

**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE
GOVERNMENT OF THE KINGDOM OF CAMBODIA CONCERNING
TRANSFER OF SENTENCED PERSONS,
DONE AT CANBERRA ON 11 OCTOBER 2006
[2006] ATNIF 22**

Documents tabled on 28 November 2006:

National Interest Analysis [2006] ATNIA 41

with attachment on consultation

Text of the proposed treaty action

Background information:

Cambodia political brief and fact sheet

List of other treaties with Cambodia

List of treaties of the same type with other countries

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and
the Government of the Kingdom of Cambodia concerning the Transfer of Sentenced Persons,
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Nature and timing of proposed treaty action

1. Australia proposes to enter into a bilateral treaty-level agreement, entitled *Agreement between the Government of Australia and the Government of the Kingdom of Cambodia concerning transfer of sentenced persons* (the Agreement).
2. The Agreement was signed on 11 October 2006 at Canberra.
3. Article 16 of the Agreement provides that the Agreement will enter into force 30 days after an exchange of notes by which each party notifies the other that its domestic requirements for the Agreement's entry into force have been complied with. Australia's domestic requirements include tabling in both Houses of Parliament for 15 sitting days, consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of Regulations under the *International Transfer of Prisoners Act 1997* to implement the Agreement in Australia.

Overview and national interest summary

4. The Agreement enables both Governments to exchange information about a prisoner's sentence, determine a prisoner's eligibility for transfer and agree upon appropriate terms of sentence enforcement following a prisoner's transfer.
5. Prisoners are called 'sentenced persons' in the Agreement (Article 1(c)). Under Article 4(c), prisoners are eligible to apply for transfer from Cambodia to Australia provided that they:
 - are Australian citizens, or
 - are otherwise permitted by Australian law to enter and remain indefinitely in Australia and have community ties to Australia.
6. Prisoners who are Cambodian nationals are eligible to apply for transfer from Australia to Cambodia (Article 4(b)).
7. Repatriating Australians incarcerated in Cambodia has a number of benefits for Australia. It will:
 - relieve the hardship and burden on the relatives of the prisoner,
 - facilitate the prospects of that prisoner's rehabilitation, and
 - reduce the burden on Australian consular officials in Cambodia.
8. Transferring Cambodian nationals from Australia to Cambodia also benefits Australia, because Australia will no longer have to pay the ongoing costs of those prisoners' incarceration.

Reasons for Australia to take the proposed treaty action

9. The operation of Australia's domestic legislation and international arrangements entered into by Australia is called the international transfer of prisoners (ITP) scheme. Australia already has a legislative framework—described in paragraphs 25 to 27—in place for its participation in international prisoner transfers. Further, Australia has concluded bilateral agreements for the transfer of prisoners with Thailand [2002] ATS 22 and Hong Kong [2006] ATS 13 and is a Party to the Council of Europe *Convention on the Transfer of Sentenced Persons* [2003] ATS 6 (Council of Europe Convention). This latter agreement facilitates the transfer of prisoners between Australia and 60 other countries.

10. Participation in ITP reflects the humanitarian, rehabilitative and social objectives of prisoner transfers while ensuring, so far as possible, that the original custodial sentence of a transferred prisoner is carried out. The rehabilitative benefits of transfer for Australian prisoners may include family support, access to rehabilitation, education, training and employment programs, work release, parole supervision, offender registration and supervision. Due to the risk of foreign prisoners fleeing the country, the general immigration policy applying to foreign prisoners is that conditional release – for example work release and parole supervision – is not available to non-citizens in prisons in Australia. They are further restricted from participating in rehabilitation programs where their English is considered insufficient to effectively comprehend and participate in a program. Transfer, importantly, enables prisoners to be considered for parole or other available gradual release or supervised release schemes available in their home country.

11. ITP is forming an increasingly important part of international cooperation in the administration of criminal justice. Most developed countries already participate in ITP schemes and have done so for some time. These countries include the United Kingdom, the United States of America, Canada and most European countries. The number of participating countries is continually increasing.

