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CRICOS Provider No. 00120C

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Re Matters relating to two treaties with Hong Kong

I refer to the Committee inquiry into matters relating to two treaties with Hong Kong, as referred by the Attorney-General and make the following submission.

Suspension of the Agreement for the Surrender of Accused Persons between the Government of Australia and the Government of Hong Kong

1. In the matter of the *Agreement for the Surrender of Accused Persons between the Government of Australia and the Government of Hong Kong* (Extradition Agreement), National Interest Analysis [2020] ATNIA 15 outlines the proposed treaty action.

2. Australia seeks to rely upon Article 62 of the *Vienna Convention on the Law of Treaties* (VCLT) to justify its actions in seeking to suspend the treaty. The *VCLT* is commonly referred to as the 'treaty on treaties' in that it sets out the rules of international law that apply to treaties. Those rules extend from the processes associated with the negotiation of treaties, their conclusion, entry into force, interpretation, and suspension and termination. The *VCLT* was concluded in Vienna on 23 May 1969, and entered into force on 27 January 1980. The *VCLT* has a total of 116 state parties. Australia became a party on 13 June 1974, and China became a party on 3 September 1997.

3. Australia has indicated that the suspension of the *Extradition Agreement* is undertaken in accordance with Article 62 of the *VCLT*, which provides:

Article 62: Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

4. Article 62 requires a number of cumulative events to have taken place before a State's consent to be a party to a treaty may be revoked. These are:

(a) the change must have taken place since the time of the conclusion of the treaty;

(b) the change was not foreseen by the parties;

(c) the circumstances in question were an essential basis for consent by the parties; and

(d) the change is such that there has been a radical transformation of the extent of the treaty obligations.

5. Additional elements of the rule are that it will not apply in the case of a boundary treaty, or where the fundamental change has arisen as a result of a breach by the State invoking the rule. The rule has been relied upon on a number of occasions before international courts and tribunals; however, it has rarely been successful as a basis of claim for withdrawing or terminating a treaty.¹

6. At the Prime Minister's Press Conference on 9 July 2020 the following comments were made:

Firstly, let me say that our Government, together with other governments around the world, have been very consistent in expressing our concerns about the imposition of the national security law on Hong Kong. Today we have agreed to announce that that national security law constitutes a fundamental change of circumstances in respect to our extradition agreement with Hong Kong and so Australia today has taken steps to suspend our extradition agreement. We have formally notified Hong Kong and advised the Chinese authorities.²

This statement is further confirmation of Australia's reliance upon Article 62 VCLT.

¹ See discussion by the ICJ in *Iceland Fisheries Jurisdiction Case* (United Kingdom v Iceland) (Merits) [1973] ICJ Reports 3.

² <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-22>

7. In the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*³ case before the International Court of Justice in 1997, the court addressed submissions that sought to invoke Article 62 of the *VCLT*. In that case Hungary and Slovakia were parties to a bilateral treaty providing for the development of a dam and related works on the Danube River, an international watercourse shared by both countries. Work on the Gabčíkovo–Nagymaros Project was unilaterally suspended by Hungary and one of the issues before the Court was whether there had been a fundamental change of circumstances which would have justified Hungary's actions.

8. In that respect the International Court observed as follows:

[104] Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above). The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that:

Article 62 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances (ICJ Reports 1973, p 63, para 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result. The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. . . . The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

9. The Court took a strict approach towards invoking Article 62 in the case of economic incapacity. Similarly, new developments in the state of environmental law and knowledge were not considered to be events that could have been completely unforeseen at the time of the conclusion of the treaty.

³ [1997] ICJ Reports 7.

10. The ATNIA identifies the following key aspects of Australia's decision to seek to suspend the Extradition Agreement based on a fundamental change of circumstances:

- a) Australia notified Hong Kong on 9 July 2020 of its intention to suspend the Extradition Agreement;
- b) Australia cited the enactment on 30 June 2020 by the People's Republic of China of the National Security Law for Hong Kong (NSL) as a fundamental change of circumstances;
- c) That the NSL is in 'direct conflict' with China's obligations under the 1984 Joint Declaration of Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration);
- d) That the NSL undermined Hong Kong's 'high degree of autonomy' guaranteed under the Joint Declaration
- e) That the NSL erodes the independence of the Hong Kong judiciary, and the rights and freedoms enjoyed by the Hong Kong people
- f) That Australia's consent to be bound by the Extradition Agreement was premised on Hong Kong having a high degree of autonomy, judicial independence and fundamental human rights.

11. The ATNIA also states that:

Given the impact of the enactment of the NSL on the application of the criminal law in Hong Kong and Australia's confidence in its legal processes, it is in the national interest to suspend the Extradition Agreement.

