

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA

**TREATY BETWEEN
THE GOVERNMENT OF AUSTRALIA
AND
THE GOVERNMENT OF MALAYSIA
ON EXTRADITION**

Putrajaya, 15 November 2005

and

**AN EXCHANGE OF NOTES BETWEEN
THE GOVERNMENT OF AUSTRALIA
AND
THE GOVERNMENT OF MALAYSIA
ON THE TREATY ON EXTRADITION**

Kuala Lumpur, 7 December 2005

**Not yet in force
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TREATY BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF MALAYSIA ON EXTRADITION

The Government of Australia and the Government of Malaysia (hereinafter referred to singularly as “the Party” and collectively as “the Parties”),

Desiring to strengthen friendly relations between the two countries;

Recognizing the need to provide for more effective cooperation between the two countries in the suppression of crime;

HAVE AGREED as follows:

ARTICLE 1 OBLIGATION TO EXTRADITE

The Parties agree to extradite to each other, pursuant to the provisions of this Treaty, any persons who are wanted for prosecution, or the imposition or enforcement of a sentence, in the Requesting Party for an extraditable offence.

ARTICLE 2 EXTRADITABLE OFFENCES

1. An offence shall be an extraditable offence if it is punishable under the laws of both Parties by imprisonment for a period of not less than one year, or by a more severe penalty.
2. An offence shall also be an extraditable offence if it consists of an attempt or a conspiracy to commit, aiding or abetting, counseling, causing or procuring the commission of or being an accessory before or after the fact to, any offence described in paragraph 1 and is punishable under the laws of both Parties by imprisonment for a period of not less than one year, or by a more severe penalty.
3. Where the request for extradition relates to a person convicted of an offence who is wanted by the Requesting Party for the enforcement of a sentence of imprisonment, a further requirement shall be that at least six months of the sentence of imprisonment remains to be served.
4. For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties:
 - (a) it shall not matter whether the laws of the Parties place the acts or omissions constituting the offence within the same category of offences or describe the offence by the same terminology;

- (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Parties, the constituent elements of the offence differ.
- 5. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, foreign exchange control or other revenue matter extradition may not be refused on the ground that the laws of the Requested Party do not impose the same kind of tax or duty or do not contain a tax, duty, customs, or exchange regulation of the same kind as the laws of the Requesting Party.
- 6. If the offence has been committed outside the territory of the Requesting Party, extradition shall be granted if the laws of the Requested Party provide for the punishment of an offence committed outside its territory in similar circumstances, and if the requirements of extradition under this Treaty are otherwise met. If the laws of the Requested Party do not so provide, the Requested Party may, in its discretion, deny extradition.
- 7. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence for which extradition is sought was committed, provided that:
 - (a) it was an offence in the Requesting Party at the time of the acts or omissions constituting the offence; and
 - (b) the acts or omissions alleged would, if they had taken place in the territory of the Requested Party at the time of the making of the request for extradition, have constituted an offence against the laws in force in that Party.

ARTICLE 3 EXCEPTIONS TO EXTRADITION

- 1. Extradition shall not be granted in any of the following circumstances:
 - (a) if the Requested Party determines that the request was politically motivated or regards the offence for which extradition is requested as a political offence. For the purposes of this Treaty, the following offences shall not be considered to be political offences:
 - (i) the murder or attempted murder of a Head of State of one of the Parties, or a member of the Head of State's family;
 - (ii) an offence for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; or
 - (iii) an attempt or conspiracy to commit, or aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, such offences;

- (b) if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status, or that that person's position may be prejudiced for any of those reasons;
 - (c) if the offence for which extradition is requested is regarded by the Requested Party as an offence under military law, but not an offence under the ordinary criminal law of the Requested Party;
 - (d) if, in respect of the offence for which the extradition of the person is requested:
 - (i) the person has been acquitted or pardoned under the laws of the Requested Party or a third state;
 - (ii) the person has undergone the punishment provided by the laws of the Requested Party or a third state; or
 - (iii) the person has been convicted under the laws of the Requested Party or a third state;
 - (e) if the person, on being extradited to the Requesting Party, would be liable to be tried or sentenced in that Party by a court or tribunal that has been specially established for the purpose of trying the person's case; or
 - (f) if it may place the Requested Party in breach of its obligations under international treaties.
2. In cases in which a person could be subject to capital punishment in the Requesting Party but would not be subject to capital punishment in the Requested Party for the same offence under the laws of the Requested Party, no request for extradition shall be submitted without prior consultation and agreement by both Parties to make such a request.
3. Extradition may be refused in any of the following circumstances:
- (a) if the person whose extradition is requested is a national of the Requested Party. Where the Requested Party refuses to extradite a national of that Party it shall, if the other Party so requests and the laws of the Requested Party allow, submit the case to the competent authorities with a view to having the person prosecuted under the laws of the Requested Party in respect of all or any of the offences for which extradition has been requested;
 - (b) if the offence for which extradition is requested is regarded under the laws of the Requested Party as having been committed in whole or in part within its jurisdiction;

