

National Interest Analysis [2023] ATNIA 5

with attachment on consultation

Treaty on Extradition between Australia and the Czech Republic

(Canberra, 17 February 2022)

[2023] ATNIF 5

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is entry into force of the *Treaty on Extradition between Australia and the Czech Republic* (the Treaty), which was signed for Australia in Canberra on 17 February 2022 by the then Attorney-General, Senator the Hon. Michaelia Cash.
2. **Article 22(1)** provides that the Treaty shall enter into force on the first day of the third month from the date on which both countries have notified each other via diplomatic note that they have complied with their respective domestic requirements for the Treaty's entry into force.

Overview and national interest summary

3. The purpose of the Treaty is to create a comprehensive framework between Australia and the Czech Republic that will facilitate the surrender of a person from one country to the other country for the purposes of a criminal prosecution or the imposition or service of a criminal sentence.
4. Under the *Extradition Act 1988*, Australia can make an extradition request to any country, but can only receive an extradition request from a country declared in regulations to be an 'extradition country'.¹ In 2007 Australia created regulations declaring the Czech Republic an 'extradition country' allowing Australia to accept an extradition request from the Czech Republic.² In the absence of the Treaty, the Czech Republic is not bound to accept a request from Australia, although it may do so. According to the Czech Republic, extradition requests from non-treaty countries are considered on a case-by-case basis and involve significant consultation across the Czech Republic's government. This is a lengthy process that may prevent the Czech Republic from being able to assist Australia, particularly in urgent circumstances.
5. The Treaty will provide the international legal framework to enable Australia and the Czech Republic to consider and accept requests for extradition from one another and provide clarity and certainty about the procedures and processes to be used when making and receiving extradition requests. The Treaty will also streamline processes for both countries, allowing them to respond to future extradition requests and broader crime cooperation challenges more efficiently and effectively. The Treaty will therefore strengthen Australia and the Czech Republic's crime cooperation relationship and enhance Australia's ability to combat transnational crime, in particular the synthetic drug trade and cybercrime.

¹ See definition of 'extradition country' in s 5 of the Extradition Act, and regulation-making power in s 55 of the Extradition Act.

² *Extradition (Czech Republic) Regulations 2007*.

6. Section 11(1) of the Extradition Act relevantly allows regulations to apply the Extradition Act to a specified extradition country subject to any limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty between that country and Australia.

7. If the proposed treaty action is taken, the Treaty will be implemented by way of regulations under the Extradition Act. These new regulations would also repeal the *Extradition (Czech Republic) Regulations 2007*.

8. By enacting new regulations that apply the Extradition Act subject to the Treaty, Australia will only be able to grant extradition requests from the Czech Republic where the requirements set out in both the Treaty and the Extradition Act are met. This means that the important safeguards and human rights protections set out in the Extradition Act will be preserved and will apply in addition to other human rights safeguards in the Treaty. The human rights safeguards in the Treaty are consistent with Australia's international human rights obligations and with the provisions of the Extradition Act.

Reasons for Australia to take the proposed treaty action

9. According to the Australian Institute of Criminology, serious and organised crime was estimated to have cost Australia between \$24.8b and \$60.1b in 2020-21.³ The most profitable criminal enterprises—including illicit drugs, other illicit commodities and cybercrime—are often perpetrated by transnational criminal actors who operate beyond Australia's borders.

10. Extradition treaties form an important part of Australia's ability to combat the most serious crimes. They are critical in disrupting and dissuading transnational and serious organised crime threats to Australia's collective economic and societal interests. They also ensure that fugitives that have fled Australia cannot evade justice by crossing borders, and that Australia can assist other countries in returning alleged criminals to face justice.

11. The Czech Republic is an important law enforcement partner to Australia in Central Europe. Key areas of engagement between the Czech Republic and Australia to date include efforts to combat the manufacture and transshipment of synthetic drugs as well as serious cybercrime. The Treaty is a demonstration of the importance of Australia's law enforcement cooperation relationship with the Czech Republic, and a practical strengthening of those ties.

12. The Treaty adds to Australia's existing suite of bilateral extradition treaties with 39 other countries, and our broader extradition relationships through multilateral agreements such as the United Nations Convention against Corruption. Prior to bringing the Treaty into force, new regulations will be made under the Extradition Act to declare the Czech Republic to be an 'extradition country' and specify that the Extradition Act applies in relation to the Czech Republic subject to the Treaty. The current *Extradition (Czech Republic) Regulations 2007* will be repealed upon commencement of the new regulations.

Obligations

Obligation to extradite and grounds of refusal

13. The Treaty provides that Australia and the Czech Republic undertake to extradite persons to each other for prosecutions or the imposition or service of a sentence for an extraditable offence,

³ Australian Institute of Criminology, *Estimating the costs of serious and organised crime in Australia, 2020-21*, Report No 38 (2022) 1.

subject to the provisions and conditions laid down in the Treaty (**Article 1**). This allows Australia to assess, on a case-by-case basis, whether to surrender a person whose extradition is sought by the Czech Republic. By virtue of paragraph 11(1)(a) of the Extradition Act, the new regulations will apply the Extradition Act to requests made under the Treaty subject to any limitations, conditions, exceptions or qualifications as are necessary to give effect to the Treaty.

14. Regulations made pursuant to section 11 of the Extradition Act do not give the terms of the relevant treaty legislative force or incorporate the treaty's terms into Australian law, but rather modify the operation of the Extradition Act.⁴ Section 11 of the Extradition Act has no effect on extradition requests **by** Australia (made under section 40 of the Extradition Act), but only extradition requests made **to** Australia.⁵ Under section 11, a treaty term can only modify the interpretation of the Act where it is **necessary** to give effect to a limitation, condition, exception or qualification in the treaty, where the treaty is directly **inconsistent** with the Extradition Act.⁶ In this way, for example, treaties can have the effect under the Extradition Act of imposing additional explicit protections under Australian law restricting the circumstances in which extradition can be granted.

15. This means that the Extradition Act will apply to all extradition requests made by the Czech Republic, but may be modified where necessary to apply a limitation, condition, exception or qualification to the terms of the Extradition Act in order to give effect to the Treaty. This would only operate in circumstances where the Extradition Act would apply in a manner that is inconsistent with the Treaty. Each of the circumstances in which the Treaty modifies the Act in this way is set out below, under the relevant Treaty article.

16. Under the Treaty, an 'extraditable offence' is:

- an offence punishable by at least one year of imprisonment in both Australia and the Czech Republic: **Article 2(1)**.
 - If extradition is sought for the enforcement of a sentence of imprisonment for an extraditable offence, at least six months of the prison sentence must remain for extradition to be granted: **Article 2(1)**⁷
 - Where an extradition request includes several offences punishable under the laws of both States and some of these do not meet minimum penalty or term of imprisonment, extradition may also be granted for the latter offences in accordance with the Requested State's domestic law: **Article 2(2)**,⁸ and

⁴ *Oates v Attorney-General (Cth)* (2001) 181 ALR 559, [16] (Lindgren J), affirmed in *Oates v Attorney-General (Cth)* (2002) 189 ALR 216, [20]-[22] (O'Loughlin & Whitlam JJ); *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641, 652 (French J); *Barton v Commonwealth* (1974) 131 CLR 477, 507 (Jacobs J).

⁵ *Oates v Attorney-General (Cth)* (2002) 189 ALR 216, [63] (Conti J).

⁶ *Oates v Attorney-General (Cth)* (2001) 181 ALR 559, [16] (Lindgren J); *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213, [65] (Gummow, Crennan, Kiefel & Bell JJ).

⁷ This is broadly consistent with the definition of an 'extradition offence' in s 5 and 'extraditable person' under s 6 of the Extradition Act. However, sections 5 and 6(ii) of the Extradition Act do contain the requirement that there be at least six months remaining on a prison sentence where extradition is sought for the enforcement of a sentence. Section 6(ii)(B), which defines 'extraditable person', only provides that a person may be extradited to serve a sentence if 'whole or part' of the sentence remains to be served. The qualification requiring at least six months be remaining on a prison sentence under Article 2(1) will therefore modify the definition of 'extradition offence' and 'extraditable person' under ss 5 and 6 of the Extradition Act respectively.

