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- **National Interest Analysis [2009] ATNIA 24**
with attachment on consultation

- **Extradition Treaty between Australia and the Republic of India**
(Canberra, 23 June 2008)
[2008] ATNIF 9

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Extradition Treaty between Australia and the Republic of India (Canberra, 23 June 2008)

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Nature and timing of proposed treaty action

1. The *Extradition Treaty Between Australia and the Republic of India* (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 20 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. In September 2008, India advised that its domestic requirements for entry into force had been met. Before notification can be given for Australia, implementing regulations must be made under the *Extradition Act 1988* (the Extradition Act).

Overview and national interest summary

3. Australia needs to ensure that criminals cannot evade justice simply by crossing borders. This requires a responsive, streamlined extradition system that effectively combats domestic and transnational crime while providing appropriate safeguards.
4. The purpose of the Treaty is to provide for more effective extradition arrangements between Australia and India. Australia's extradition relationship with India is presently governed by the *Commonwealth Scheme for the Rendition of Fugitive Offenders 1966* (the London Scheme), an arrangement of less than treaty status which applies between members of the Commonwealth. The London Scheme is non-binding at international law and does not impose legal obligations on participants. The Treaty will provide for binding obligations at international law and strengthen and clarify our existing extradition relationship.
5. The Treaty is based on Australia's model extradition treaty and is able to be implemented under Australia's domestic legislative framework for extradition. The Treaty adds to Australia's existing network of modern bilateral extradition treaties with 35 other countries and to our extradition obligations under a number of multilateral agreements

Reasons for Australia to take the proposed treaty action

6. India is an important partner in South Asia in efforts to combat transnational crime. Although Australia has existing extradition relationships with Bangladesh, Pakistan and India through the London Scheme, Australia does not currently have any bilateral extradition treaties with countries in this region.

7. Australia is able to make an extradition request to any country, and is able to receive an extradition request from any country that is declared to be an 'extradition country' under regulations made under the Extradition Act. India is currently declared to be an 'extradition country' under the Extradition Act, by virtue of the *Extradition (Commonwealth Countries) Regulations 1998*, which give effect to the London Scheme in Australia.

8. The Treaty will modernise and provide for more effective extradition arrangements between Australia and India. Under the London Scheme, the Requesting Party must provide a full brief of evidence of the alleged extradition offence sufficient to establish a prima facie case. The Treaty streamlines this process by providing for a less than 'prima facie' case approach to extradition. Under the Treaty, an extradition request must provide supporting documentation to establish a sufficient link between the alleged offender and the offence for which extradition is sought.

9. An international trend towards simplifying extradition matters has seen a move to a 'no evidence' standard of information for extradition requests and this is Australia's preferred standard. However, India's domestic legal requirements necessitated a departure from Australia's preferred 'no evidence' standard. Nonetheless, the evidentiary standard in the Treaty is still a marked improvement on current arrangements under the London Scheme.

Obligations

10. The Treaty will provide a modernised framework for Australia and India to exchange extradition requests for persons who are wanted for prosecution, or for the imposition or enforcement of a sentence for an extraditable offence (Article 1).

11. The Treaty provides that an extraditable offence is an offence which, at the time of the request, is punishable under the laws of both countries by imprisonment for a maximum period of at least one year or by a more severe penalty (Article 2(1)). Where extradition is sought to enforce a sentence of imprisonment for such an offence, extradition shall be granted only if at least six months of the sentence remains to be served (Article 2(1)).

12. The obligation to extradite is qualified by numerous internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the Extradition Act. Article 4(1) sets out the mandatory grounds of refusal. The Requested State is obliged to refuse an extradition request in any of the following circumstances:

- the offence for which extradition is sought is a military offence which is not also an offence under the general criminal law (Article 4(1)(a));
- lapse of time has meant that the person whose extradition is requested has become immune from prosecution or punishment under the laws of the Requesting State (Article 4(1)(b)); or
- the offence for which extradition is requested, or any other offence for which the person may be detained or prosecuted under the Treaty, carries the death penalty, and the Requesting State has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out (Article 4(1)(c)).