- (c) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is requested;
- (d) if the competent authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is sought; or
- (e) if the surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, particularly because of her or his age or state of health.

ARTICLE 4
EXTRADITION PROCEDURES AND SUPPORTING DOCUMENTS

1. A request for extradition shall be made in writing and sent through the diplomatic channel. A request from Australia to Malaysia shall be sent to the Minister charged with the responsibility for fugitive criminals. A request from Malaysia to Australia shall be sent to the Attorney-General's Department. All documents submitted in support of a request for extradition shall be authenticated in accordance with Article 6. Three copies of the request and supporting documents shall also be provided. However, the copies do not require authentication.
2. All requests shall be supported by:
 - (a) the details necessary to establish the identity and nationality of the person sought including, when possible, photographs and fingerprints and a statement of the current location of the person, if known;
 - (b) a statement of each offence for which extradition is sought;
 - (c) a statement of the acts and omissions which are alleged against the person in respect of each offence for which extradition is sought;
 - (d) the text of the laws creating each offence;
 - (e) the text of the laws describing the penalty which may be imposed; and
 - (f) a statement as to whether there is any limitation period in respect of proceedings or punishment.
3. If the person is accused of an offence the request for extradition shall be accompanied by a warrant for the arrest of the person, or a copy thereof.
4. If the person has been convicted of an offence and a sentence has been imposed, the request for extradition shall be accompanied by:

- (a) documents that provide evidence of the conviction; and
 - (b) documents that provide evidence of the sentence imposed and the extent to which the sentence has not been carried out.
5. If the person has been convicted of an offence and no sentence has been imposed, the request for extradition shall be accompanied by:
 - (a) documents that provide evidence of the conviction; and
 - (b) a statement confirming that a sentence is to be imposed.
6. Neither Party shall require, as a condition to extradition pursuant to this Treaty, that the other Party prove a *prima facie* case against the person sought.

ARTICLE 5 TRANSLATION

All documents submitted by the Requesting Party shall be translated into the language of the Requested Party, unless the Parties agree otherwise.

ARTICLE 6 ADMISSIBILITY OF DOCUMENTS

1. A document that, in accordance with Article 4, accompanies a request for extradition shall be admitted in evidence, if authenticated, in any extradition proceedings in the territory of the Requested Party.
2. For a request from Australia to Malaysia, the warrant of arrest, or the document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed before any competent authority or any certified copy of it, shall be received in evidence in any proceedings for extradition if it is authenticated:
 - (a) in the case of a warrant by being signed, or in the case of any other original document by being certified by a judge, magistrate, or other competent authority of Australia; or in the case of a copy by being certified to be a true copy of the original; and
 - (b) either by the oath of some witness or by being sealed with the official seal of the competent authority of Australia.
3. For a request from Malaysia to Australia, a document is authenticated for the purposes of this Treaty if:

- (a) it purports to be signed or certified by a Judge, Magistrate or an official in or of Malaysia; and
- (b) it purports to be authenticated by the public seal of a Minister of State, or of a Department or official of Malaysia.

ARTICLE 7
ADDITIONAL INFORMATION

1. If the Requested Party considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Treaty to enable extradition to be granted, that Party may request that additional information be furnished within such time as it specifies. The Requested Party may set a time limit for the submission of such information, and may grant a reasonable extension of the time limit upon application of the Requesting Party setting forth reasons for such extension.
2. If the person whose extradition is requested is under arrest and the additional information furnished is not sufficient in accordance with this Treaty, or is not received within the time specified, the person may be discharged from custody. Such discharge shall not preclude the Requesting Party from making a fresh request for the extradition of the person.
3. Where the person is discharged from custody in accordance with paragraph 2, the Requested Party shall notify the Requesting Party as soon as practicable.