⁸ This is covered in s 20 of the Extradition Act, which allows Australia, where surrendering a person for an extradition offence, to surrender a person for other offences provided that the person has provided their consent.

- conduct that constitutes an offence in both Australia and the Czech Republic: **Article 2((1), (3) and (6)).**⁹

17. The Treaty contains a number of mandatory and discretionary grounds of refusal of an extradition request which align with Australia's domestic legal framework and Australia's international legal obligations, including international human rights obligations. **Article 3** of the Treaty specifies the following mandatory grounds of refusal of an extradition request:

- the offence for which extradition is requested is, in the opinion of the Requested State, a political offence (**Article 3(a)**);¹⁰
- there are substantial grounds for believing the request has been made for the purpose of prosecuting or punishing a person on account of their race, language, ethnic origin, gender, religion, nationality, political opinion or other status, or that the person's position may be prejudiced for any of those reasons (**Article 3(b)**);¹¹
- the offence for which the extradition is requested is, in the opinion of the Requested State an offence under military law, but not an offence under the ordinary criminal law of the Requested State (**Article 3(c)**);¹²
- the person has already been acquitted, pardoned, granted an amnesty or had the penalty remitted, or undergone the penalty in the Requested State in respect of the conduct constituting the extradition offence (double jeopardy) (**Article 3(d)**);¹³
- the death penalty may be imposed as punishment for the extraditable offence, unless the Requesting State provides a sufficient assurance in the opinion of the Requested State, that the death penalty will not be imposed, or, if imposed, will not be carried out (**Article 3(e)**);¹⁴ or
- the Requested State has substantial grounds to believe the extradited person would be in danger of being subjected to torture¹⁵ or other cruel, inhuman or degrading treatment or punishment in the Requesting State¹⁶ (**Article 3(f)**).

⁹ This requirement, commonly referred to as dual (or double) criminality, does not form part of the definition of 'extraditable offence' in Australia, but must nevertheless be satisfied to enable extradition: Extradition Act, s 19(2)(c).

¹⁰ Reflects mandatory ground of refusal under Extradition Act, ss 19(2)(d) and 22(3)(a) and definition of 'extradition objection' under s 7(a).

¹¹ Reflects mandatory ground of refusal under Extradition Act, ss 19(2)(d) and 22(3)(a) and definition of 'extradition objection' under ss 7(b) and (c). This is an example where the Treaty may operate to modify the Extradition Act to include additional explicit protections. The additional protected attributes listed in the Treaty (namely, prejudice on the basis of 'language', 'ethnic origin' and 'gender') that are not expressly referenced in the Extradition Act will operate as mandatory grounds of refusal under s 22(3)(e) of the Extradition Act. In practice, these would otherwise be considered as part of the Attorney-General's general discretion in s 22(3)(f). Similarly, although Article 3(b) of the Treaty does not reference 'sex' and 'sexual orientation', these protected attributes are expressly listed in the definition of 'extradition objection' under ss 7(b) and (c) of the Extradition Act and would still constitute a mandatory ground of refusal under s 22(3)(a).

¹² Reflects mandatory ground of refusal under Extradition Act, ss 19(2)(d) and 22(3)(a) and definition of 'extradition objection' under s 7(d).

¹³ Reflects mandatory ground of refusal under Extradition Act, ss 19(2)(d) and 22(3)(a) and definition of 'extradition objection' under s 7(e).

¹⁴ Reflects mandatory ground of refusal under Extradition Act, s 22(3)(c).

¹⁵ Reflects mandatory ground of refusal under Extradition Act, s 22(3)(b).

¹⁶ This is an example where the Treaty may operate to modify the Extradition Act to include additional explicit protections. By virtue of s 22(3)(e), cruel, inhuman or degrading treatment or punishment (CIDTP) will form an

18. The Treaty's mandatory ground of refusal relating to the death penalty reflects Australia's domestic legal requirements. Paragraph 22(3)(c) of the Extradition Act provides that the Attorney-General must only surrender a person to another country for an offence punishable by a penalty of death if the requesting country provides 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. In practical terms, the issue is highly unlikely to arise in extraditions between Australia and the Czech Republic as the Czech Republic has abolished the death penalty.

