

National Interest Analysis [2020] ATNIA 16

with attachment on consultation

Suspension of the Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Suspension of the Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters

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Nature and timing of proposed treaty action

1. The proposed treaty action is the suspension of the *Agreement between the Government of Australia and the Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters* (the MLA Agreement) done at Sydney on 23 September 1996.
2. The operation of the MLA Agreement will be suspended in accordance with the *Vienna Convention on the Law of Treaties* (VCLT). Article 57 of the VCLT enables a treaty to be suspended at any time where there is mutual consent between the parties.¹
3. On 28 July 2020 Hong Kong provided Australia with a diplomatic note purporting to unilaterally suspend the MLA Agreement. The MLA Agreement does not contain a mechanism for suspension and Hong Kong's note did not provide any legal basis for the purported suspension of the MLA Agreement. Hong Kong's action to suspend the MLA Agreement was in response to Australia's notice to Hong Kong on 9 July 2020 of its intention to suspend the *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong* (the Extradition Agreement) on the basis of a fundamental change of circumstances. This followed the adoption by the People's Republic of China of the National Security Law for Hong Kong (NSL), enacted on 30 June 2020.
4. To suspend the MLA Agreement by mutual consent under the VCLT, Australia will formally notify Hong Kong in writing that it consents to the suspension. Suspension will take effect upon issuance of that notification.

Overview and national interest summary

5. The purpose of the proposed treaty action is to consent to the suspension of the MLA Agreement. Following receipt of the notice from Hong Kong that it wishes to suspend the Agreement, ongoing cooperation on MLA matters is unlikely to occur with Hong Kong. The suspension of the MLA Agreement will formalise this situation and mean that Australia cannot provide assistance in criminal matters to, or request assistance from, Hong Kong under the MLA Agreement, during the suspension.

¹ Article 57 of the VCLT provides:

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

Reasons for Australia to take the proposed treaty action

6. The MLA Agreement establishes a regime to cooperate on obtaining assistance in criminal matters, including material for use as evidence in criminal proceedings and to take action in relation to proceeds of crime. Treaties are a reliable and effective means of cooperation between countries as they create an obligation at international law to provide assistance and are designed to accommodate the mutual legal assistance procedures of both parties.

7. Consenting to the suspension of the MLA Agreement in accordance with Article 57 of the VCLT would provide certainty as to the legal basis under which the MLA Agreement is suspended as well as the date from which the suspension would take effect; being the date on which Australia notifies Hong Kong that we consent to the MLA Agreement suspension. Suspension will also ensure that the application of the NSL will not compromise the intent or integrity of the mutual legal assistance process.

Obligations

8. During the period of the suspension, Australia and Hong Kong will be released from their obligations to perform the MLA Agreement, including to consider MLA requests under the MLA Agreement.

9. Australia currently has ten active MLA requests to Hong Kong and one incoming MLA request from Hong Kong under the MLA Agreement. These requests will no longer be progressed.

Costs

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

11. There are no other immediate costs associated with the proposed treaty action. Suspending the MLA Agreement will, in effect, suspend all costs related to enforcing the treaty.

Implementation

12. The implementation of the MLA Agreement suspension does not require any changes to domestic law. Each State and Territory Government has been made aware of suspension of the MLA Agreement and its operation by formal letter from the Attorney-General's Department. There are no provisions requiring the consent of State and Territory Government to the proposed treaty action.

Future treaty action

13. It will remain open to Australia to seek to revoke the suspension to recommence the MLA 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

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

Contact details

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CONSULTATION

1. Australian State and Territory Governments have been consulted on the suspension of the MLA Agreement through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT).