

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

Background

- 5.1 On 18 September 2012, the *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 (the 'Agreement') was tabled in the Commonwealth Parliament.
- 5.2 The proposed Agreement sets out security procedures and practices for the exchange and protection of classified information between Australia and Spain, and for visits to either party that require access to such information or restricted areas or facilities where classified information is held.¹
- 5.3 Australia already has a number of similar legally binding agreements related to the protection of Classified Information.²
- 5.4 The proposed Agreement will replace a less-than-treaty status Arrangement between the National Security Authority of the Kingdom of

1 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 (Hereafter referred to as 'NIA'), para 6.

2 Australia has also concluded agreements with Germany, Republic of Korea, NATO, Denmark, New Zealand, Singapore, South Africa, United States of America, Sweden, France, Canada and the European Union. See Joint Standing Committee on Treaties, *Report 115*, p. 15.

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.³

- 5.5 Less-than-treaty status arrangements are widely used. They differ from treaties in that their content is usually confidential and they are not legally binding.⁴
- 5.6 The Agreement was negotiated at the request of Spain because of a Spanish legal requirement that all agreements of this sort entered into by Spain be treaty level status agreements.⁵
- 5.7 Australia and Spain have a number of defence interests in common. The Department of Defence identified the following projects in particular as examples where classified information would need to be exchanged:
- the \$8 billion Air Warfare Destroyer project;
 - the \$3 billion amphibious ships project; and
 - the nearly \$1.5 billion air-to-air refueller project, now part of Airbus military.⁶
- 5.8 The Agreement is specifically limited to defence information, and will not cover information exchange relating to criminal or terrorist matters.⁷

Protection of classified information

- 5.9 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

3 NIA, para 4.

4 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

5 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

6 NIA, para 5; and the Hon. Stephen Smith, MP, Minister for Defence, *Speech: Asia and International Security: An Australian Perspective*, 15 February 2010, <http://www.foreignminister.gov.au/speeches/2010/100215_madrid.html>, accessed 21 September 2012.

7 NIA, para 9.

form, or in the form of material including equipment or technology.⁸

- 5.10 Like previous agreements of this sort, the Agreement requires each party to treat the other party's classified information in accordance with an equivalent agreed standard.⁹
- 5.11 Spain and Australia have examined each other's security policies and standards, and are each satisfied these obligations can be met by the other.¹⁰
- 5.12 To ensure this occurs, the following steps must be adhered to when classified information is being exchanged:
 - the originating country must ensure that the information has been given a security classification in accordance with the originating country's classification scheme;¹¹
 - the receiving country must then assign a security classification that is not lower than the classification given by the originating country;¹²
 - the receiving country shall accord the transferred information a standard of physical and legal protection no less stringent than that which it accords its own classified information of a corresponding classification;¹³
 - the transferred information is not to be used for any purpose other than that for which it was provided, nor is it to be disclosed to any third party without prior written consent of the originating country;¹⁴
 - the receiving country is obliged to take all appropriate legal steps to prevent disclosure of the information, for example, as a result of a freedom of information request;¹⁵

8 NIA, para 5.

9 NIA, para 8.

10 NIA, para 8.

11 *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 (Hereafter referred to as the Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information), Article 4.

12 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 4.

13 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

14 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

15 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

- 5.13 The Agreement contains a number of compliance mechanisms to ensure that the exchanged information is being protected appropriately.
- 5.14 For example, on request, each party must provide the other with information concerning security standards, practices and procedures for safeguarding the exchanged information. Each party must inform the other party in writing of any changes that affect the manner in which exchanged information is protected.¹⁶
- 5.15 Exchanged information will be transferred in accordance with the national laws, security regulations and procedures of the transmitting country and through government-to-government channels, unless otherwise mutually agreed.¹⁷
- 5.16 The Agreement requires each party to ensure that all establishments, facilities and organisations within its territory protect the exchanged information in accordance with the Agreement, including carrying out security inspections where necessary.¹⁸
- 5.17 Access to the exchanged information will be restricted to citizens of either party who have been granted a personnel security clearance to an appropriate level, and who have a need-to-know. The Agreement will also permit parliamentary representatives to continue to access classified information provided current information access practices are applied.¹⁹
- 5.18 If a breach of security is believed to have occurred, the parties are required to report the breach to the other party as soon as possible. Breaches will be investigated immediately by the receiving country, and the originating country will be informed of the findings and any corrective action taken.²⁰
- 5.19 Once it is no longer required for its original designated purpose, the exchanged information must be destroyed or returned to the originating country.²¹

16 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 5.

17 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 9.

18 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 6.

19 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 8.

20 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 12.

21 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

- 5.20 Disputes over the Agreement are to be resolved through consultation and negotiation. There is no right to access a third party dispute settlement process.²²

Reasons for Australia to take the proposed treaty action

- 5.21 As has been already noted, this treaty has been negotiated at Spain's request on the basis that Spanish law requires that agreements of this sort be of treaty level status.²³ Consequently, ratification of the treaty is important to Australia's ongoing good defence relations with Spain. In addition, Australia and Spain share common billion dollar defence projects, the success of which may be impeded by a failure to reach an agreement on the exchange of classified information.

- 5.22 Also:

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.²⁴

Implementation

- 5.23 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.²⁵
- 5.24 The new Protective Security Policy Framework (PSPF) includes 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'.²⁶

22 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 13.

23 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

24 NIA, para 7.

25 NIA, para 10 -12.

26 NIA, para 11.

- 5.25 The terms of the proposed Agreement were negotiated prior to the announcement of the new PSPF. The proposed Agreement (at Article 4) aligns with the Department of Defence's current classification system and this is necessary until the Department makes the transition to the new classification system in August 2013.²⁷
- 5.26 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.²⁸
- 5.27 The proposed Agreement will not result in any change to the existing roles of the Commonwealth Government or the State and Territory Governments.²⁹

Costs

- 5.28 Each Party shall bear its own costs incurred in the implementation of the proposed Agreement. There are no anticipated costs to the Australian Government in complying with the proposed Agreement.³⁰

Conclusion

- 5.29 The Committee believes that the existence of billion dollar defence contracts between Australia and Spain is sufficient cause to support the Agreement. The Committee has examined agreements of this sort in the past and is of the view that they provide a sound basis for the exchange of classified information.

27 NIA, para 11.

28 NIA, para 12.

29 NIA, para 12.

30 NIA, para 13.

Recommendation 5

The Committee supports the *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* and recommends that binding treaty action be taken.

