

**DOCUMENTS TABLED ON 26 NOVEMBER 2009:**

- **National Interest Analysis [2009] ATNIA 23**  
**with attachment on consultation**
  
- **Treaty between Australia and the Republic of India  
on Mutual Legal Assistance in Criminal Matters  
(Canberra, 23 June 2008)**  
**[2008] ATNIF 8**



## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

#### **Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters [2008] ATNIF 8**

#### **Nature and timing of proposed treaty action**

1. *The Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters* (the Treaty) was approved by the Federal Executive Council on 19 June 2008, and signed for Australia on 23 June 2008 by the Minister for Foreign Affairs, the Hon Stephen Smith MP.
2. Article 23 of the Treaty provides that the Treaty shall enter into force 30 days after the date on which the Contracting States have notified each other in writing that they have complied with their respective requirements for the entry into force of the Treaty. Before notification can be given for Australia, implementing regulations must be made under the *Mutual Assistance in Criminal Matters Act 1987* (the MA Act).

#### **Overview and national interest summary**

3. The Treaty will better enable Australia and India to assist each other in the investigation, prosecution and suppression of crimes including terrorism, drug trafficking, fraud, money laundering and people trafficking. Australia has similar mutual assistance treaties with more than 25 other countries and is also a party to a number of multilateral agreements that impose mutual assistance obligations.
4. Mutual assistance treaties allow Australia to obtain information and evidence for the investigation or prosecution of a crime. They also facilitate the location, restraint, forfeiture and repatriation of the instruments and proceeds of crime. The Treaty is based on Australia's model mutual assistance treaty and is consistent with the MA Act.
5. The purpose of the Treaty is to provide for more effective mutual assistance arrangements between Australia and India. Australia's mutual assistance relationship with India is presently governed by the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth 1986* (the Harare Scheme), an arrangement of less-than-treaty status which applies between members of the Commonwealth. The Treaty will modernise and streamline the mutual assistance relationship between Australia and India and ensure that the domestic procedures of both countries are accommodated.

## **Reasons for Australia to take the proposed treaty action**

6. India is an important partner in efforts to combat transnational crime in South Asia. Concluding the Treaty will ensure that Australia can provide, request and receive mutual assistance to and from India in accordance with clearly defined and mutually agreed terms specifically tailored to the particular circumstances of both countries.

7. Mutual assistance is a formal process whereby the Government of one country (the Requesting State) requests assistance from the Government of another country (the Requested State) in a criminal investigation or prosecution. Assistance may also extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested State's jurisdiction in relation to a criminal activity that took place in that Requesting State.

8. Currently, Australia is able to make and receive mutual assistance requests to and from India based on the Harare Scheme. However, the Harare Scheme is non-binding and does not impose legal obligations under international law. The Treaty will provide for binding international legal obligations and strengthen and clarify our existing mutual assistance relationship.

## **Obligations**

9. Under the Treaty, Australia and India have agreed to grant each other assistance in criminal investigations and proceedings (Article 1). Such assistance may include:

- serving documents, for example officially providing a document to a person requiring him or her to appear before a court of the Requesting State (Articles 2(3)(g) and 11);
- arranging for the taking of statements or evidence from a person in the Requested State, including the temporary transfer of persons in custody, from the Requested State to the Requesting State, for this purpose (Articles 2(3)(a), 2(3)(f), 12, 13 and 14);
- locating and identifying a person (Article 2(3)(c));
- executing requests for the search of premises and seizure of potential evidence provided that the information supplied by the Requesting State would justify such action under the law of the Requested State (Articles 2(3)(d) and 19);
- locating, restraining, forfeiting or confiscating the proceeds and instruments of crime (Articles 2(3)(e) and 20); and
- other assistance consistent with the objects of the Treaty and the law of the Requested State (Article 2(3)(h)).

10. Mutual assistance under the Treaty does not include other types of international cooperation such as extradition and the international transfer of prisoners (Article 2(4)). A treaty on extradition between Australia and India was signed at the

same time as the Mutual Assistance Treaty ([2008] ATNIF 9). Australia does not have an agreement with India covering the international transfer of prisoners.

11. The obligation to provide assistance is qualified by internationally accepted grounds for refusal as set out in Article 5 of the Treaty. These grounds reflect the mandatory and discretionary grounds for refusal set out in subsections 8(1) and 8(2) of the MA Act.

12. Article 5(1) obliges the Requested State to refuse to provide assistance if the request relates to an offence under military law which is not also an offence under the ordinary criminal law.

