

**National Interest Analysis [2012] ATNIA 15
with attachment on consultation**

**Agreement between the Government of Australia and the Kingdom of Spain for the
Mutual Protection of Classified Information of Defence Interest
done at Madrid on 17 November 2011**

[2011] ATNIF 29

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011
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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest* (the proposed Agreement), done at Madrid on 17 November 2011.
2. Article 16 of the proposed Agreement provides that it will enter into force once the Government of Australia and the Kingdom of Spain (the Parties) have notified each other, in writing, that their respective domestic requirements for entry into force have been satisfied. The date of entry into force for the proposed Agreement shall be the date of the last notification.
3. Subject to consideration by the Joint Standing Committee on Treaties (JSCOT), it is proposed the Government of Australia send the written notification to the Kingdom of Spain as soon as practicable after the tabling period expires.
4. The proposed Agreement will replace the less-than-treaty *Arrangement Between the National Security Authority of the Kingdom of Spain and the Defence Security Authority of the Department of Defence of Australia for the Mutual Protection of Classified Information of Defence Interest*. This Arrangement was signed on 19 January 2006 as an interim measure until the proposed Agreement enters into force.

Overview and national interest summary

5. The purpose of the proposed Agreement is to strengthen the legal framework for the continued exchange of “Classified Information”¹ between the Parties and for the protection of such Classified Information. This holds clear benefits for Australia as Spain is supporting the development of Australia’s defence capabilities, such as the Multi-Role Tanker Transport aircraft, Air Warfare Destroyer, and Landing Helicopter Dock Amphibious Ship Programs. In addition, it will provide a strong foundation for future defence cooperation between Australia and Spain.

¹ “Classified Information” is defined in Article 1(2) of the proposed Agreement as “all information and material of Defence interest which requires protection in the interests of national security and which is subject to a national security classification of the Originating Party. The information may be in oral, visual, electronic or documentary form, or in the form of material including equipment or technology.”

Reasons for Australia to take the proposed treaty action

6. The proposed Agreement sets out security procedures and practices for the exchange and protection of Classified Information between the Parties and for visits by either Party requiring access to such information or restricted areas or facilities where Classified Information is held. The proposed Agreement is not controversial and is similar to other legally binding agreements related to the protection of Classified Information that Australia has entered into with a wide range of countries.

7. The proposed Agreement ensures that Classified Information which the Government of Australia passes to the Kingdom of Spain will be afforded the required standard of protection. Likewise the proposed Agreement will give the Kingdom of Spain confidence that the Government of Australia will protect its Classified Information.

Obligations

8. The obligations of the proposed Agreement are similar to those found in comparable security of information agreements Australia has entered into. The proposed Agreement does not oblige either party to share Classified Information. Rather, the proposed Agreement facilitates the sharing of Classified Information between the Parties by ensuring it will be protected to an agreed equivalent standard. Having examined each other's security policies and standards, both Parties are satisfied these obligations can be met by the other.

9. The proposed Agreement imposes the following obligations:

Scope (Article 2)

The proposed Agreement covers the exchange of Classified Information of defence interest. Information relating to terrorism or intelligence is specifically excluded from the proposed Agreement; such exchanges would require the negotiation of separate arrangements (Article 2.2).

Classification of information (Article 4)

The Originating Party is required to assign all Classified Information with a National Security Classification before transmission to the Recipient Party (Article 4.1). The Recipient Party must then assign the "Transferred Classified Information"² with a National Security Classification no lower than the original classification (Article 4.2).

Details of security standards (Article 5)

On request, each Party must provide the other with information concerning security standards, practices and procedures for safeguarding Classified Information. Each Party must inform the other Party in writing of any changes that affect the manner in which Transferred Classified Information is protected.

² "Transferred Classified Information" is defined in Article 1(12) of the proposed Agreement as "Classified Information which is passed between the Parties regardless of whether it is passed orally, visually, electronically, in writing, through the handing over of material or in any other form or manner".

Compliance and security inspections (Article 6)

Each Party is required to ensure that all establishments, facilities and organisations within its territory protect Transferred Classified Information in accordance with the Proposed Agreement. This includes carrying out security inspections where necessary.

Protection and use of Classified Information (Article 7)

The Recipient Party shall accord the Transferred Classified Information a standard of physical and legal protection no less stringent than that which it accords its own Classified Information of a corresponding national security classification (Article 7.1).

Transferred Classified Information shall not be used for any purpose other than that for which it was provided or be disclosed to any Third Party, without prior written consent of the Originating Party (Articles 7.4 and 7.5). The Recipient Party is obliged to take all appropriate legal steps to prevent disclosure of Transferred Classified Information, for example, in relation to disclosure under “freedom of information” legislation (Article 7.6).