13. The provision in Article 4(1)(c) reflects Australia's domestic legal requirements. Section 22(3)(c) of the Extradition Act provides that the Minister cannot surrender a person to another country for a death penalty offence unless the requesting country first gives an undertaking that the person will not be tried for the offence, or that if the person is tried the death penalty will not be imposed, or if it is imposed, that it will not be carried out.

14. Articles 4(2) and (3) set out discretionary grounds of refusal. Extradition may be refused where:

- the offence for which extradition is requested is an offence of a political character (Article 4(2));
- the person whose extradition is requested would be exposed to 'double jeopardy' as that person has already been tried and finally dealt with in respect of the offence for which extradition is sought (Article 4(3)(a));
- there are substantial grounds for believing that the extradition 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 opinion or that the person's position may be prejudiced for any of those reasons (Article 4(3)(b));
- the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced by an extraordinary or ad hoc court or tribunal in the Requesting State (Article 4(3)(c)), for example where a court or tribunal of an irregular and fundamentally unfair nature has been specially set up to try or sentence the person in the Requesting Party.; or
- the Requested State believes there may be exceptionally serious consequences for the person sought if returned to the Requesting State (Article 4(3)(d)).

As specified in the Agreed Minutes to the Treaty this Treaty will not affect the rights and obligations of the Contracting States arising from International Conventions/Treaties to which they are parties. This would include where a Contracting Party is obliged to refuse extradition pursuant to specific international Treaty obligations. Accordingly, a Contracting State would be allowed to refuse an extradition request in compliance with non-refoulement obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ([1989] ATS21).

15. Article 5 of the Treaty provides that nationals of either Contracting State may be extradited to the other. This clarifies that the Treaty applies to the extradition of both nationals and non-nationals of the Contracting States. If extradition of a national of the Requested State is not granted, the Requesting State may ask the Requested State to prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested State allow it, the Requested State must submit the case to its competent authorities for prosecution.

16. In accordance with Article 6(1), a request for extradition may be refused if the person whose extradition is sought may be tried for the extradition offence in the courts of the Requested State. Article 6(2) stipulates that where the Requested State refuses for this reason, it shall submit the case to its competent authorities for consideration. If the competent authorities decide not to prosecute, the request for extradition must be reconsidered (Article 6(3)).

17. The procedures and supporting documentation that are required in making a request for extradition are prescribed in Article 7. The information and documentation that must be provided in support of an extradition request include:

- details necessary to establish the identity and nationality of the person (Article 7(3)(a));
- a statement of the current location of the person, if known (Article 7(3)(b));
- a statement of each offence for which extradition is sought (Article 7(3)(c));
- a statement of the acts and omissions which are alleged against the person in respect of each offence for which extradition is sought (Article 7(3)(d));
- the text of the laws creating each offence and prescribing the penalty (Article 7(3)(e));
- a statement as to whether there is any limitation in respect of proceedings or punishment (Article 7(3)(f));
- if the person is accused of an offence, a warrant for the arrest of that person and, if required by the Requesting State, other information that would reasonably establish that the person has committed the offence for which extradition is requested (Article 7(4)); and
- if the person has been convicted and sentenced, a certificate of conviction and sentence (Article 7(5)(a)) and a statement that the sentence is enforceable and how much remains to be served (Article 7(5)(b)).

18. Article 10 of the Treaty provides that in urgent cases a Contracting State may request the provisional arrest of the person sought to be extradited before the extradition request is presented. The request must be accompanied by the information listed in Article 10(2) (including a statement of the existence of an arrest warrant or conviction against the person sought). The Requested Party shall notify the Requesting Party without delay of action taken on its application and the reasons for any denial (Article 10(3)). Where a provisional arrest is made, the person arrested may be released after 60 days if an extradition request (with all necessary supporting documentation) has not been received by the Requested State.