13. The Requested State has the discretion to refuse to provide assistance in a range of circumstances. Assistance may be refused if:

- the request relates to an offence of a political character (Article 5(2));
- the request relates to a prosecution which would expose a person to 'double jeopardy' because the person to be prosecuted has previously been finally acquitted or pardoned of the offence in question, or has served the sentence imposed (Article 5(3)(a));
- there are substantial grounds for believing the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions, or that the person's position may be prejudiced for any of those reasons (Article 5(3)(b));
- complying with the request would impair the Requested State's sovereignty, security, public order, or essential public interest, or prejudice the safety of any person (Article 5(3)(c)); or
- the punishment for the offence for which the Requesting State seeks to prosecute a person may prevent the Requested State from complying under its domestic laws (Article 5(3)(d)).

14. Article 5(4) specifies that the Requested State has the discretion to provide assistance in the absence of dual criminality, that is, where there is no equivalent offence under the laws of the Requested State.

15. Where a request would interfere with an ongoing investigation, prosecution or other proceeding, the Requested State may delay providing assistance (Articles 5(5) and 8(6)). Article 5(6) of the Treaty states that before refusing or postponing a request for assistance, the Requested State must consider whether assistance could be granted subject to conditions.

16. The Treaty includes detailed provisions about the form and content of mutual assistance requests (Articles 6 and 7). Each Contracting State is required to execute requests for assistance promptly in accordance with its laws (Article 8(2)). Subject to the law of the Requested State, assistance should be provided in the manner requested. If the Requested State becomes aware of circumstances likely to cause significant delay in responding to the request for assistance, it must promptly inform the Requesting State (Article 8(7)).

17. Each Contracting State may require that the application for assistance, its contents and related documents, and the granting of assistance be kept confidential (Article 10(1)). The Treaty requires that information and evidence obtained under the Treaty not be used for purposes other than those stated in the request without the prior consent of the Requested State (Article 10(3)).

### **Implementation**

18. It is proposed that the Treaty be implemented through regulations made under the MA Act. Section 7 of the MA Act allows regulations to be made providing that the MA Act applies to a foreign country subject to any mutual assistance treaty between that country and Australia that is referred to in the regulations. This is the mechanism through which mutual assistance treaties are given effect in Australia's domestic law.

### **Costs**

19. The Requested State shall meet all the ordinary costs of fulfilling the request for assistance (Article 21(2)). However, Article 21(2) of the Treaty provides that the Requesting State shall bear the travel expenses of any person travelling to or from the Requested State in accordance with a mutual assistance request, including custodial or escorting officers (Article 21(2)(a) and (b)), and expenses associated with the taking of evidence from the Requested State via video, satellite or other technological means (Article 21(2)(c)). Where expenses are of an exceptional nature the Contracting States shall consult to determine the terms and conditions upon which they shall be met.

20. In practice, expenses incurred by Australia when making and responding to mutual assistance requests are generally met from the existing budgets of relevant Government Agencies, principally the Australian Attorney-General's Department, the Commonwealth Director of Public Prosecutions, the Australian Federal Police, and other law enforcement agencies.

### **Regulation Impact Statement**

21. Since the Treaty deals with criminal justice issues, neither the Treaty nor implementing regulations have financial implications for businesses or individuals. Any associated costs are borne by governments and law enforcement agencies.

22. According to the self-assessment guidelines provided by the Office of Best Practice Regulation, the regulatory option has low/no impact and therefore does not require further regulatory analysis.

### **Future treaty action**

23. The Treaty provides that the countries shall consult on the interpretation and implementation of the Treaty (Article 22).

24. The 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. Any amendment to

the Treaty would be subject to Australia's domestic treaty process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties (JSCOT).

### **Withdrawal or denunciation**

25. Either country may terminate the Treaty by written notice through diplomatic channels at any time (Article 23(3)). The Treaty shall cease to be in force six months following the date of receipt. Termination of the Treaty will not affect any requests made before and up to the date of termination. Termination by Australia will be subject to Australia's domestic treaty process, including tabling in Parliament and consideration by JSCOT.

### **Contact details**

Treaties, International Arrangements and Corruption Section  
International Crime Cooperation Division  
Attorney-General's Department.





## **ATTACHMENT ON CONSULTATION**

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**[2008] ATNIF 8**

#### **CONSULTATION**

26. 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 bi-annual SCOT meetings throughout the course of the treaty negotiations. No requests for further information or comments on the Treaty with India have been received to date.

27. Negotiations with India 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