

National Interest Analysis [2020] ATNIA 15

with attachment on consultation

***Suspension of the Agreement for the Surrender of Accused and Convicted Persons
between the Government of Australia and the Government of Hong Kong***

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Suspension of the Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong

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Nature and timing of proposed treaty action

1. The proposed treaty action is the suspension of the *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong* (the Extradition Agreement), done at Hong Kong on 15 November 1993.¹
2. The operation of the Extradition Agreement will be suspended in accordance with the *Vienna Convention on the Law of Treaties* (VCLT). Article 62 of the VCLT enables a treaty to be suspended where a fundamental change of circumstances has occurred.²
3. Article 65 of the VCLT sets out the procedure for suspension of a treaty. A party that invokes a ground for suspending the operation of a treaty under the VCLT must notify the other party in writing of its claim and the reasons for the suspension.³ If the other party has not objected within three months, the party making the notification may carry out the suspension through an instrument communicated to the other party.⁴
4. Australia notified Hong Kong via diplomatic note on 9 July 2020 of its intention to suspend the Extradition Agreement citing the adoption by the People's Republic of China of the National Security Law for Hong Kong (NSL), enacted on 30 June 2020, as a fundamental change in circumstances. Australia received a diplomatic note from Hong Kong on 28 July 2020 purporting to suspend the Extradition Agreement as a result of the action taken by Australia. Hong Kong did not provide any legal basis for the purported suspension, or otherwise reference the VCLT. Australia intends to provide an instrument to Hong Kong to bring the suspension into immediate effect on 9 October 2020.

¹ [1997] ATS 11, as amended by the *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China amending the Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong*, done at Hong Kong on 19 March 2007 [2008] ATS 6.

² Article 62 of the VCLT provides:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

...

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

³ VCLT, Article 65(1) and Article 67(1).

⁴ VCLT, Article 65(2) and 67(2).

Overview and national interest summary

5. The purpose of the proposed treaty action is to suspend the extradition relationship due to the impact of the People's Republic of China's imposition of the broad NSL. This will mean that there will be no mechanism to request the surrender of, or to surrender, individuals between Australia and Hong Kong during the suspension.

6. The NSL is in direct conflict with China's international obligations under the legally binding *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, signed by the Parties on 19 December 1984 (the Joint Declaration). It has undermined Hong Kong's high degree of autonomy guaranteed under the Joint Declaration and erodes the independence of the Hong Kong judiciary and the rights and freedoms enjoyed by the Hong Kong people, both of which have underpinned the success of Hong Kong and the One Country, Two Systems framework. Given the impact of the enactment of the NSL on the application of the criminal law in Hong Kong and Australia's confidence in its legal processes, it is in the national interest to suspend the Extradition Agreement.

Reasons for Australia to take the proposed treaty action

7. Extradition treaties are a mechanism for the surrender of fugitive criminals from one country to another. They are a reliable and effective means of doing so because such treaties create an obligation at international law to extradite in certain defined circumstances and are designed to accommodate the extradition procedures of both parties.

8. There are currently no extradition cases between Australia and Hong Kong. Over the past decade, Australia has made nine extradition requests to Hong Kong and Hong Kong has made three extradition requests to Australia.

9. Article 62 of the VCLT enables a treaty to be suspended where a fundamental change of circumstances has occurred. The adoption by the People's Republic of China of the NSL constitutes a fundamental change of circumstances with respect to the Extradition Agreement. Australia's consent to be bound by the Extradition Agreement in 1993 was premised on Hong Kong having a high degree of autonomy, judicial independence and fundamental human rights.

10. Suspension of the Extradition Agreement will ensure that the application of the NSL will not compromise the intent or integrity of the extradition process for any individuals who may be surrendered by Australia to Hong Kong in criminal matters.

Obligations

11. During the period of the suspension, Australia and Hong Kong will be released from their obligations to perform the Extradition Agreement, including to consider extradition requests under the treaty.⁵

12. If Hong Kong does object to the suspension of the Extradition Agreement under Article 65 of the VCLT within three months of Australia's notification, Australia will be obliged to seek a solution through dispute settlement procedures with Hong Kong (eg.

⁵ VCLT, Article 72(1).

through negotiation, mediation or conciliation).⁶ Australia is not required to consent to a judicial procedure, as China has entered a reservation to Article 66 of the VCLT, which provides for the possibility of submitting a dispute under the VCLT to judicial settlement, arbitration or conciliation.

Implementation

13. The implementation of the Extradition Agreement suspension does not require any changes to domestic law. Each State and Territory government has been made aware of suspension of the treaty and its operation by letter from the Attorney-General's Department.

Costs

14. A self-assessment of the regulatory impact of suspension of the Extradition Agreement has been conducted by the Attorney General's Department. The Office of Best Practice Regulation confirmed on 17 July 2020 that a Regulation Impact Statement is not required.

15. There are no immediate costs associated with the proposed treaty action. Suspending the Extradition Agreement will, in effect, suspend any costs related to enforcing the treaty. There are currently no active extradition requests between Australia and Hong Kong.

Future treaty action

16. It will remain open to Australia to seek to revoke the suspension to re-commence the Extradition Agreement at a later time, or to consider other treaty actions. Any further treaty action would be subject to Australia's domestic treaty processes including tabling and consideration by JSCOT.

Withdrawal or denunciation

17. Article 21 of the Extradition Agreement provides that either party may terminate the Agreement by notice in writing at any time. The Agreement shall cease to have effect six months after the receipt of that notice.

Contact details

International Crime Treaties and Policy
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⁶ VCLT, Article 65(3).

ATTACHMENT ON CONSULTATION

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CONSULTATION

1. Australian State and Territory Governments have been consulted on the Treaty through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No requests for further information or comments on the Treaty have been received to date.