12. The Council of Europe Convention has been used to transfer prisoners out of Australia to the United Kingdom (seven prisoners transferred), Spain (six prisoners transferred), the Netherlands (six prisoners transferred), the United States (one prisoner transferred), Germany (one prisoner transferred), Italy (one prisoner transferred), Canada (one prisoner transferred) and Israel (one prisoner transferred). Australia has successfully transferred one prisoner back from the United Kingdom under the Council of Europe Convention and repatriated three Australians from Thailand under the ITP treaty with Thailand. As at 5 October 2006, Australia was processing an additional 71 requests for transfer out of Australia and 26 requests for transfer to Australia. These applications have been made under both the Council of Europe Convention and Australia's ITP agreement with Thailand and Hong Kong.

13. It is Australia's experience that the effectiveness of the ITP scheme is rapidly improving as an increasing number of countries become parties to the Council of Europe Convention and gain familiarity with the ITP scheme. Those countries that would not consider becoming parties to the Council of Europe Convention are expressing greater interest in bilateral ITP agreements.

14. Cambodia is not a party to any multilateral convention relating to the transfer of prisoners and we are not aware that it intends to become a party to any such convention in the near future. Accordingly, the negotiation of a bilateral agreement with Cambodia is required in order to provide a basis on which Australia may engage in prisoner transfers with Cambodia.

15. Cambodia has not completed a bilateral ITP treaty with any other country.

16. Over the past year there has been growing public pressure for Australia to capitalise on its well established ITP scheme by concluding bilateral ITP agreements with more of its regional neighbours. This pressure has come from a wide range of individuals and groups, including parliamentarians, media commentators, senior academics, human rights organisations, prisoner support groups, friends and families of prisoners, and prisoners themselves. In addition, Australia has been approached by a number of countries about the possibility of Australian involvement in prisoner transfers. The negotiation of an ITP treaty with Cambodia has been a priority. As at 11 October 2006, Cambodia has five Australian nationals in its prisons, and there are 13 Cambodian nationals in Australian prisons.

17. It is difficult to estimate precisely the number of prisoners likely to benefit from the Agreement after it enters into force, as this will depend on the number of Australians sentenced in Cambodia (and the number of Cambodians sentenced in Australia) from time to time and sentenced persons' personal interest in transfers. An overall reduction in the number of Australians incarcerated in Cambodia is likely. In addition to humanitarian and rehabilitative benefits, this would reduce the resource burdens placed on Australia's consular staff in Cambodia, and provide significant financial savings. DFAT consular staff visit Australian prisoners on a regular basis and provide a range of resource intensive consular services.

18. The Agreement provides for Australia to exercise considerable flexibility in determining prisoner transfers. The scope that this flexibility affords is in Australia's interests. Either Australia or Cambodia could request transfer of a prisoner under the Agreement (Article 5(2)(b)). Prisoners can apply to either the Australian or Cambodian Government to initiate the process. Prisoners would only be transferred if they, the Australian Government and the Cambodian Government all gave informed consent to the transfer.

19. Prisoners would need to satisfy numerous criteria to be eligible for transfer (Article 4). These conditions include that the offender did not commit certain offences under the law of Cambodia, that the prisoner's sentence is final and not subject to any appeal, that the prisoner has a right to reside in the receiving jurisdiction and that the prisoner has at least one year of their sentence remaining to be served at the time of the request to transfer. This final requirement may be waived by the agreement of Cambodia and Australia (Article 4(e)).

Obligations

20. The primary obligation imposed upon Australia under the proposed Agreement is to facilitate, in accordance with the Agreement, requests for transfer of Australian prisoners serving sentences in Cambodia to Australia and Cambodian nationals serving prison sentences in Australia to Cambodia (Article 2(1)). The Agreement applies to any request for transfer presented after entry into force of the Agreement, even if the sentence was imposed before entry into force of the Agreement (Article 16(2)).

