

National Interest Analysis [2012] ATNIA 20

with attachment on consultation

**Treaty between Australia and the Socialist Republic of Vietnam on Extradition
(Canberra, 10 April 2012)**

[2012] ATNIF 4

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The *Treaty between Australia and the Socialist Republic of Vietnam on Extradition* (the proposed Treaty) was approved by the Federal Executive Council on 19 October 2011 and signed for Australia on 10 April 2012 by the Attorney-General, the Hon Nicola Roxon MP.
2. Article 20 of the proposed Treaty provides that it shall enter into force on the thirtieth day after the date on which the Parties have notified each other in writing that they have complied with their respective requirements for the entry into force of the proposed Treaty. Before notification can be given by Australia, Australia's treaty processes must be completed, including tabling in Parliament, consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of implementing regulations under the *Extradition Act 1988* (the Extradition Act).

Overview and national interest summary

3. It is in Australia's interests 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 proposed Treaty is to provide for effective extradition arrangements between Australia and Vietnam. Australia does not currently have bilateral arrangements with Vietnam to facilitate extradition. Australia can cooperate with Vietnam to request or grant extradition only for offences covered by multilateral treaties to which both countries are party. The proposed Treaty will enable Australia to cooperate with Vietnam to request or grant extradition for any offences punishable under the laws of both countries by imprisonment for a maximum period of at least one year or by a more severe penalty.
5. The proposed Treaty is consistent with other Australian bilateral extradition treaties and is able to be implemented under Australia's existing domestic legislative framework for extradition. The proposed Treaty adds to Australia's existing network of modern bilateral extradition treaties with 38 other countries and to our extradition obligations under a number of multilateral agreements. The safeguards and protections in the proposed Treaty are consistent with those in the Extradition Act.

Reasons for Australia to take the proposed treaty action

6. Vietnam is an important partner in Southeast Asia for the Australian Government's efforts to combat transnational crime.
7. The proposed Treaty will oblige Vietnam to consider Australian requests for extradition and to grant extradition where the requirements set out in the proposed Treaty are met. Whilst Australia can request extradition of any country in the absence of a treaty, there are no assurances that the other country will consider Australia's request.
8. Implementation of the proposed Treaty will also enable Australia to receive extradition requests from Vietnam and oblige Australia to consider such requests. The Extradition Act only allows Australia to receive extradition requests from countries declared to be an 'extradition country' in regulations, although Australia can currently consider extradition requests for offences covered by multilateral instruments containing extradition obligations to which both Australia and Vietnam are parties. Prior to bringing the proposed Treaty into force, regulations will be made under the Extradition Act declaring Vietnam to be an extradition country, and stating that the Extradition Act applies in relation to Vietnam subject to the proposed Treaty.
9. The proposed Treaty will facilitate closer cooperation between Australia and Vietnam on transnational crime matters and will assist to ensure neither country becomes a safe haven for persons accused of serious crimes in the other country. The proposed Treaty contains a number of important safeguards and human rights protections, including mandatory grounds for refusal of extradition where a person would be subject to the death penalty or torture.
10. The proposed Treaty adopts the 'no evidence' standard for extradition requests. This accords with an international trend towards simplifying extradition requests. The 'no evidence' standard is included in the United Nations Model Extradition Treaty. Australia has over 30 modern bilateral extradition treaties which adopt the 'no evidence' standard. The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the conduct alleged against the person in respect of each offence for which extradition is sought (Article 6), instead of evidence sufficient to prove each alleged offence under the laws of the requested country.

Obligations

11. The proposed Treaty will oblige Australia and Vietnam to consider one another's requests for the extradition of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence for an extraditable offence, in accordance with the provisions of the proposed Treaty (Article 1).
12. The proposed Treaty provides that an extraditable offence is an offence which, at the time of the request, is punishable under the laws of both Parties 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(2)).
13. The obligation to extradite in Article 1 is qualified in the proposed Treaty by a number of internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the Extradition Act. Article 3(1) sets out the mandatory grounds for refusal. The Requested Party is obliged to refuse an extradition request in any of the following circumstances:

- where 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, ethnic origin, gender, language, religion, nationality, political opinion or other status, or that that person’s position may be prejudiced for any of those reasons’ (Article 3(1)(a));
- where the person whose extradition is requested would be exposed to ‘double jeopardy’: that is, where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party or another country in respect of the offence for which extradition is sought (Article 3(1)(b));
- where 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 Party (Article 3(1)(c));
- if the offence for which extradition is requested, or any other offence for which the person may be detained or prosecuted under the proposed Treaty, carries the death penalty, and the Requesting Party has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out (Article 3(1)(d)); or
- where there are substantial grounds for believing that the person would be subject to torture in the Requesting Party’s territory (Article 3(1)(e)).

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

15. Article 3(2) of the proposed Treaty sets out discretionary grounds for refusal. Extradition may be refused where:

- the Requested Party regards the offence for which extradition is sought as a political offence (Article 3(2)(a)) or an offence under military law but not under the ordinary criminal law of the Requested Party (Article 3(2)(b));
- the offence for which extradition is requested is considered by the Requested Party as having been committed wholly or partially within its jurisdiction (Article 3(2)(c));
- a prosecution in respect of the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is sought (Article 3(2)(d));
- the authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is requested (Article 3(2)(e));
- 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 Party (Article 3(2)(f)); or
- the Requested Party considers that the extradition of the person would be ‘unjust or oppressive, or, in exceptional cases, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations’ (Article 3(2)(g)).