12. Referring back to the legal test to be applied in the case of the application of Article 62 VCLT, the following observations can be made:

(a) the change must have taken place since the time of the conclusion of the treaty;

Comment: The Extradition Agreement was concluded in 1993, and amended by Protocol in 2007 which predate the enactment of the NSL on 30 June 2020

(b) the change was not foreseen by the parties;

Comment: The enactment of the NSL could not have been foreseen in either 1993 or 2007

(c) the circumstances in question were an essential basis for consent by the parties; and

Comment: It would appear that Australia asserts that the essential basis upon which Australia's consent to become bound by the Extradition Agreement were that:

- Hong Kong have a high degree of autonomy
- Hong Kong have judicial independence
- Hong Kong have fundamental human rights

The Extradition Agreement makes no direct or indirect reference to any of these three elements that Australia seeks to rely upon. If these were to have been considered to constitute an essential basis for Australian consent to become a party to the treaty, they would in the normal course of treaty making have been reflected either in the preamble to the treaty or in the main body of the treaty.

(d) the change is such that there has been a radical transformation of the extent of the treaty obligations.

Comment: The extent of any radical transformation that Australia seeks to rely upon is unclear, other than the impact arising from the operation of the NSL. In this respect, it can be observed that Australia notified Hong Kong of its intention to suspend the Extradition Agreement on 9 July, only nine days after the commencement of the NSL. Australia does not make any direct reference to events that occurred during that period of nine days to support an assertion that a radical transformation of the extent of the treaty obligations had occurred, other than the “impact of the NSL of the application of the criminal law in Hong Kong and Australia’s confidence in its legal processes”.

13. The view taken by scholars,⁴ the International Law Commission,⁵ and international courts and tribunals, is that a restrictive approach be taken towards the invoking of Article 62. This is also generally reflected in state practice. This author is not aware of any previous occasion that Australia has sought to rely upon Article 62 to suspend, terminate, or withdraw from a treaty.

14. A fundamental rule of treaty law is reflected in the principle of *pacta sunt servanda* which is found in Article 26 VCLT, which states:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This rule of treaty law reinforces that a treaty creates a binding obligation between the state parties. It is an obligation that should not be discarded, except in accordance with treaty law. Unilateral suspension of a treaty in reliance upon Article 62 VCLT is therefore an exceptional measure.

16. Though not directly related to this inquiry, the position Australia has taken with respect to the Extradition Agreement and the details provided in the ATNIA, may also apply with respect to other Australia – Hong Kong treaties, in particular:

- Agreement between the Government of Australia and the Government of Hong Kong concerning the Investigation of Drug Trafficking and the Confiscation of the Proceeds of Drug Trafficking [1991] ATS 33
- Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Transfer of Sentence Persons [2006] ATS 13

15. There has in recent months been much international commentary on states seeking to withdraw or unilaterally modify treaties. In some instances those actions may have been justified, while in

⁴ Wolff Heintschel von Heinegg “Treaties, Fundamental Change of Circumstances” *Max Planck Encyclopedia of Public International Law* (August 2006)

⁵ International Law Commission, “Draft Articles on the law of treaties with commentaries” (1966) https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf

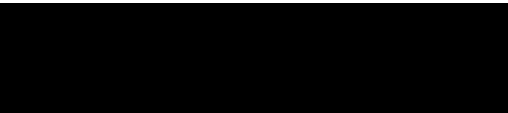
others they are legally dubious. Unilateral withdrawal from treaties will result in a loss of faith in treaties being a legally binding instrument between states that are to be performed in good faith. As Article 62 VCLT outlines, suspension of a treaty relationship based on a fundamental change of circumstances is an exceptional measure that can only be undertaken in very narrowly defined circumstances.

16. Australia is to be commended for having publicly identified the grounds upon which it has sought to suspend the Extradition Treaty. The processes established under this inquiry permitting public comment on Australia's actions can only assist in providing confidence with respect to Australia's actions and adherence to international law.

Suspension of the Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters

17. On 28 July 2020 Hong Kong communicated with Australia via a diplomatic note that it was seeking to unilaterally suspend the *Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters* (MLA Agreement). It has been indicated by [2020] ATNIA 16 that Hong Kong did not provide any 'legal basis' for the purported suspension. Australia is now seeking to regularize the suspension of the treaty by indicating mutual consent to the suspension.

18. Australia's purported treaty action in this instance would be consistent with the position that it has taken with respect to the Extradition Agreement. Many of the grounds that Australia has identified to support its suspension of the Extradition Agreement in [2020] ATNIA 15 are also applicable to the MLA Agreement.



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