21. Australia would be obliged to endeavour to inform prisoners of the substance of the Agreement (Article 5(1)), and to inform Cambodian authorities of any request for transfer (Article 5(2)). Australia would also be obliged to inform prisoners wanting to be transferred to Australia of any costs associated with the transfer, and that Australia may seek to recover these costs (Article 4(h)). Where a request is made for the transfer of a prisoner, being a Cambodian national, to Cambodia, Australia would be obliged to ensure that the Cambodian national consents to the transfer voluntarily and with full knowledge of the legal consequences (Article 6(1)). In such circumstances, Australia would also be obliged to afford an opportunity to Cambodia prior to the

transfer to verify that the Cambodian national has provided informed consent to the transfer (Article 6(2)).

22. Australia would be obliged to provide specified information to Cambodia, upon request, before making a request for transfer of a prisoner to Cambodia or taking a decision on whether or not to agree to the transfer of an Australian prisoner from Cambodia (Article 5(5)). Where a request for transfer is made, either to or from Cambodia, Australia would be obliged to provide to Cambodia the information set out in Articles 5(3) and (4). Where Australia accepts a prisoner from Cambodia, it would also be obliged to provide information to Cambodia concerning the enforcement of the sentence in Australia (Article 9).

23. Australia would also be obliged, subject to its domestic law, to cooperate in facilitating the transit of prisoners by Cambodia to or from third States through Australian territory (Article 10). Cambodia has a similar obligation to facilitate the transit of prisoners by Australia.

24. Where Australia receives an Australian prisoner transferred from Cambodia, there would be an obligation to enforce the sentence as imposed by Cambodia and the sentence could not be made more severe than the sentence originally imposed by Cambodia. Australia would also be obliged to modify or terminate the sentence as soon as it is informed of any decision by Cambodia following the review, revision, modification or cancellation of the sentence or a decision by Cambodia to grant pardon, amnesty or commutation of the sentence (Article 8).

Implementation

25. The legislative basis for Australia's participation in ITP is well established, having been developed through extensive consultation and co-operation with State and Territory authorities.

26. Regulations will be required under section 8 of the *International Transfer of Prisoners Act 1997* (the ITP Act) to enable Australia to give effect to obligations under the Agreement. This would then allow Australia to notify Cambodia in writing that its domestic requirements have been fulfilled, with a view to bringing the treaty into force (Article 16). The ITP Act provides the legislative framework for Australia's participation in ITP. The ITP Act provisions can be enabled by either multilateral treaties, bilateral treaties or a less than treaty status arrangement. The ITP scheme has been in operation in Australia since September 2002.

27. Many prisoners to be transferred out of Australia will have been sentenced for State and Territory offences. As there are no federal prisons, the States and the Northern Territory have passed complementary legislation to participate in the ITP scheme. All States and Territories in which there are active ITP cases currently assist the Australian Government in processing applications.

28. The Australian Government has also concluded Administrative Arrangements to facilitate ITP with all Australian States and Territories except for South Australia. A draft arrangement is being considered by South Australia. The Arrangements set out the administrative protocols and arrangements for the transfer out of foreign prisoners who are held in gaol as either State or Federal offenders, and the transfer in (as federal prisoners) of Australians who were imprisoned overseas. The Australian Government has been liaising with South Australia to finalise the last outstanding Administrative Arrangement.

Costs

29. The cost of the continued enforcement of the sentence after transfer is to be borne by the receiving party (Article 12(2)). Each prisoner transferred from Australia to Cambodia will represent a cost saving of over A\$79,000 for each year the prisoner would otherwise have spent in a prison in an Australian State or Territory. This figure is the approximate annual cost of maintaining a person in prison in Australia according to the Productivity Commission's 2006 Report on Government Service Provision.

30. In relation to incoming prisoners, it has been agreed between the Commonwealth, the States and the Territories that:

- the Commonwealth will meet all general administrative costs involved in the processing of transfers;
- the Government of the State or Territory to which a prisoner wishes to return will be responsible for meeting the costs of transporting the prisoner to Australia from the international point of departure, and for maintaining the prisoner in prison in Australia; and
- if the State or Territory Minister considers that an incoming prisoner is in a position to pay the costs associated with their transfer to Australia, they may seek reimbursement by the prisoner of such costs as a condition of the transfer.

