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National Interest Analysis [2008] ATNIA 7

with attachment on consultation

**Treaty between Australia and the State of the United Arab Emirates
on Mutual Legal Assistance in Criminal Matters
(Hobart, 26 July 2007)**

[2007] ATNIF 17

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters (Hobart, 26 July 2007)

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Nature and timing of proposed treaty action

1. *The Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters* (the Treaty) was approved by the Federal Executive Council on 30 November 2006, and signed for Australia on 26 July 2007, by the then Minister for Justice and Customs in Hobart. It was tabled on 18 September 2007 but Parliament was dissolved before the end of 15 sitting days.
2. Article 24 of the Treaty provides that the Treaty shall enter into force 30 days after the date on which instruments of ratification are exchanged. Before Australia can exchange instruments of ratification, regulations need to be made under the *Mutual Assistance in Criminal Matters Act 1987* (the MA Act) to implement the Treaty.

Overview and national interest summary

3. The purpose of the Treaty is to better enable Australia and the United Arab Emirates 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 instruments and proceeds of crime.
5. The Treaty is based on Australia's model mutual assistance treaty and the provisions of the MA Act.

Reasons for Australia to take the proposed treaty action

6. 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 the Requesting State.
7. Mutual assistance treaties are not the only way in which Australia and other countries can assist each other in the investigation or prosecution of criminal matters. Assistance based on reciprocity is possible where both parties have mutual assistance laws enabling assistance to be requested and provided in the absence of a treaty. The MA Act enables Australia to provide assistance on the basis of reciprocity.
8. Treaties have a range of benefits over arrangements based on reciprocity. Treaties provide certainty, impose mutual obligations in international law and institute practical arrangements for requesting and providing mutual assistance.
9. The United Arab Emirates is an important partner in efforts to combat transnational crime in the Middle East. Concluding the Treaty will ensure that Australia can provide, request and receive mutual assistance to and from the United Arab Emirates in accordance with clearly defined and mutually agreed terms specially tailored to the particular circumstances of each country.

Obligations

10. Under the Treaty, Australia and the United Arab Emirates have agreed to grant each other assistance in criminal investigations and proceedings (Article 1). Such assistance may include:
 - arranging for a person to give evidence or to assist in criminal investigations in the Requesting State (either in person or via electronic communication facilities where appropriate), including the temporary transfer of people in custody for this purpose (Articles 11 and 12),
 - taking a statement from a person for the purpose of a criminal investigation in the Requesting State (Article 1(3)(a) and Article 10),
 - taking testimony from a person in a manner that can be used as evidence in a criminal proceeding in the Requesting State (Article 1(3)(a) and Article 9),
 - providing publicly available documents and records to the Requesting State (Article 14),
 - 'serving documents', for example officially providing to a person a document from the Requesting State requiring that the person appear before a court of the Requesting State (Article 1(3)(h) and Article 8),
 - locating and/or identifying a person (Article 1(3)(d)),
 - executing requests for 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 (Article 16),
 - locating, restraining, forfeiting or confiscating proceeds of crime and instruments of crime (Articles 17 and 18),

- returning embezzled public funds (Article 19), and
- other assistance consistent with the objects of the Treaty and the law of the Requested State (Article 1(3)(i)).

11. Mutual assistance under the Treaty does not include other types of international cooperation such as extradition and international transfer of prisoners (Article 1(4)). Extradition arrangements with the United Arab Emirates are covered by a separate Treaty signed at the same time as this Treaty. Australia does not have an agreement with the United Arab Emirates covering transfer of prisoners.

12. The obligation to provide assistance is qualified by internationally accepted grounds for refusal as set out in 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. Article 3(1) of the Treaty obliges the Requested State to refuse to provide assistance if:

- the request relates to an offence of a political character (Article 3(1)(a)(i)),
- the request relates to an offence under military law which is not also an offence under the ordinary criminal law of the Requested State (Article 3(1)(a)(ii)),
- 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 3(1)(b)),
- 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 3(1)(c)), or
- complying with the request would prejudice the sovereignty, security, national interest or other essential interests of the Requested State (Article 3(1)(d)).

13. Article 3(2) gives the Requested State the discretion to refuse to provide assistance in a range of circumstances. The request may be refused if the request relates to the prosecution or punishment of a person:

- for an offence where the acts or omissions alleged to constitute that offence would not constitute an offence under the laws of the Requested State (Article 3(2)(a)),
- for an offence committed outside the territory of the Requesting State where the laws of the Requested State would not allow punishment of an offence in similar circumstances (Article 3(2)(b)), or
- for an offence which, had it been committed in the Requested State, could no longer be prosecuted by reason of lapse of time or any other reason (Article 3(2)(c)).

14. Article 3(2)(d) gives the Requested State the discretion to refuse to provide assistance where the provision of assistance could:

- prejudice an investigation or proceeding in the Requested State,
- prejudice the safety of any person, or
- impose an excessive burden on the resources of the Requested State.

15. Article 3(2)(e) gives the Requested State the discretion to refuse to provide assistance where that assistance may result in the death penalty being imposed or carried out, unless having regard to the interests of international criminal cooperation, the special circumstances of the case and the extent permitted by the law of the Requested State, the Requested State considers that the assistance requested should be granted. This approach is consistent with the death penalty provisions in subsections 8(1A) and 8(1B) of the MA Act. The United Arab Emirates retains the death penalty for a range of crimes, including murder, rape and treason.

16. Article 3(3) of the Treaty states that prior to refusing a request for assistance, the Requested State must consider whether assistance could be granted subject to conditions. If the Requesting State accepts conditional assistance, it will be required by the Treaty to comply with the conditions.

17. The Treaty includes detailed provisions about the form and content of mutual assistance requests (Article 4). Each country is required to promptly execute requests for assistance in accordance with its respective laws (Articles 2(1) and 5). 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 5(3)).

18. Each country may require that the application for assistance (where relevant), its contents and related documents, and the granting of assistance be kept confidential (Articles 7(1) and 7(2)). 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 7(3)).

Implementation

19. 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

20. 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)); expenses associated with video conferencing or television links (Article 21(2)(c)); and expenses related to the service of documents (Article 21(2)(d)). The Requested State shall meet all other ordinary costs of fulfilling the request for assistance (Article 21(2)). Any exceptional expenses incurred in fulfilling the request will be met by the Requesting State, following consultation between the States (Article 21(2)(e)).

21. 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

22. 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.

23. 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

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

25. 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* 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

26. Either country may terminate the Treaty by written notice through diplomatic channels at any time (Article 24). The Treaty will cease to be in force six months following the date of notification. 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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CONSULTATION

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1. 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 for consideration at its meeting on 27 September 2006 and 18 May 2007. No requests for further information or comments on the Treaty with the United Arab Emirates have been received to date.
2. Negotiations with the State of the United Arab Emirates 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.