

National Interest Analysis [2015] ATNIA 16

with attachment on consultation

Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters

(Brisbane, 15 November 2014)

[2014] ATNIF 32

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters

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Nature and timing of proposed treaty action

1. It is proposed to bring into force the *Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters* ('Treaty') which was signed for Australia on 15 November 2014, by the Minister for Foreign Affairs, the Hon Julie Bishop MP.
2. **Article 26** (Entry into Force and Termination) of the Treaty provides that it shall enter into force 30 days after Australia and Brazil ('Parties') have notified each other in writing through diplomatic channels that their respective requirements for entry into force have been fulfilled. Before notification can be given by Australia under **Article 26**, Australia's domestic treaty-making requirements must be completed, including consideration by the Joint Standing Committee on Treaties ('JSCOT'), the passing of implementing regulations under the *Mutual Assistance in Criminal Matters Act 1987* ('Mutual Assistance Act') and Executive Council approval.

Overview and national interest summary

3. Mutual legal assistance is a formal process whereby the Government of one country ('Requesting Party') requests assistance from the Government of another country ('Requested Party') in relation to a criminal investigation or prosecution. Assistance may extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the jurisdiction of the Requesting Party.
4. Mutual assistance treaties establish a framework of practical arrangements based on mutual obligation enabling Australia to request and provide information and evidence for investigating or prosecuting serious crimes. It is in Australia's interests to be able to provide and request the widest possible assistance in criminal matters, so that criminals cannot evade justice where evidence of or proceeds from their criminal conduct is located in a foreign jurisdiction. This requires a responsive and streamlined mutual assistance framework.
5. Australia does not currently have a bilateral agreement with Brazil to facilitate mutual legal assistance. Both Australia and Brazil are parties to multilateral conventions that contain mutual assistance obligations and can also provide each other with assistance on the basis of reciprocity. In situations where no multilateral convention or bilateral mutual assistance treaty applies, however, there is no obligation on either country to consider a request for assistance from the other country. The Treaty will therefore provide a more comprehensive framework to govern bilateral mutual assistance between Australia and Brazil as well as

clarity and certainty about the procedures and processes to be used in making and executing mutual assistance requests.

6. The Treaty adds to Australia's existing network of modern bilateral mutual legal assistance treaties with 29 other countries¹ and to our mutual assistance obligations under several multilateral conventions.² The safeguards and protections in the Treaty are consistent with those contained domestically in the Mutual Assistance Act. The obligations under the Treaty will be implemented under Australia's existing domestic legislative framework for mutual assistance by way of regulations under the Mutual Assistance Act.

Reasons for Australia to take the proposed treaty action

7. Brazil is Australia's largest trading partner in South America, with imports and exports between our countries totalling **\$1.321 billion** in 2013. Australian investment in Brazil was **\$13,049 million** in 2013. There are approximately 100 Australian companies with a presence in Brazil. Australia and Brazil also cooperate multilaterally on issues of mutual interest at international fora. For example, Australia and Brazil both prioritise reform of international financial institutions at G20 meetings and cooperate on climate change and agricultural trade reform in the World Trade Organisation through the Cairns Group. The people-to-people links between our countries are also developing – Australia's education system attracts a substantial number of Brazilian students and tourist travel between our countries is significant.

8. Brazil is an important partner in South America for the Australian Government's efforts to combat transnational crime.

9. The Treaty will ensure that Australia can provide, request and receive assistance to and from Brazil in accordance with clearly defined and mutually agreed terms.

10. Assistance based on reciprocity is possible where both States have mutual assistance laws, enabling assistance to be requested and provided in the absence of a treaty. While this is presently the case between Australia and Brazil, the Treaty has a range of benefits over an arrangement based on reciprocity. The Treaty will provide certainty; impose obligations at international law and institute practical arrangements for requesting and providing assistance. Importantly, the Treaty would oblige Brazil to consider Australian requests for assistance where the requirements set out in the Treaty are met. In the absence of a treaty, there are no assurances that Australia's requests for assistance will be considered.

11. The Treaty contains a number of important safeguards and human rights protections, including the ability to refuse to provide assistance in cases where the death penalty may be imposed or executed, the request has been made for the purpose of prosecuting someone on discriminatory grounds, or where double jeopardy (that is, where a person is tried twice for the same offence) or dual criminality (that is, the conduct would be an offence in both Australia and Brazil) considerations apply.

¹ Argentina, Austria, Canada, China, Ecuador, Finland, France, Greece, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Korea, Luxembourg, Malaysia, Mexico, Monaco, Netherlands, Philippines, Portugal, Spain, Sweden, Switzerland, Thailand, United Arab Emirates, United Kingdom and United States.

² Examples are the *United Nations Convention against Transnational Organized Crime* [2004] ATS 12 and the Protocols thereto and the *United Nations Convention against Corruption* [2006] ATS 2.

