

National Interest Analysis [2014] ATNIA 20

with attachment on consultation

**Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the
Socialist Republic of Viet Nam**

(Sydney, 2 July 2014)

[2014] ATNIF 22

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam (Sydney, 2 July 2014)

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Nature and timing of proposed treaty action

1. It is proposed to bring into force the *Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam* (the Treaty), which was signed for Australia on 2 July 2014 by the Minister for Justice, the Hon Michael Keenan MP.
2. Article 22 of the Treaty provides that it shall enter into force on the thirtieth day after the date on which the Parties have notified each other in writing that they have complied with their respective domestic requirements for the entry into force of the Treaty. Before notification can be given by Australia, Australia's treaty processes must be completed, including tabling in Parliament, consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of implementing regulations under the *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act).

Overview and national interest summary

3. Mutual assistance is a formal process whereby the Government of one country (the Requesting Party) requests assistance from the Government of another country (the Requested Party) in relation to a criminal investigation or prosecution. Assistance may extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the Requesting Party.
4. Mutual assistance treaties establish a framework of practical arrangements based on mutual obligation enabling Australia to request and provide information and evidence for investigating or prosecuting serious crimes. It is in Australia's interests to be able to provide and request the widest possible assistance in criminal matters, so that criminals cannot evade justice where evidence of their criminal conduct is located in a foreign jurisdiction. This requires a responsive and streamlined mutual assistance framework.
5. Australia does not currently have a bilateral agreement with Vietnam to facilitate mutual assistance. Both Australia and Vietnam are parties to multilateral conventions that contain mutual assistance obligations and can also provide the other country with assistance on the basis of reciprocity. However, in situations where no multilateral convention applies, there is no obligation on either country to consider a request for assistance from the other country. The Treaty would therefore provide a more comprehensive framework to govern bilateral mutual legal assistance between Australia and Vietnam as well as clarity and certainty about the procedures and processes to be used in making and executing mutual assistance requests.

6. The Treaty adds to Australia's existing network of bilateral mutual assistance treaties with 29 other countries and our mutual assistance obligations under a number of multilateral conventions. The safeguards and protections in the Treaty are consistent with those contained in the Mutual Assistance Act. The proposed Treaty is able to be implemented under Australia's existing domestic legislative framework for mutual assistance by way of regulations.

Reasons for Australia to take the proposed treaty action

7. Vietnam is an important partner in Southeast Asia for the Australian Government's efforts to combat transnational crime.

8. The Treaty will ensure that Australia can provide, request and receive assistance to and from Vietnam in accordance with clearly defined and mutually agreed terms.

9. Assistance based on reciprocity is possible where both States have mutual assistance laws, enabling assistance to be requested and provided in the absence of a treaty. While this is presently the case between Australia and Vietnam, the Treaty has a range of benefits over an arrangement based on reciprocity. The Treaty will provide certainty, impose obligations at international law and institute practical arrangements for requesting and providing assistance. Importantly, the Treaty would oblige Vietnam to consider Australian requests for assistance where the requirements set out in the Treaty are met. In the absence of a treaty, there are no assurances that Australia's requests will be considered.

10. The Treaty contains a number of important safeguards and human rights protections, including the ability to refuse to provide assistance in cases where there is a risk that the death penalty may be imposed or carried out, the request has been made for the purpose of prosecuting someone on discriminatory grounds, or where double jeopardy¹ or dual criminality² considerations apply.

Obligations

11. The Treaty will oblige Australia and Vietnam (the Parties) to grant one another's requests for assistance in criminal investigations and related proceedings in accordance with their respective laws and the provisions of the Treaty (Article 1(1)). The assistance to be provided may include:

- taking evidence and obtaining statements of persons, including the execution of letters rogatory (Article 1(3)(a));
- providing documents, records and evidence (Article 1(3)(b));
- locating and identifying persons (Article 1(3)(c));
- executing requests for search and seizure (Article 1(3)(d));
- locating, restraining and forfeiting proceeds and/or instruments of crime (Article 1(3)(e));
- seeking the consent of persons in custody and others to give evidence or to assist in investigations (Article 1(3)(f));
- serving documents (Article 1(3)(g));

¹ "Double jeopardy" describes a situation where a person is tried twice for the same offence.

² "Dual criminality" means that the conduct in question would be an offence in both Australia and Vietnam.

- collecting forensic material (Article 1(3)(h));
- exchanging information (Article 1(3)(i)); and
- other assistance consistent with the objects of the Treaty, which is not inconsistent with the laws of the Requested Party (Article 1(3)(j)).