ARTICLE 8
PROVISIONAL ARREST

1. In case of urgency, a Party may request the provisional arrest of the person sought pending presentation of the request for extradition.
2. The request for provisional arrest shall contain:
 - (a) a description of the person sought, including, if possible, a photograph or fingerprints;
 - (b) the location of the person sought, if known;
 - (c) a statement or description of the offences allegedly committed by the person, or of which the person has been convicted;
 - (d) a concise statement of the facts of the case, including a statement of the acts or omissions alleged to constitute each offence and, if possible, the time and location of each offence;

- (e) a copy of a warrant of arrest or a statement of a finding of guilt or judgment of conviction against the person sought;
 - (f) a statement of the punishment that can be, or has been, imposed for the offences; and
 - (g) a statement that a request for extradition for the person sought will follow.
3. A request for provisional arrest shall be made in writing or, where possible, by any means capable of producing a written record and transmitted directly between the Attorney-General's Department of Australia and the Attorney General's Chambers of Malaysia and by means of the facilities of the International Criminal Police Organisation (INTERPOL).
 4. On receipt of the request for provisional arrest, the Requested Party shall take appropriate steps to secure the arrest of the person sought. The Requesting Party shall be promptly notified of the result of its request and the reason for any denial.
 5. A person arrested under the request for provisional arrest may be discharged upon the expiration of 60 days from the date of that person's provisional arrest if a request for extradition, supported by the documents specified in Article 4, has not been received.
 6. The discharge of a person pursuant to paragraph 5 of this Article shall not prevent the institution of proceedings to extradite the person sought if the extradition request is subsequently received.

ARTICLE 9 COMPETING REQUESTS

1. If the Requested Party receives requests from more than one State for the extradition of the same person, either for the same offence or for a different offence, the Requested Party shall determine to which of those States the person is to be extradited and shall notify the States of its decision.
2. In making its decision, the Requested Party shall consider all relevant factors, including -
 - (a) whether the requests were made pursuant to any treaties;
 - (b) the time and place of the commission of each offence;
 - (c) the respective interests of the requesting States;
 - (d) the gravity of the offences;
 - (e) the nationality of the victim;

- (f) the nationality of the person sought;
- (g) the ordinary place of residence of the person;
- (h) the possibility of further extradition between the requesting States; and
- (i) the order in which the requests were received from the requesting States.

ARTICLE 10 DECISION AND SURRENDER

1. The Requested Party shall, as soon as a decision on the request for extradition has been made, communicate that decision to the Requesting Party.
2. If the request is denied in whole or in part, the Requested Party shall provide an explanation of the reasons for the denial. The Requested Party shall provide copies of the pertinent judicial decisions regarding the case upon request.
3. If the request for extradition is granted, the authorities of the Parties shall agree on the date and place for the surrender of the person sought.
4. If the person sought is not removed from the territory of the Requested Party by an agent of the Requesting Party within the time prescribed by the law of the Requested Party, the person may be discharged, and the Requested Party may subsequently refuse extradition for the same offence.
5. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited, it shall notify the other Party. In that case the Parties shall agree to a new date for surrender, and the provisions of paragraph 4 shall apply.
6. Upon the completion of the proceedings against a person surrendered to the Requesting Party, the Requesting Party shall upon request inform the Requested Party of the outcome of such proceedings and upon request provide it with a copy of the final court decision.

ARTICLE 11 SEIZURE AND SURRENDER OF PROPERTY

1. To the extent permitted under its laws, the Requested Party may seize and surrender all property connected with the offence in respect of which extradition is granted that is found in the possession of the person sought at the time of his arrest.

2. Subject to paragraph 1, the abovementioned property may, if the Requesting Party so requests, be surrendered to the Requesting Party even if the extradition cannot be carried out.
3. The Requested Party may condition the surrender of the property upon satisfactory assurances from the Requesting Party that the property will be returned to the Requested Party as soon as practicable. The Requested Party may also defer surrender of such property if it is needed as evidence in the Requested Party.
4. The Requesting Party shall bear the cost of the return of any property surrendered.
5. The rights of third parties in the surrendered property shall be duly respected.