19. Article 5 of the Treaty also provides the following discretionary grounds for refusing an extradition request:¹⁷

- the offence is considered under the Requested State's laws as having been committed in whole or in part within the territory of the Requested State (**Article 5(a)**);
- there is a prosecution pending against the person in the Requested State in respect of the offence for which extradition is sought (**Article 5(b)**);
- the Requested State considers that the extradition of the person would be unjust or oppressive in the circumstances of the case, including the person's health, age or other personal circumstances (**Article 5(c)**);
- the prosecution or sentence for which extradition is sought would be barred by reason of lapse of time under the law of the Requested State (**Article 5(d)**);
- the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the Requesting State by an extraordinary or *ad hoc* court or tribunal (**Article 5(e)**);
- the person has been extradited to the Requested State from a third State which has denied consent to re-extradite, if consent is required (**Article 5(f)**);
- if the competent authorities of the Requested State have decided either to terminate or not to institute proceedings against the person for the offence for which the extradition is sought (**Article 5(g)**); or
- the person whose extradition is sought is a national of the Requested State (**Article 4**). If extradition is refused on the basis of nationality the Requested Party shall, at the request of the Requesting Party, commence proceedings against the person if appropriate to do so.¹⁸ This provision aims to ensure that nationality cannot be used as a basis for evading justice.

express mandatory ground of refusal as part of the Attorney-General's surrender determination. In practice, CIDTP is otherwise considered as part of the Attorney-General's general discretion in s 22(3)(f).

¹⁷ The Extradition Act itself does not contain express discretionary grounds of refusal, instead it confers the Attorney-General the widest possible discretion to refuse surrender under s 22(3)(f). However, by virtue of s 22(3)(e), the discretionary grounds of refusal listed in Article 5 of the Treaty will form express discretionary grounds for the Attorney-General to consider when making a surrender determination under s 22(3) of the Extradition Act. This does not otherwise limit the Attorney-General's broad discretion to refuse surrender under s 22(3)(f).

¹⁸ Section 45 of the Extradition Act allows for prosecution to occur in Australia in lieu of extradition.

20. The Treaty includes a ‘speciality rule’ (**Article 16**) by which the Requesting State assures the Requested State that a person extradited under the Treaty shall not be detained, tried or subjected to any other restriction of his or her liberty in the territory of the Requesting Party for any offence committed before her or his extradition surrender other than for:

- an offence for which extradition was granted;
- another extraditable offence that is provable on the same facts, and punishable by the same or lesser penalty, as the offence for which extradition was granted; or
- any other extraditable offence to which the Requested State consents,

unless the person has had the opportunity to leave the Requesting State and has not done so within 45 days of release in respect of the extraditable offence,¹⁹ or if the person voluntarily returns to the Requesting State’s territory after leaving it.

21. The speciality rule is a common feature of extradition treaties and aims to ensure that a Requesting State cannot make an extradition request to prosecute a person for one offence, with the intention of prosecuting them for other additional criminal conduct immediately after they have been surrendered. This is intended to strengthen the integrity of the extradition process between States and the broader integrity of the Requesting State’s criminal justice system.

22. **Article 17** provides that, where a person has been extradited to the Requesting State, the Requesting State must not further extradite the person to a third country for any offence committed prior to the person’s surrender, unless the Requested State consents, the person fails to leave the Requesting State’s territory within 45 days of being free to do so,²⁰ or the person voluntarily returns to the Requesting State’s territory after leaving it. This is designed to ensure that countries do not extradite persons with the ulterior motive of further extraditing them on to a third country, and is a standard extradition treaty term.

23. **Article 20** specifies that the Treaty shall not affect any rights or obligations of Australia and the Czech Republic arising from other treaties to which both countries are parties. This would include situations where a Party is obliged to refuse extradition under specific international treaties, such as international human rights treaties, to which they are both parties.