16. Article 4(1) of the proposed Treaty provides that either Party may refuse extradition of its own nationals. Under Article 4(2), if extradition of a national of the Requested Party is not granted, the

Requesting Party may ask the Requested Party to prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested Party allow it, the Requested Party must submit the case to its competent authorities to determine whether a prosecution may be undertaken.

17. Article 5 specifies that the proposed Treaty will not affect the obligations of the Parties arising from any multilateral instrument to which both are parties. This would include situations where a Party is obliged to refuse extradition under specific international treaty obligations outside of the proposed Treaty.

18. The procedure and supporting documentation required in making a request for extradition are prescribed in Article 6. 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 whose extradition is sought (Article 6(2)(a)(v));
- a statement of the current location of the person, if known (Article 6(2)(a)(vi));
- a statement of each offence for which extradition is sought (Article 6(2)(a)(i));
- a statement of the conduct which is alleged against the person in respect of each offence for which extradition is sought (Article 6(2)(a)(ii));
- the text of the laws establishing each offence and prescribing the penalty which may be imposed (Article 6(2)(a)(iii));
- a statement regarding any applicable time limitations (Article 6(2)(a)(iv));
- if the person is accused of an offence, a warrant for the arrest of that person (Article 6(2)(b)); and
- if the person has been convicted of an offence, documentary evidence of the conviction, any sentence imposed, the extent to which any sentence imposed has not been carried out, and any options available to the person to challenge the conviction or sentence (where convicted *in absentia*) (Article 6(2)(c)-(d)).

19. Article 7 of the proposed Treaty provides that extradition of a person may still be granted, even if all of the requirements of Article 6 have not been met, provided that the person consents to be extradited.

20. Article 10 of the proposed Treaty provides that in urgent cases a Party may request the provisional arrest of the person sought to be extradited before the extradition request is presented. The request for provisional arrest 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 is obliged to take the necessary steps to secure the arrest of the person and to notify the Requesting Party promptly of the result of the provisional arrest request (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 Party (Article 10(4)).

21. Article 12 deals with the situation where an extradition request is received for the same person from two different countries. It sets out six factors that must be considered by the Requested Party in deciding to which country the person is to be extradited, including the relative seriousness of the offences for which extradition is sought if the requests relate to different offences (Article 12(2)).

22. Article 13 sets out the procedure for surrendering the person to the Requesting Party once a decision to extradite has been made. For instance, it requires that the Requesting Party remove the

person from the territory of the Requested Party within such reasonable period as the Requested Party may specify (Article 13(3)).

23. Article 14 makes provision for the surrender, upon request, of all property found in the Requested Party's territory that has been acquired as a result of the offence for which extradition is requested, or may be required as evidence. Surrender of such property is subject to the law of the Requested Party and the rights of third parties.

24. Article 15 allows extradition to be postponed to allow the Requested Party to prosecute or enforce a sentence against the person for an offence other than an offence constituted by conduct for which extradition is sought. If the person is serving a sentence in the Requested Party, the person may be temporarily surrendered to the Requesting Party for prosecution in relation to an offence for which extradition is sought and then returned to the Requested Party after proceedings have concluded, in accordance with mutually agreed conditions (Article 15(3)).

25. Article 16 sets out the rule of speciality, which prohibits the Requesting Party from prosecuting or punishing an extradited person for any offence other than an offence for which extradition was granted, or any other extraditable offence provable on the same facts and punishable by the same or lesser penalty, unless the Requested Party consents. Speciality only applies in relation to offences committed before the person was surrendered (Article 16(1)), and does not apply if the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it (Article 16(2)).

26. Article 17 provides that, where a person has been extradited under the proposed Treaty, the Requesting Party must not then extradite the person to a third country for any offence committed prior to the person's extradition unless the Requested Party consents, or the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it.

27. Article 18 sets out the procedure to be followed when a person is to be extradited to a Party from a third country through the territory of the other Party. In these circumstances, the Party seeking the person's extradition must request permission for transit from the other Party.

28. Article 19(1) provides that the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for extradition, and shall otherwise represent the interests of the Requesting Party.

Implementation

29. Section 11 of the Extradition Act allows regulations to be made providing that the Extradition Act applies to a specified extradition country subject to any bilateral extradition treaty between that country and Australia that is set out in the regulations. This is the mechanism through which extradition treaties are given effect in Australia's domestic law. It is proposed that the proposed Treaty will be implemented by way of regulations made under the Extradition Act.

Costs

30. Article 19(3) of the proposed Treaty provides that the Requesting Party must bear the expenses incurred in conveying the person from the Requested Party's territory. The Requested Party agrees to pay all other expenses incurred in its territory in connection with extradition proceedings arising out of an extradition request (Article 19(1) and (2)).

31. In accordance with the usual procedure for international extradition, expenses incurred in relation to extradition requests received or made by Australia under the proposed Treaty will be met from existing budgets, principally those of the Commonwealth Attorney-General's Department in respect of Vietnamese requests and Australian investigative and prosecutorial agencies seeking extradition (in respect of Australian requests).

Regulation Impact Statement

32. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

33. The proposed 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.

34. Any amendment to the proposed Treaty would be a treaty action and would be subject to Australia's domestic treaty process.

Withdrawal or denunciation

35. Under Article 20(3) of the proposed Treaty, either Party may terminate the proposed Treaty by written notice at any time. The proposed Treaty will cease to be in force on the one hundred and eightieth day after the date on which such notice is given. Termination by Australia would be subject to Australia's domestic treaty process.

Contact details

Transnational Crime and Treaties Section
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 proposed Treaty was provided to State and Territory representatives through the biannual SCOT meetings throughout the course of the treaty negotiations. No requests for further information or comments on the proposed Treaty have been received to date.

37. Negotiations with Vietnam about the proposed 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.