Once it is no longer required for the purpose for which it was provided the Transferred Classified Information shall be destroyed or returned to the Originating Party (Article 7.8).

Access to Classified Information (Article 8)

Access to the Transferred Classified Information is restricted to: citizens of either Party who have been granted a Personnel Security Clearance to an appropriate level in accordance with each Party’s laws and regulations and who have a need-to-know (Article 8.1). The Parties acknowledge that parliamentary representatives may continue to access Classified Information provided current information access practices are applied.

Transmission of Classified Information (Article 9)

Classified Information shall be transferred in accordance with the national laws, security regulations and procedures of the transmitting Party (Article 9.1) and through government-to-government channels, unless mutually determined otherwise by the Parties (Article 9.2).

Security breaches (Article 12)

All suspected and known security breaches shall be reported as soon as possible to the Originating Party. Such breaches will be investigated immediately by the Recipient Party, and the Originating Party will be informed of the findings and any corrective action taken.

Dispute settlement (Article 13)

Any disputes shall be resolved by consultation and negotiation and not be referred to a Third Party for resolution.

Visits (Article 10; Annex A)

Annex A sets out procedures for visits by personnel requiring access to Classified Information or to areas where such information is held. Such visits shall be subject to prior written approval in accordance with Article 10 of the proposed Agreement.

Contractors (Annex B)

Annex B contains provisions for access to Classified Information by defence contractors and sub-contractors.

Implementation

10. No changes to domestic laws or policy are required to implement the proposed Agreement. The proposed Agreement can be implemented in accordance with the Australian Government Protective Security Policy Framework, which sets out procedures for the protection of classified information. The proposed Agreement will not effect any change to the existing roles of the Commonwealth Government or the State and Territory Governments.

Implementation of the proposed Agreement under the new Protective Security Policy Framework

11. The Australian Government introduced a new Protective Security Policy Framework (PSPF), including a revision of the Government's security classification system. The revised system reduces the number of classifications from six to four: PROTECTED, CONFIDENTIAL, SECRET and TOP SECRET. (Further information about the new Protective Security Framework can be found at www.protectivesecurity.gov.au). The classification system was introduced across Government from 1 August 2012. However, due to information and communication technology complexities the Department of Defence was granted an extension and will continue to use the RESTRICTED classification until August 2013.

12. The terms of the proposed Agreement were negotiated prior to the announcement of the new PSPF. The proposed Agreement (at Article 4) aligns with Defence's current classification system and this is necessary until Defence makes the transition to the new classification system in August 2013. The National Security Authority of the Kingdom of Spain was kept informed of the changes during the negotiation of the proposed Agreement. When given the option of how best to accommodate the anticipated reform, Spain specifically requested that the proposed Agreement proceed with the existing classifications and that any necessary changes be made via the treaty amendment process at a later date.

Costs

13. Article 14 provides that each Party shall bear its own costs incurred in the implementation of the proposed Agreement. There are no anticipated costs to the Australian Government complying with the proposed Agreement.

Regulation Impact Statement

14. The Office of Best Practice Regulation, Department of Finance and Deregulation has been consulted and confirms a Regulation Impact Statement is not required.

Future treaty action

15. The proposed Agreement does not provide for the negotiation of any future legally binding treaties, although Article 15 states the proposed Agreement will be reviewed every five (5) years from the date of signature to ensure that the national security classifications continue to correspond, and allows for any necessary changes to be made.

16. Article 16.2 allows for amendments to the proposed Agreement to be made at any time by the mutual determination of the Parties expressed in writing. Any amendments would enter into force once the Parties notify each other that their respective requirements for entry into force have been met.

17. As noted in paragraph 12 above, the terms of the proposed Agreement were negotiated prior to the adoption of the new PSPF. Amendments to the proposed Agreement will likely be required when Defence makes the transition to the new PSPF in 2013.

Withdrawal or denunciation

18. Article 16.3 allows for the proposed Agreement to be terminated at any time by:

- a. mutual determination; or
- b. either Party giving the other written notice of its intention to terminate. Termination would take effect six (6) months after giving such notice.

19. Termination would be subject to the domestic treaty process.

20. In accordance with Article 16.4, if the proposed Agreement were terminated the responsibilities and obligations respecting the protection, disclosure and use of Transferred Classified Information would continue to apply until the Originating Party releases the Recipient Party from this obligation. This ensures that Transferred Classified Information provided under the proposed Agreement will continue to receive appropriate protection after the proposed Agreement is terminated.

Contact details

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ATTACHMENT ON CONSULTATION

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Consultation

21. The States and Territories were advised about the proposed Agreement through the biannual schedule of treaties under negotiation, consideration and review provided to the Commonwealth-State-Territory Standing Committee on Treaties. No State or Territory comment has been received to date. The proposed Agreement does not require State or Territory action for its domestic implementation.