Processes for extradition requests

24. **Article 6(1)** requires each party to appoint a Central Authority as the central channel for transmitting and receiving extradition requests. For Australia, this will be the Attorney-General’s Department. Australia will however continue to follow its standard practice of submitting requests through the diplomatic channel, which is not excluded pursuant to **Article 6(2)**. Extradition requests, supporting documents and information must be in, or be accompanied by, a translation into the Requested State’s official language (**Article 6(3)**). Documents must also be authenticated, which is taken to be done if the documents are signed or certified by an officer of the Requesting State and sealed by an official seal of Minister or Ministry of the Requesting State (**Article 7(5)**).

¹⁹ This is broadly consistent with the requirements for a speciality undertaking under s 22(4) of the Extradition Act. However, s 22(4) of the Extradition Act does not contain an express timeframe for the period constituting an ‘opportunity to leave’ the Requesting State. The Treaty would therefore operate to modify the Extradition Act such that a 45 day period applies to a speciality undertaking pursuant to s 22(4), in relation to a person having the opportunity to leave the Requesting State.

²⁰ As with Article 16, this is broadly consistent with the requirements for a speciality undertaking under s 22(4) of the Extradition Act. However, the Treaty would operate to modify the Extradition Act such that a 45 day period applies to a speciality undertaking pursuant to s 22(4), in relation to a person having the opportunity to leave the Requesting State.

25. The Treaty sets out the documentation required to make an extradition request and allows for the Requested State to request additional information (**Articles 7 and 8**).

26. **Article 9** of the Treaty provides that, in urgent cases, a State may apply through the International Criminal Police Organisation for the provisional arrest of a person whose extradition will later be requested. A provisional arrest request is a request for the Requested State to urgently arrest a person pending receipt of a full extradition request. A provisional arrest application may be appropriate, for example, when there is a risk that the person may abscond or flee from the Requested State before a full extradition request can be transmitted. **Article 9(2)** of the Treaty sets out the information and supporting documentation that must accompany an application for a provisional arrest. **Article 9(4)** provides that a person arrested under Article 9 may be released if the Requested State does not receive a full extradition request (supported by the information and documentation specified by Article 7) within 60 days from the person's arrest.²¹

Other obligations

27. Where the Requested State receives extradition requests from two or more States for the same person, **Article 10(1)** allows the Requested State to determine to which of these States the person is to be extradited. In doing so, the Requested State must have regard to all the relative circumstances, including the relative seriousness of the offences for which extradition is sought, the time and place of commission of the offences; when the requests were received; the person's nationality and ordinary place of residence; and the possibility of subsequent extradition to another State (**Article 10(2)**).

28. **Article 11** provides that the Requested State must notify the Requesting State of any decision on extradition and give reasons for any rejection of the request as soon as a decision has been made.

29. **Article 12(1)** allows the Requested State to postpone a person's extradition in order to prosecute or enforce a sentence against the person for different conduct from that of the extradition offence.²² Surrender may also be postponed on medical grounds if there is a serious danger to the person's life due to grave illness (**Article 12(2)**).²³

30. Under **Article 12(3)**, if the person is in custody or serving a sentence in the Requested State for another offence, the Requested State may temporarily surrender the person to the Requesting State for prosecution in relation to the offence for which extradition is sought and then be returned to the Requested State after proceedings have concluded in the Requesting State.²⁴

31. **Article 13** of the Treaty deals with the process of surrendering a person to the Requesting State once the Requested State has agreed to an extradition request. The key requirement is that the Requesting State remove the person from the Requested State within the time period fixed by the Requested State, although that time limit can be extended by agreement due to circumstances beyond the control of one of the States. If the Requesting State does not remove the person within the required period, the Requested State may release the person from custody, bringing the extradition process to a conclusion, and can refuse a subsequent extradition request for that person for the same offence. The standard period for a surrender to be carried out from Australia is

²¹ Section 17(2) of the Extradition Act contains a 45 day timeframe in these circumstances. The Treaty will therefore operate to modify the Extradition Act in this circumstance to a 60 day timeframe. This modification is expressly recognised by s 11(2) of the Extradition Act.

