, or legislative instruments are required on entry into force to implement the Agreement.

Costs

45. Any costs that may arise in relation to the transfer of nuclear material, naval nuclear propulsion plants or related equipment will be negotiated and set out in either implementing instruments or in other government-to-government mechanisms (Article IV(A)-(C)).

46. No regulatory costs associated with this treaty action are anticipated and each Party will bear its own incidental costs of participating in the Agreement.

Future treaty action

47. The Agreement specifies that amendments may be made as agreed in writing by the Parties and shall enter into force on the date of the last note in an exchange of diplomatic notes among the Parties, following the completion of any relevant domestic processes (Article XIII(F)). For Australia, any such amendment would be subject to Australia's domestic treaty-making requirements.

Termination

48. The Agreement shall remain in force until 31 December 2075 (Article XIII(A)). Any Party may terminate the Agreement (including its Annexes) by giving at least one year's written notice to the other Parties (Article XIII(B)).

49. In the event a Party terminates or materially breaches the Agreement, each other Party has the right to require the return or destruction of any naval nuclear propulsion information, nuclear material and equipment that it communicated, exchanged, or transferred pursuant to the Agreement (Article XIII(D)).

50. A Party considering a determination of material breach or a decision to give a written notice to terminate the Agreement is expected to consult with the other Parties prior to finalising such a determination or decision (Article XIII(D)).

51. In the event that Australia: materially breaches its obligations under the NPT, CSA or Article 14 Arrangement; terminates, abrogates, or otherwise withdraws from any of these instruments; or, detonates a nuclear explosive device; the UK and the US have the right to cease further cooperation under the Agreement and require the return of any nuclear material or equipment transferred pursuant to the Agreement (Article VI(H)).

52. Notwithstanding any termination or expiration of the Agreement, obligations relating to: conditions and guarantees relating to the nuclear information, material and equipment transferred under the Agreement; liability, indemnity and warranty; cooperation relating to the application of Australia-IAEA Safeguards Agreements and Article 14 Arrangement; use and dissemination of nuclear information, material and equipment; intellectual property; and, security, will continue in force (Article XIII(E)).

Policy, Strategy and Engagement Division
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ATTACHMENT ON CONSULTATION

Agreement among the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for Cooperation Related to Naval Nuclear Propulsion

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CONSULTATION

Commonwealth Departments

53. The Australian Submarine Agency consulted with the Department of the Prime Minister and Cabinet, the Department of Defence, the Department of Foreign Affairs and Trade, the Australian Safeguards and Non-Proliferation Office, the Department of Finance, Treasury, the Attorney-General's Department, the Australian Border Force, the Australian Nuclear Science and Technology Organisation, the Australian Radiation Protection and Nuclear Safety Agency, the Australian Radioactive Waste Agency, the Department of Climate Change, Energy, the Environment and Water, and the Department of Home Affairs. No concerns have been identified.

State and Territory Governments

54. The Australian Submarine Agency has consulted with State and Territory Governments and no concerns have been identified. No action is expected to be required from States or Territories to implement the Agreement.

Public Consultation

55. No public consultation has been undertaken, given the classified scope of consultations between the Parties on the Agreement, including matters relating to national security and operational capability.