Response to Questions on Notice

Joint Standing Committee on Treaties

By email: jsct@aph.gov.au

21 October 2022

Re: ***Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime***

Submitter: Henry Chen
Hearing date: 12 October 2022
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Question: What would a dispute resolution clause look like in the context of a law enforcement or mutual legal assistance treaty?

Response: There are three options considered below: (1) the International Court of Justice, (2) an arbitration clause, and (3) improving oversight by the Attorney-General's Department.

Option 1: International Court of Justice

Australia's bilateral treaties with Switzerland on mutual legal assistance[1] and extradition[2] provide for disputes to be referred to the International Court of Justice ('ICJ'):

> Any dispute between the Contracting Parties concerning the interpretation of this Treaty which has not been settled by consultations…may be referred by either Party to the International Court of Justice in conformity with the Statute of the Court.

The ICJ has recently been used as a forum for dispute resolution in an Australian law enforcement context. In 2014, the ICJ reviewed the legality of an Australian search warrant in the *Seizure and Detention Case*,[3] relating to ASIO's seizure of documents from the Canberra offices of Bernard Collaery in the Witness K prosecution.[4] Similarly, in 2008, the ICJ found that France breached its mutual legal assistance treaty with Djibouti by failing to give reasons for its refusal to transmit an investigation record.[5]

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[1] *Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters* [1994] ATS 7, art 21(3).
[2] *Treaty between Australia and Switzerland on Extradition* [1991] ATS 2, art 17(2).
[3] *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [2014] ICJ Rep 147.
[4] Tom Allard, 'Australia ordered to cease spying on East Timor by International Court of Justice', *Sydney Morning Herald* (online, 4 March 2014) <https://www.smh.com.au/politics/federal/australia-ordered-to-cease-spying-on-east-timor-by-international-court-of-justice-20140304-hvfya.html>.
[5] *Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177.

The International Court of Justice is the default court under international law. Even where a treaty contains no dispute resolution clause, States can agree to bring any treaty dispute to the ICJ by entering a special agreement.[6] States can also accept the ICJ's jurisdiction after an application is filed, as occurred in the France/Djibouti case.[7] States may also make reciprocal declarations recognising the compulsory jurisdiction of the ICJ.[8] While Australia has made such a declaration (which enabled Timor-Leste to bring the *Seizure and Detention Case* in the ICJ), the US withdrew from compulsory jurisdiction in 1986.[9]

Deleting the words '*and any such disputes shall not be referred to any court, tribunal, or third party*' from article 11(2) of the *CLOUD Act Treaty* would restore the default position, even if the US is unlikely to agree to the inclusion of a positive referral to the ICJ, for political reasons.

Option 2: Arbitration

Australia's treaty with Europol on police cooperation[10] contains an example of a detailed arbitration clause in article 18:

> 1. Any dispute between the Parties concerning the interpretation or application of this Agreement, or any question affecting the relationship between the Parties which is not settled amicably, shall be referred for final decision to a tribunal of three arbitrators, at the request of either Party. Each Party shall appoint one arbitrator. The third, who shall be chairman of the tribunal, is to be chosen by the first two arbitrators.
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> 2. If one of the Parties fails to appoint an arbitrator within two months following a request from the other Party to make such an appointment, the other Party may request the President of the International Court of Justice, or in his absence the Vice-President, to make such an appointment.
>
> 3. Should the first two arbitrators fail to agree upon the third within two months following their appointment, either Party may request the President of the International Court of Justice, or in his absence the Vice-President, to make such appointment.
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> 4. Unless the Parties agree otherwise, the tribunal shall determine its own procedure.
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> 5. The tribunal shall reach its decision by a majority of votes. In case of equality of votes the Chairman shall have a casting vote. The decision shall be final and binding on the Parties to the dispute.

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[6] *Statute of the International Court of Justice* art 36(1).
[7] *Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177, [60]–[64].
[8] *Statute of the International Court of Justice* art 36(2); 'Declarations recognizing the jurisdiction of the Court as compulsory', *International Court of Justice* <https://www.icj-cij.org/en/declarations>.
[9] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (GWU Legal Studies Research Paper No. 291, 2008).
[10] *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office* [2007] ATS 34.

> 6. Each Party reserves the right to suspend its obligations under this Agreement where the procedure laid down in this Article is applied or might be applied in accordance with paragraph 1, or in any other case where a Party is of the opinion that the obligations incumbent on the other Party under this Agreement have been breached.

Similarly, article 45(2) of the multilateral *Budapest Convention on Cybercrime*[11] contains a short form dispute resolution clause:

> In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the [European Committee on Crime Problems], to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Option 3: Improving Domestic Oversight

At the JSCOT hearing of 12 October 2022, it was suggested that article 5(12) of the *CLOUD Act Treaty* could act as a substitute for a dispute resolution mechanism because it empowers the Designated Authorities of Australia and the US to disallow international production orders. However, the weakness of this provision is that it relies on service providers to first raise 'specific objections' under article 5(11).

This weakness could be resolved by inserting an additional information sharing provision into article 5 requiring that, whenever an international production order is made, a copy of:

a) the production order; and
b) any supporting documents used in the domestic approval process;

must be sent to the receiving State's Designated Authority.

This would enable the Australian Attorney-General's Department to conduct reviews of incoming production orders on its own motion, removing its reliance on technology companies to identify potential breaches of the *CLOUD Act Treaty*. It would go further than the current annual sharing of 'aggregate data' in article 11(3), which is unlikely to be sufficiently detailed to bring breaches of targeting principles or human rights protections to light.

[11] *Convention on Cybercrime* (23 November 2001) ETS 185.