²² This is also reflected in s 26(3) of the Extradition Act.

²³ A delay in surrender on medical grounds is also permitted under s 26(6)(a) of the Extradition Act.

²⁴ This is permitted under s 24 of the Extradition Act.

two months.²⁵ The standard period for a surrender to be carried out under Czech law is three months.²⁶

32. **Article 14** requires the Requesting State to provide information to the Requested State about the outcome of subsequent criminal proceedings against the surrendered person upon request. This enables the Requested State to confirm that the person has been prosecuted, consistent with the purpose of the extradition request.

33. **Article 15** allows for the surrender, upon request, of property found in the Requested State'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 State and the rights of third parties.²⁷

34. **Article 18** of the Treaty sets out the transit arrangements between Australia and the Czech Republic (the Contracting States for the purposes of Article 18) in circumstances where a person is being surrendered to one of the States from a third state through the territory of the other State. Pursuant to Article 18, a state requesting transit must apply in writing, providing all information required by the transit state.²⁸

Implementation

35. Subsection 11(1) of the Extradition Act relevantly allows regulations to be made that apply the Extradition Act to a specified extradition country subject to any limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty between that country and Australia. This is the mechanism through which extradition treaties are given effect in Australia's domestic law. The Treaty would be implemented by way of regulations made under the Extradition Act.

36. **Article 22(2)** of the Treaty provides that the Treaty only applies to requests received after its entry into force, and will apply even if the relevant conduct constituting the offence occurred before the entry into force of the Treaty.

37. Upon commencement of the new Regulations, the *Extradition (Czech Republic) Regulations 2007* will be repealed, but will continue to apply to any existing requests already received from the Czech Republic.

Costs

38. **Article 19** of the Treaty deals with the costs and expenses associated with extradition between Australia and the Czech Republic. As the Czech Republic is already an extradition country, there is no anticipated additional costs implications associated with the operation of the Treaty.

²⁵ Extradition Act, s 26(5).

²⁶ See s 101 of the *International Judicial Cooperation in Criminal Matters Act* (Act No. 104/2013) (Czech Republic).

²⁷ The seizure of likely evidence relating to the extradition offence is permitted at the time of arrest under s 13 of the Extradition Act, or seized by warrant under s 14, and the Attorney-General may subsequently direct that it be sent to the Requesting Country under s 27 of the Extradition Act. Property which may be proceeds of crime cannot be seized or handed over under the Extradition Act, and the Requesting Country would need to make a separate mutual assistance request to Australia, pursuant to the *Mutual Assistance in Criminal Matters Act 1987*.

²⁸ Section 48 of the Extradition Act contains provisions concerning transit through Australia for extradition purposes.

39. Under the Treaty the Requested State is responsible for the costs of representing the Requesting State's interests in its territory, including in legal proceedings, and the Requesting State is responsible for the expenses incurred in removing the person from the Requested State's territory after a surrender determination.

40. The Office of Best Practice Regulation has been consulted and has confirmed that a Regulation Impact Statement is not required.

Future treaty action

41. The Treaty is silent as to amendment of the Treaty. In the absence of an express amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties* [1974] ATS 2 applies to allow amendment by agreement between Australia and the Czech Republic.

42. Any amendment to the Treaty would be a treaty action and would be subject to Australia's domestic treaty requirements.

Withdrawal and denunciation

43. Pursuant to **Article 22(3)** of the Treaty, either State may terminate the proposed Treaty by diplomatic note. Termination takes effect six months after the date on which the note is received. Requests submitted before the termination and still pending at the time when the termination takes effect shall be executed under the Treaty. Termination by Australia would be a treaty action and subject to Australia's domestic treaty requirements.

Contact details

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ATTACHMENT ON CONSULTATION

Treaty on Extradition between Australia and the Czech Republic

(Canberra, 17 February 2022)

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CONSULTATION

44. 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 Agreement was provided to State and Territory representatives through the biannual SCOT meetings during the course of negotiations. No requests for further information or comments on the Treaty have been received to date.