31. As these are details of Australia's domestic arrangements, it is not necessary to reflect them in the Agreement.

32. In relation to outgoing prisoners, it has been agreed with States and Territories that the costs of moving a prisoner within Australia to the international point of departure would be borne by the Government of the State or Territory in which the prisoner is held before transfer. The parties will mutually decide, on a case by case basis, which party shall bear all other costs associated with the transfer, including the costs of transfer incurred from the international point of departure (Article 12(1)). It is common for the receiving country to request that the prisoner or the prisoner's family pay for the costs associated with the physical transfer.

Regulation Impact Statement

33. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

34. The Agreement is silent as to amendment. In the absence of an amendment provision, Article 39 of the Vienna Convention on the Law of Treaties would apply to allow amendment by agreement between the Parties. Any amendment to the Agreement would be effected in accordance with Australia's domestic treaty process requirements.

35. The Agreement does not provide for the negotiation of future legally binding instruments.

Withdrawal or denunciation

36. Either party may terminate the Agreement by written notice at any time. The Agreement will cease to have effect six months from the date upon which notice is received (Article 16(3)).

Termination of the Agreement will not affect the sentence enforcement of any prisoners who have already transferred under the Agreement. Any withdrawal from the Agreement by the Australian Government would be effected in accordance with Australia's domestic treaty process requirements.

Contact details

International Legal Cooperation Section
International Crime Branch
Criminal Justice Division
Attorney-General's Department

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CONSULTATION

1. The ITP scheme, since its inception in Australia in 2002, has received broad public support. With a number of high-profile Australians currently imprisoned abroad, the Australian public has become increasingly aware and expectant that ITP agreements can be negotiated to repatriate Australians to Australian gaols.

2. This proposed treaty action will have an impact on the States and Territories. The impact will be that States and Territories will be required to consider applications for:

- the transfer of offenders, both incarcerated and on parole, from their States and Territories to Cambodia, and
- the transfer of prisoners from Cambodia to a State or Territory of Australia.

3. The consensual nature of the ITP scheme ensures that States and Territories are involved in any transfers affecting them and that their consent will be sought to the transfer of any prisoner, or prisoner transferring to their jurisdiction from Cambodia. The consent of the relevant State or Territory must be obtained before any such transfer can occur.

4. In the case of outward transfers, federal prisoners may be transferred out of a State or Territory without the approval of that State or Territory. However, each State or Territory will assist in processing transfers of federal offenders, by providing reports on the prisoner's behaviour and progress through the prison system. Transfer of State or Territory prisoners out of Australia require the approval of that State or Territory. The Australian Government works closely with States and Territories to process all applications under the ITP scheme.

5. On 22 July 2005, Senator the Hon Christopher Ellison wrote to all State and Territory ministers with portfolio responsibility for implementation of the ITP scheme. Copies of these letters were provided to members of the Commonwealth-State/Territory (Officials') Standing Committee on Treaties (SCOT) in each jurisdiction. The consultation letters asked for comments on the proposed treaty action.

6. Responses were received from the Hon Tony Kelly MLC, New South Wales Minister for Justice, the Hon John D'Orazio MLA, Western Australian Minister for Justice and Small Business and the Hon Judy Jackson, Tasmanian Attorney-General. Attorney-General Jackson and Minister Kelly supported the proposed treaty action. Minister D'Orazio thanked the Australian Government for the opportunity to comment.

7. A treaty schedule was provided to SCOT at their meeting on 27 September 2006. The schedule listed the treaty with Cambodia as under negotiation. There was no comment from the Committee at its meeting about this treaty. The treaty was also listed in previous treaty schedules for SCOT meetings in September 2005 and May 2006.

BACKGROUND INFORMATION

Political Brief on the Government of the Kingdom of Cambodia

Political Overview

The Royal Kingdom of Cambodia is a constitutional monarchy with a bicameral system of government.