19. Article 11 deals with the situation where an extradition request is received for the same person from two different countries. It sets out the factors that must be considered by the Requested State in deciding to which country the person is to be extradited, such as the relative seriousness of the offences for which extradition is sought (Article 11(2)).

20. Article 12 sets out the procedure for surrendering the person to the Requesting State once a decision to extradite has been made. For instance, it requires that the Requesting State remove the person from the territory of the Requested State within such reasonable period as the Requested State may specify (Article 12(3)).

21. Article 13 makes provision for the surrender, upon request, of all property found in the Requested State that has been acquired as a result of the offence for which extradition is requested, or may be required as evidence against the extradited person. Surrender of such property is subject to the law of the Requested State and the rights of third parties.

22. Article 14 allows extradition to be postponed to allow the Requested State to prosecute the person for a different offence, or so that the person may serve a sentence for a different offence. If the person is serving a sentence in the Requested State, the person may be temporarily surrendered to the Requesting State for prosecution and then returned to the Requested State in accordance with mutually agreed conditions.

23. Article 15 sets out the rule of speciality, which prevents the Requesting State from prosecuting or punishing an extradited person for offences other than those for which extradition

was granted, unless the Requested State consents. This guarantee only applies in relation to offences committed before the person was surrendered (Article 15(1)), and does not apply if the person fails to leave the Requested State within 45 days of being free to do so or, having left, returns. In addition, a person extradited under the Treaty may not be extradited to a third State for an offence committed prior to his or her extradition unless the Requested State consents (Article 15(2)).

24. Article 16 sets out the procedure to be followed when one of the Contracting States is seeking an individual's extradition from a third State and that person will transit through the territory of the other Contracting State. In these circumstances, the Requesting State must seek permission for transit from the other Contracting State.

25. Article 17(1) provides that the Requested State shall make all necessary arrangements for the representation of the Requesting State in any proceedings arising out of a request for extradition, and shall otherwise represent the interests of the Requesting State.

26. In accordance with Article 19, the Treaty does not affect the rights and obligations arising from international conventions or treaties to which Australia and/or India are parties.

Implementation

27. Australia has 35 bilateral treaties on extradition with other countries. These treaties have been implemented in Australia by the making of regulations under the Extradition Act. The safeguards and protections in the Treaty are consistent with those in the Extradition Act. It is proposed that the Treaty will also be implemented by way of regulations made under the Extradition Act. Section 11 of the Extradition Act allows regulations to be made providing that the Extradition Act applies to a foreign country subject to any extradition treaty between that country and Australia that is referred to in the regulations. This is the mechanism through which extradition treaties are given effect in Australia's domestic law.

Costs

28. Article 17 of the Treaty provides that the Requesting State must bear the expenses related to translation of documents and the transportation of persons surrendered. The Requested State agrees to pay all other expenses incurred in the Requested State in connection with extradition proceedings concerning the person whose extradition is sought.

29. In accordance with the usual procedure for extradition cases, expenses incurred in extradition cases conducted under the Treaty will be met from existing budgets, principally those of the Australian Attorney-General's Department and the Commonwealth Director of Public Prosecutions.

Regulation Impact Statement

30. 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.

31. 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

32. The Treaty provides that the Contracting States shall consult on the interpretation and application of the Treaty (Article 18).

33. 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 Contracting States.

34. Any amendment to the Treaty would be a treaty action and 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

35. Pursuant to Article 20(2) of the Treaty, either Contracting State may terminate the Treaty by written notice at any time. The Treaty will cease to be in force six months following the date on which such notice is received. 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

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International Crime Cooperation Division
Attorney-General's Department

ATTACHMENT ON CONSULTATION

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CONSULTATION

36. 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.

37. 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.