Obligations

12. The Treaty will oblige the Parties to provide each other with assistance in the investigation and prosecution of criminal offences and related proceedings (**Article 1(1)**). The assistance to be provided may include:

- (a) taking evidence and obtaining statements of persons, including experts (**Article 1(3)(a)**);
- (b) providing information, documents and other records, including criminal and government records, judicial documents and expert evaluations (**Article 1(3)(b)**);
- (c) locating persons and objects, including their identification (**Article 1(3)(c)**);
- (d) examining objects and sites to the extent that it is not inconsistent with the laws of the Requested Party (**Article 1(3)(d)**);
- (e) search and seizure (**Article 1(3)(e)**);
- (f) delivering property and evidence (**Article 1(3)(f)**);
- (g) making persons in custody and others available to give evidence or assist investigations (**Article 1(3)(g)**);
- (h) service of documents, including documents seeking the attendance of persons (**Article 1(3)(h)**);
- (i) measures to locate, restrain and forfeit the proceeds and instruments of crime and return and share assets (**Article 1(3)(i)**); and
- (j) other assistance consistent with the objects of the Treaty and the law of the Requested Party (**Article 1(3)(j)**).

13. Mutual assistance under the Treaty does not include extradition, execution of criminal judgments imposed in the territory of the Requesting Party (except to the extent permitted by the Treaty and the Requested Party's laws) and international transfer of prisoners to serve sentences (**Article 2 (Exclusions)**). Australia has an existing extradition treaty with Brazil.³ Australia does not have an agreement with Brazil covering the international transfer of prisoners.

14. The obligation to provide mutual legal assistance in **Article 1** is subject to a number of internationally accepted grounds for refusal which largely reflect the existing grounds contained in the Mutual Assistance Act. Under **Article 4(1)** (Refusal or Postponement of Assistance), the Requested Party may refuse to provide assistance if:

- (a) the request relates to an offence for which the death penalty may be imposed or executed (**Article 4(1)(a)**);
- (b) execution of the request would impair the Requested Party's sovereignty, security, public order, essential public interest or prejudice the safety of any person (**Article 4(1)(b)**);
- (c) the request relates to an offence that is regarded by the Requested Party as an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, of a political character (**Article 4(1)(c)**);

³ *Treaty on Extradition between Australia and the Federative Republic of Brazil* (Canberra, 22 August 1994), [1996] ATS 15

- (d) there are grounds to believe the request has been made for the purpose of prosecuting a person on account of race, sex, religion, nationality, ethnic origin or political opinions, or that that person's position may be prejudiced for any of these reasons (**Article 4(1)(d)**);
- (e) the request relates to an offence the prosecution of which in the Requesting Party would be incompatible with the Requested Party's law on double jeopardy (**Article 4(1)(e)**);
- (f) the request relates to an offence that is regarded by the Requested Party as an offence under military law, which is not also an offence under ordinary criminal law (**Article 4(1)(f)**);
- (g) the request relates to an offence where acts or omissions alleged to constitute that offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence, or could not be prosecuted in the Requested Party in similar circumstances (**Article 4(1)(g)**); or
- (h) providing the assistance sought could impose an excessive burden on the human or financial resources of the Requested Party (**Article 4(1)(h)**).

15. Brazil abolished the death penalty for ordinary crimes in 1979 and has not carried out an execution since 1855.⁴ Australia has a long-standing policy of opposition to the death penalty. **Article 4(1)(a)** relating to the death penalty is able to be implemented consistently with Australia's policy position and domestic legal requirements under subsections **8(1A)** and **8(1B)** of the Mutual Assistance Act.

16. **Article 4(4)** of the Treaty provides that, prior to refusing or postponing assistance, the Requested Party must consider whether assistance could be granted subject to any necessary conditions. If the Requesting Party accepts conditional assistance, it must comply with the conditions.

17. Where a request would interfere with an ongoing investigation, prosecution or civil proceeding, the Requested Party may temporarily delay providing assistance (**Article 4(2)**). The Requested Party must promptly inform the Requesting Party if the request is wholly or partially refused or its execution is postponed and provide reasons for the refusal or postponement (**Article 4(3)**).

18. **Article 5** (Contents of Requests) outlines the content of mutual legal assistance requests. **Article 5(1)** lists the information that is to be included in a request, including:

- (a) the name and contact details of the competent authority (**Article 5(1)(a)**);
- (b) a description of the nature of the investigation or proceedings, including a summary of the facts and provision of the applicable laws (**Article 5(1)(b)**);
- (c) a description of the nature and purpose of the assistance sought (**Article 5(1)(c)**);
- (d) the need and reasons for any confidentiality required (**Article 5(1)(d)**); and
- (e) any time limits for compliance with the request (**Article 5(1)(e)**).

19. **Article 5(2)** lists additional information that should be included where possible to facilitate execution of the request.

⁴ <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>

20. **Article 3** (Execution of Requests) of the Treaty requires each Party to execute requests for assistance promptly in accordance with its laws (**Article 3(1)**). The Requested Party must promptly inform the Requesting Party of the outcome of the execution of the request (**Article 3(5)**). If the Requested Party becomes aware of circumstances likely to cause significant delay in responding to the request for assistance, it must promptly inform the Requesting State (**Article 3(4)**).