Cambodia's Constitution - passed in 1993 - sets out the ethos and territory of the nation; the prerequisites and role of the king; the obligations and rights of Cambodian citizens; the function and role of the national parliament; the responsibilities and procedures of government; and the role and means of selection of the judiciary, the Supreme Council of Magistracy and Constitutional Council.

The King, who is Head of State, must be a member of the royal family, descended from specified bloodlines and be over 30 years of age. The King is elected by the Royal Council of the Throne consisting of the Prime Minister, presiding officers and chiefs of the Order of Mohanikay and Thammayut.

Government is formed by the party/parties with a majority of seats in the National Assembly following universal elections every five years. Until 2006, when the Constitution was amended to allow government by a simple majority, a two-thirds majority of the 123 seat National Assembly was required to form government. The last national election, in 2003, was generally assessed by international observers to be credible.

Election to the Senate is non-universal in nature: commune councillors and members of the National Assembly vote on behalf of their constituents. The King also nominates two senators. Members of the Commune (local) Councils are elected by universal vote. As well as voting for senators, Council members elect village chiefs for the villages they administer.

Cambodia has a civil law code with a three tier judicial system: trial court, appeals court and supreme court. Each province and municipality has their own courts with judges and magistrates appointed, promoted and dismissed by the Supreme Council of the Magistracy, chaired by the King.

Economic Overview

Cambodia is one of the world's least developed countries, with an estimated per capita GDP in 2005 of between US\$393 to US\$448. While the Cambodian economy has performed well in recent years – growth has averaged 6 per cent over the last decade – continuing reforms will be required to sustain this.

Cambodia is seeking to broaden its economic base, which has for many years been dominated by agriculture and garment manufacturing. The garment industry generates over 90 per cent of Cambodia's exports but the industry may face increased competition in 2008 when US and EU safeguards against Chinese imports are scheduled to be lowered. The Cambodian Government is seeking to expand the fast growing tourism industry. The opening up of Cambodia's resources sector potentially including reserves of oil, gas, bauxite and precious metal will diversify revenue sources, encourage investment and provide employment opportunities and skills transfer.

Cambodia was one of the first least developed countries to gain membership of the WTO in 2005. It is in the process of completing its membership obligations.

Bilateral Overview

Australia has a long and developing relationship with Cambodia, following our involvement in the early 1990s national peace process and the United Nations Transitional Authority in Cambodia (UNTAC), as well as our ongoing cooperative approach to development assistance.

Bilateral trade and investment levels are low but there is growing interest in Cambodia from Australian companies, particularly in the resources sector, with potential flow-on opportunities for service providers. As a least developed country, Cambodian products receive tariff-free access to Australia. Exports to Cambodia in 2005 equalled \$47 million, comprising mainly pharmaceuticals and veterinary medicaments (\$12 million), games and sporting goods (\$12 million) and integrated circuits (\$3 million). Imports from Cambodia were worth \$8 million, comprising mainly clothing (\$6 million). Two-way investment in 2005 was modest at \$55 million. Cambodia is Australia's 71st merchandise export market, Australia was Cambodia's 14th principal supplier of imports.

Cambodia has shown a strong commitment to confronting transnational crime and has been a strong partner of Australia in this respect through both bilateral and regional mechanisms.



CAMBODIA

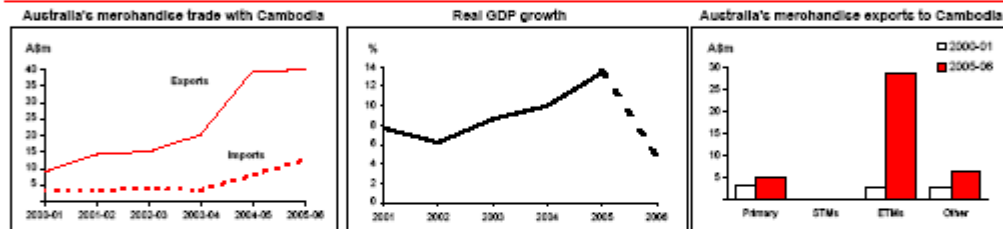
Fact Sheet

General information:

Fact sheets are updated biannually: May and September

| | | | |
|--------------------|----------------------------------|---------------------|--|
| Capital: | Phnom Penh | Head of State: | |
| Surface area: | 181,035 sq km | Head of Government: | |
| Official language: | Khmer | | |
| Population: | 14.5 million (2005) | | |
| Exchange rate: | A\$1 = 3,040.3 Riels (June 2006) | | |

| Recent economic indicators: | 2001 | 2002 | 2003 | 2004 | 2005(a) | 2006(b) |
|-----------------------------------|-------|-------|-------|-------|---------|---------|
| GDP (US\$bn) (current prices): | 4.0 | 4.3 | 4.6 | 5.3 | 6.2 | 6.8 |
| GDP PPP (US\$bn) (c): | 24.6 | 26.3 | 28.8 | 31.8 | 34.7 | 37.5 |
| GDP per capita (US\$): | 302 | 317 | 333 | 373 | 430 | 459 |
| GDP per capita PPP (US\$) (c): | 1,871 | 1,953 | 2,092 | 2,256 | 2,399 | 2,534 |
| Real GDP growth (% change YOY): | 7.7 | 6.2 | 8.6 | 10.0 | 13.4 | 5.0 |
| Current account balance (US\$m): | -45 | -104 | -170 | -122 | -265 | -382 |
| Current account balance (% GDP): | -1.1 | -2.4 | -3.7 | -2.3 | -4.3 | -5.6 |
| Goods & services exports (% GDP): | 52.8 | 55.5 | 57.4 | 64.5 | 64.6 | n.a. |
| Inflation (% change YOY): | 0.2 | 3.3 | 1.2 | 3.9 | 5.8 | 5.0 |



Australia's trade relationship with Cambodia ^(a):

| Australian merchandise trade with Cambodia, 2005-06: | Total share: | Rank: | Growth (yoy): | |
|--|--------------|-------|---------------|-------|
| Exports to Cambodia (A\$m): | 40 | 0.0% | 75th | 1.5% |
| Imports from Cambodia (A\$m): | 13 | 0.0% | 84th | 56.8% |
| Total trade (exports + imports) (A\$m): | 52 | 0.0% | 81st | 10.9% |

| Major Australian merch. exports, 2005-06 (A\$m): | Major Australian merch. imports, 2005-06 (A\$m): |
|--|--|
| Medicaments (incl. veterinary) 13 | Non-monetary gold 6 |
| Toys, games & sporting goods 11 | Clothing 5 |
| Cereal preparations 3 | Bed, table, toilet and kitchen linen 1 |
| Paper manufactures 1 | |

| Australia's trade in services with Cambodia, 2005: | Total share: |
|--|--------------|
| Exports of services to Cambodia (A\$m): | n.a. |
| Imports of services from Cambodia (A\$m): | n.a. |

Cambodia's global merchandise trade relationships:

| Cambodia's principal export destinations, 2005: | | | Cambodia's principal import sources, 2005: | | |
|---|---------------|-------|--|-----------|-------|
| 1 | United States | 60.0% | 1 | Thailand | 24.7% |
| 2 | Germany | 10.4% | 2 | China | 14.5% |
| 3 | Vietnam | 4.6% | 3 | Hong Kong | 13.4% |
| 22 | Australia | 0.2% | 13 | Australia | 1.0% |

Compiled by the Market Information and Analysis Section, DFAT, using the latest data from the ABS, the IMF and various international sources.

(a) All recent data subject to revision; (b) IMF forecast; (c) PPP is purchasing power parity; (d) Total may not add due to rounding.

n.a. Data not available.

There are no other bilateral treaties between Australia and Cambodia

List of treaties of the same type with other countries.

Agreement with the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences

[2002] ATS 22

Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Australia concerning Transfer of Sentenced Persons

[2006] ATS 13

Council of Europe Convention on the Transfer of Sentenced Persons

[2003] ATS 6