12. Mutual assistance under the Treaty does not include extradition, the execution of criminal judgments (except to the extent permitted by the Treaty and the Requested Party's laws) or the transfer of prisoners (Article 1(4)). Australia has existing treaties with Vietnam covering extradition³ and the transfer of prisoners⁴.

13. Article 2 specifies that the Treaty will not affect the obligations of the Parties arising from any other instrument to which both are parties, or otherwise. This would include situations where a Party has a specific obligation to refuse mutual assistance under an international treaty outside of the present Treaty.

14. The obligation to provide assistance in Article 1 is subject to a number of internationally accepted mandatory and discretionary grounds for refusal which largely reflect the existing grounds contained in the Mutual Assistance Act. Under Article 4(1), the Requested Party must refuse to provide assistance in any of the following circumstances:

- where execution of the request would prejudice the Requested Party's sovereignty, security, national interest or other essential interests (Article 4(1)(a), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(e) of the Mutual Assistance Act);
- where execution of the request would be contrary to the fundamental principles of its domestic laws and international agreements to which it is a party (Article 4(1)(a));
- where the person to whom the request relates would be exposed to 'double jeopardy'; that is, where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party, the Requesting Party or another country in respect of the same act or omission (Article 4(1)(b), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(c) of the Mutual Assistance Act);
- where a lapse of time has meant that the person to whom the request relates has become immune from prosecution under the laws of the Requested Party (Article 4(1)(c));
- the request relates to an offence which is not criminalised in both countries (dual criminality requirement) (Article 4(1)(d), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(a) of the Mutual Assistance Act);
- the request relates to an offence which the Requested Party considers as being of a political character (Article 4(1)(e), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(a) of the Mutual Assistance Act);
- the request relates to an offence that is regarded by the Requested Party as an offence under its military law but not also an offence under its ordinary criminal law (Article 4(1)(f), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(d) of the Mutual Assistance Act);
- the Requested Party considers that there are substantial grounds for believing the request has been made for the purpose of investigating, prosecuting or punishing a person on

³ Treaty between Australia and the Socialist Republic of Viet Nam on Extradition, (Canberra, 10 April 2012), [2014] ATS 7

⁴ Agreement between the Government of Australia and Socialist Republic of Viet Nam concerning the Transfer of Sentenced Persons (Canberra, 13 October 2008), [2009] ATS 27

account of race, sex, sexual orientation, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons (Article 4(1)(g), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(c) of the Mutual Assistance Act); or

- the Requested Party considers that there are substantial grounds for believing that if the request was granted, any person would be in danger of being subjected to torture (Article 4(1)(h), which corresponds with the mandatory ground of refusal contained in paragraph 8(1)(ca) of the Mutual Assistance Act).

15. Article 4(2) of the Treaty sets out discretionary grounds for refusal. Parties may refuse assistance if provision of the assistance:

- could prejudice an investigation or proceeding in the Requested Party (Article 4(2)(a)(i), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(d) of the Mutual Assistance Act);
- would, or would be likely to, prejudice the safety of any person (Article 4(2)(a)(ii), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(e) of the Mutual Assistance Act); or
- would impose an excessive burden on resources (Article 4(2)(a)(iii), which corresponds with the discretionary ground of refusal contained in paragraph 8(2)(f) of the Mutual Assistance Act).

16. Vietnam retains the death penalty for serious crimes including drug offences. Australia has a long-standing policy of opposition to the death penalty. The provision in Article 4(2)(b) relating to the death penalty reflects Australia's policy position and domestic legal requirements. Under the Treaty, Parties may refuse assistance if the request relates to an offence punishable by the death penalty unless the Requesting Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out (Article 4(2)(b), which operates consistently with the existing provisions in subsections 8(1A) and 8(1B) of the Mutual Assistance Act).

17. Article 4(4) of the proposed Treaty provides that, prior to refusing assistance, the Requested Party must consider whether assistance could be granted subject to any necessary conditions. If the Requesting Party accepts conditional assistance, it must comply with the conditions.

18. Article 5 outlines the content of mutual assistance requests. Article 5(1) lists the information that is to be included in a request, including:

- a description of the assistance sought, including the purpose (Article 5(1)(a));
- contact details of the competent authority (Article 5(1)(b));
- a summary of the case (Article 5(1)(c));
- a description of the alleged offence (Article 5(1)(d));
- in asset recovery matters: the order of the competent authority (Article 5(1)(e));
- details of any particular procedures or requirements to be followed (Article 5(1)(f));
- any requirements for confidentiality or limitations on the use of the information (Article 5(1)(g)); and
- any time limits for compliance with the request (Article 5(1)(h)).

19. Article 5(2) lists other information that may facilitate execution of the request and should also be included, where possible.