ARTICLE 12 TEMPORARY AND DEFERRED SURRENDER

1. The Requested Party may postpone the surrender of a person in order to proceed against that person, or so that that person may serve a sentence, for an offence other than an offence constituted by an act or omission for which extradition is sought. In such case the Requested Party shall advise the Requesting Party accordingly.
2. When the person is serving a sentence in the territory of the Requested Party for an offence other than an offence constituted by an act or omission for which extradition is sought, the Requested Party may temporarily surrender the person to the Requesting Party to be prosecuted for an offence for which extradition is sought. The person so surrendered shall be kept in custody in the Requesting Party and shall be returned to the Requested Party after proceedings against the person have concluded, in accordance with written conditions to be mutually determined by the Parties.

ARTICLE 13 RULE OF SPECIALITY

1. Subject to paragraph 3, a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of her or his personal liberty, in the territory of the Requesting Party for any offence committed before her or his extradition other than:
 - (a) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that that offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition was sought; or

- (b) any other extraditable offence in respect of which the Requested Party consents.
- 2. A request for the consent of the Requested Party under this Article shall be accompanied by such of the documents mentioned in Article 4 as are sought by the Requested Party.
- 3. Paragraph 1 does not apply if the person has had an opportunity to leave the Requesting Party and has not done so within 45 days of final discharge in respect of the offence for which that person was extradited or if the person has returned to the territory of the Requesting Party after leaving it.

ARTICLE 14
SURRENDER TO A THIRD STATE AND RESURRENDER

- 1. A person who has been extradited under this Treaty shall not be re-extradited by the Requesting Party to a third State for trial or punishment for any offence that was committed before his extradition to the Requesting Party unless the Requested Party consents to that surrender.
- 2. To the extent permitted by the laws of the Requesting Party, a person who has been extradited under this Treaty shall not be resurrendered by the Requesting Party to an international tribunal established in accordance with a multilateral international convention that applies to the Requesting Party for trial or punishment for any offence that was committed before his extradition to the Requesting Party unless:
 - (a) the Requested Party consents to that surrender; and
 - (b) if under the convention, the consent of another State is required, that State consents.
- 3. Paragraph 1 or 2 shall not prevent the re-extradition or resurrender of an extradited person to a third State or the relevant international tribunal established in accordance with a multilateral international convention that applies to the Requesting Party if -
 - (a) that person leaves the territory of the Requesting Party after the extradition and voluntarily returns to it; or
 - (b) that person does not leave the territory of the Requesting Party within 45 days of the day on which the person is free to leave.
- 4. For the purpose of sub-paragraph (1)(a) and (2)(a), a Party whose consent is requested may require the submission of any document or statement referred to in Article 4.

ARTICLE 15
TRANSIT

1. Either Party may authorize transportation through its territory of a person surrendered to the other Party by a third State. A request for transit shall be made in writing or, where possible, by any means capable of producing a written record and transmitted directly between the Attorney-General's Department of Australia and the Attorney General's Chambers of Malaysia. It shall contain a description of the person being transported and a brief statement of the facts of the case.
2. Upon receipt of such a request, the Requested Party shall grant the request unless it is satisfied that there are reasonable grounds for refusing to do so.
3. Permission for the transit of a person shall, subject to the laws of the Requested Party, include permission for the person to be held in custody during transit.
4. The Party to which the person is being extradited shall reimburse the other Party for any expense incurred by that other Party in connection with the transit.

ARTICLE 16
REPRESENTATION AND EXPENSES

1. The Requested Party shall advise, assist, appear in court on behalf of the Requesting Party, and represent the interests of the Requesting Party, or otherwise make the necessary arrangements for the Requesting Party's legal representation, in any proceedings arising out of a request for extradition.
2. The Requesting Party shall bear the expense related to the translation of documents and the transportation of the person surrendered. The Requested Party shall pay all other expenses incurred in that Party by reason of the extradition proceedings including expenses incurred in its territory in the arrest and detention of the person whose extradition is sought until that person is surrendered to a person nominated by the Requesting Party.

ARTICLE 17
WAIVER OF EXTRADITION PROCEEDINGS

1. If the person sought consents to return to the Requesting Party after personally being advised by a competent judicial authority of the effect of such consent under the laws of the Requested Party, and if so permitted by the laws of the Requested Party, the Requested Party may surrender him without further proceedings.
2. Surrender pursuant to this Article shall be subject to Articles 13 and 14.