21. **Article 7(1)** (Limitation and use of Confidentiality) of the Treaty provides that the Requested Party may require, after consultation with the Requesting Party, that information or evidence provided, or its source, be kept confidential or be disclosed or used subject to terms and conditions it specifies. **Article 7(3)** provides that the Requesting Party may require that a request, its contents and supporting documents and any action taken be kept confidential except to the extent necessary to execute it or under terms and conditions specified by it. **Article 7(2)** of the Treaty requires that information and evidence obtained under it not be used for purposes other than those stated in the request without the prior consent of the Requested Party.

22. **Article 8** (Certification and Authentication) of the Treaty sets out certification and authentication requirements for documents, records or objects provided through a request for assistance.

23. **Article 9** (Language) provides that requests and supporting documents must be accompanied by a translation into the language of the Requested Party.

24. **Article 10** (Representation) 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 assistance, and shall otherwise represent the interests of the Requesting Party.

25. **Articles 12 to 22** of the Treaty set out requirements for specified forms of assistance available under the Treaty. This includes:

- (a) taking of evidence (**Article 12**);
- (b) obtaining of statements (**Article 13**);
- (c) presence of persons involved in proceedings (**Article 14**);
- (d) transmission and return of documents and objects (**Article 15**);
- (e) availability of persons to give evidence or assist investigations (**Article 16**);
- (f) making persons in custody available to give evidence or assist investigations (**Article 17**);
- (g) the safe conduct of any person who is in the Requesting Party in order to give evidence or assist in investigations (**Article 18**);
- (h) requests relating to proceeds and instruments of crime (**Article 19**);
- (i) service of documents (**Article 20**);
- (j) provision of publically available and official documents (**Article 21**); and
- (k) search and seizure (**Article 22**).

26. **Article 23** (Other Assistance) specifies that the Treaty will not affect the obligations between the Parties, pursuant to other treaties or arrangements, or otherwise.

27. **Article 27** (Consultation and Dispute Settlement) of the Treaty provides that the Parties shall consult promptly on the interpretation, application and implementation of the

Treaty, and if the Central Authorities of the Parties are unable to agree, any dispute shall be resolved through consultation by diplomatic channels.

Costs

28. **Article 11(1)** (Expenses) of the Treaty provides that the Requested Party shall meet the costs of fulfilling the request for assistance, and the Requesting Party shall bear the travel expenses of any person travelling to or from the Requested Party in connection with a mutual assistance request, including custodial or escorting officers, as well as expert's fees and expenses. Where expenses are of an extraordinary nature the Parties shall consult to determine the terms and conditions under which the requested assistance can be provided (**Article 11(2)**).

29. In accordance with the usual practice for mutual assistance requests, expenses incurred by Australia when making or responding to mutual assistance requests under the Treaty will be met from existing budgets, principally those of the Commonwealth Attorney-General's Department and the Australian Federal Police (who execute the majority of requests) in relation to requests from Brazil, and the Australian investigative and prosecutorial agencies seeking assistance through Australian requests.

Implementation

30. It is proposed that the Treaty will be implemented through making regulations under **Section 44** (Regulations) of the Mutual Assistance Act consistent with the implementation of other mutual assistance treaties entered into by Australia. **Section 7** (Application of Act) of the Mutual Assistance Act allows regulations to provide that the Mutual Assistance Act applies to a specified foreign country subject to any mutual assistance treaty between that country and Australia that is set out in the regulations. This is the mechanism through which mutual assistance treaties are given effect in Australia's domestic law.

Future treaty action

31. **Article 25** (Amendment) of the Treaty provides that the Treaty may be amended at any time by mutual consent of the Parties, in accordance with their respective domestic procedures. Any future amendment to the Treaty will constitute a treaty action and will therefore be subject to completion of Australia's domestic treaty-making requirements (as outlined at Paragraph 2 above).

Withdrawal or denunciation

32. The Treaty makes no specific provision for future withdrawal or denunciation. Under **Article 26(2)** (Entry into Force and Termination), however, either Party may terminate the Treaty by written notice at any time through diplomatic channels. The Treaty will cease to be in force on the one hundred and eightieth day after the date on which such notice was given. Termination by Australia would be subject to Australia's domestic treaty process.

Contact details

Transnational Crime Section
International Crime Cooperation Division
Attorney-General's Department.

ATTACHMENT ON CONSULTATION

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33. Australian State and Territory Governments were consulted on the Treaty through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Treaty was provided to State and Territory representatives during bi-annual SCOT meetings throughout the course of the Treaty negotiations. No requests for further information or comments on the Treaty have been received to date.

34. Negotiations with the Federative Republic of Brazil about the Treaty were not in the public domain as Australia follows the long-established international practice that a bilateral treaty remains confidential to the parties negotiating until it is signed.

35. Consultation was conducted with relevant Australian Government departments and agencies.