20. Article 6 of the Treaty requires each Party to execute requests for assistance in accordance with its laws, and to the extent those laws permit, in the manner requested (Article 6(1)). If the Requested Party becomes aware of circumstances likely to cause significant delay in responding to the request for assistance, it must promptly inform the Requesting Party (Article 6(3)). The Requested Party must also promptly inform the Requesting Party if it is unable to comply, in whole or in part, with a request for assistance and, to the extent possible, the reasons for that non-compliance (Article 6(4)).

21. Article 7 of the Treaty provides for the returning to the Requested Party of all material provided under the Treaty once it is no longer needed.

22. Article 8 of the Treaty provides that the Requesting Party may require that an application for assistance and the granting of assistance be kept confidential (Article 8(1)). The Requested Party may also require that information and evidence it provides be kept confidential, except to the extent that the information and evidence is needed for the investigation or proceeding to which the request relates (Article 8(3)). Furthermore, the information and evidence obtained may not be used or disclosed by the Requesting Party for purposes other than those stated in the request without the prior consent of the Requested Party (Article 8(4)).

23. Articles 9 to 18 of the Treaty set out specific requirements for the various forms of assistance available. This includes:

- service of documents (Article 9);
- taking of evidence (Article 10);
- obtaining voluntary statements of persons (Article 11);
- the availability of persons in custody to give evidence or to assist investigations (Article 12);
- the availability of other persons to give evidence or assist investigations (Article 13);
- the guarantee of safe conduct of any person who is in the Requesting Party in order to give evidence or assist in investigations, pursuant to a request made by the Requesting Party (Article 14);
- provision of publicly available and official documents (Article 15);
- certification and authentication requirements for documents, records or objects provided through a request for assistance (Article 16);
- search and seizure (Article 17); and
- requests relating to proceeds and instruments of crime (Article 18).

24. Article 19 provides that the Parties may enter into subsidiary arrangements consistent with the purposes of the Treaty and with the laws of both Parties.

25. Article 20(1) of the Treaty provides that the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance, and shall otherwise represent the interests of the Requesting Party.

26. Article 21 provides for the Parties to consult with each other promptly concerning the interpretation, application or carrying out of the Treaty.

Costs

27. Article 20(2) of the proposed Treaty provides that the Requested Party shall meet the ordinary costs of fulfilling the request for assistance, and the Requesting Party shall bear the travel expenses of any person travelling to or from the Requested Party in connection with a mutual assistance request, including custodial or escorting officers. Where expenses are of a substantial or extraordinary nature the Parties shall consult to determine the terms and conditions upon which the request shall be executed and the manner in which costs shall be allocated (Article 20(3)).

28. In accordance with the usual practice for mutual assistance requests, expenses incurred by Australia when making or responding to mutual assistance requests under the proposed Treaty will be met from existing budgets, principally those of the Commonwealth Attorney-General's Department and the Australian Federal Police (who execute the majority of requests) in relation to Vietnamese requests, and by the Australian investigative and prosecutorial agencies seeking assistance in relation to Australian requests.

Implementation

29. It is proposed that the Treaty will be implemented through making regulations under section 44 of the Mutual Assistance Act consistent with the implementation of other mutual assistance treaties entered into by Australia. Section 7 of the Mutual Assistance Act allows regulations to provide that the Mutual Assistance Act applies to a specified foreign country subject to any mutual assistance treaty between that country and Australia that is set out in the regulations. This is the mechanism through which mutual assistance treaties are given effect in Australia's domestic law.

Future treaty action

30. The proposed Treaty is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties* ([1974] ATS 2) applies to allow amendment by agreement between the Parties.

31. Any amendment to the proposed Treaty would be a treaty action and would be subject to Australia's domestic treaty process.

Withdrawal or denunciation

32. Under Article 22(3) of the proposed Treaty, either Party may terminate the proposed Treaty by written notice at any time. The proposed Treaty will cease to be in force on the one hundred and eightieth day after the date on which such notice is received. Termination of the proposed Treaty will not affect any requests made pursuant to the Treaty prior to termination taking effect. Termination by Australia would be subject to Australia's domestic treaty process.

Contact details

Transnational Crime Section
International Crime Cooperation Division
Attorney-General's Department.

ATTACHMENT ON CONSULTATION

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33. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Treaty was provided to State and Territory representatives through the biannual SCOT meetings throughout the course of the treaty negotiations. No requests for further information or comments on the Treaty have been received to date.
34. Negotiations with Vietnam about the Treaty were not in the public domain as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed. Consultation was conducted with relevant Australian Government departments and agencies.