ARTICLE 18
CONSULTATION

1. For the purpose of promoting the most effective use of this Treaty, the Parties shall consult, at times mutually agreed upon by them, concerning the interpretation, application or implementation of this Treaty either generally or in relation to a particular case.
2. The Parties may develop such practical measures as may be necessary to facilitate the implementation of this Treaty.

ARTICLE 19
SETTLEMENT OF DISPUTES

Any difference or dispute between the Parties arising from the interpretation or implementation of the provisions of this Treaty shall be settled amicably through consultation or negotiation between the Parties through diplomatic channels without reference to any third party or international tribunal.

ARTICLE 20
AMENDMENT

1. This Treaty may be modified or amended at any time by mutual written consent of the Parties. Such modification or amendment will enter into force on such date as may be mutually agreed upon by the Parties and will form part of this Treaty.
2. Any modification or amendment will be without prejudice to the rights and obligations arising from or based on this Treaty before or up to the date such modification or amendment enters into force.

ARTICLE 21
ENTRY INTO FORCE

1. This Treaty shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Treaty have been complied with.
2. This Treaty shall apply to requests presented after the date of its entry into force whether the relevant acts or omissions constituting the offence or offences to which the request relates occurred before or after that date.

ARTICLE 22
TERMINATION

1. Either Party may terminate this Treaty by notice in writing at any time and it shall cease to be in force six months following the date on which notice is given.
2. Termination of this Treaty shall be without prejudice to the rights and obligations arising from or based on this Treaty and to the completion of any requests made pursuant to this Treaty before or up to the date of termination.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty.

DONE at Putrajaya on the fifteenth day of November two thousand and five in two original copies in the English language.

FOR AND ON BEHALF OF THE
GOVERNMENT OF AUSTRALIA

FOR AND ON BEHALF OF THE
GOVERNMENT OF MALAYSIA

Hon. Christopher Martin Ellison
Minister for Justice and Customs

Tan Sri Abdul Gani Patail
Attorney-General.

Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition

7 December 2005

Note from Malaysia

I have the honour to refer to the Treaty on Extradition signed today between the Government of Malaysia and the Government of Australia (“the Treaty”), and agree that the Treaty be interpreted and applied in accordance with the provisions set forth in this Note.

Article 3(2) of the Treaty requires that in cases in which a person could be subject to capital punishment in the Requesting Party but would not be subject to capital punishment in the Requested Party for the same offence under the laws of the Requested Party, no request for extradition shall be submitted without prior consultation and agreement by both Parties to make such a request. A consultation between the Parties would not constitute a consultation within the meaning of Article 18. Any agreement reached between the Parties as a result of such consultation would not be binding if there has been any non-disclosure of relevant facts during the consultation, whether the non-disclosure was deliberate or otherwise and whether those facts were known or unknown at the time of the consultation.

I have the further honour to propose that this Note and Your Excellency’s Note in reply confirming on behalf of the Government of Australia the foregoing arrangements shall be regarded as constituting an agreement between the two Governments, which shall enter into force simultaneously with the Treaty.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Note from Australia

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

“I have the honour to refer to the Treaty on Extradition signed today between the Government of Malaysia and the Government of Australia (“the Treaty”), and agree that the Treaty be interpreted and applied in accordance with the provisions set forth in this Note.

Article 3(2) of the Treaty requires that in cases in which a person could be subject to capital punishment in the Requesting Party but would not be subject to capital punishment in the Requested Party for the same offence under the laws of the Requested Party, no request for extradition shall be submitted without prior consultation and agreement by both Parties to make such a request. A consultation between the Parties would not constitute a consultation within the meaning of Article 18. Any agreement reached between the Parties as a result of such consultation would not be binding if there has been any non-disclosure of relevant facts during the consultation, whether the non-disclosure was deliberate or otherwise and whether those facts were known or unknown at the time of the consultation.

I have the further honour to propose that this Note and Your Excellency's Note in reply confirming on behalf of the Government of Australia the foregoing arrangements shall be regarded as constituting an agreement between the two Governments, which shall enter into force simultaneously with the Treaty.”

I have the further honour to confirm on behalf of the Government of Australia that the above proposal is acceptable to the Government of Australia and that Your Excellency's Note and this Note in reply shall constitute an agreement between the two Governments, which shall enter into force simultaneously with the Treaty on Extradition.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.