UNIVERSITY OF
Southampton
School of Law

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

13 October 2011

Dear Sir/Madam

Please find on the following pages a submission to the Committee in relation to its inquiry into the **Southern Indian Ocean Fisheries Agreement (Rome, 29 December 2006)** and the **Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 14 November 2009)**.

In the interests of full disclosure, please also be aware that, before taking up my present position, in my former capacity as an Executive Officer in the Sea Law, Environmental Law and Antarctic Policy Section of the Department of Foreign Affairs and Trade, I participated in preparing Australia's negotiating position during the development of the Southern Indian Ocean Fisheries Agreement, although I did not attend any of the meetings at which the Agreement was negotiated. The other treaty entirely postdates my departure from the Government's employ. In any event, however, the bulk of my submission is directed at observations made in the National Interest Analyses for both treaties rather than at the treaty texts themselves.

Yours faithfully

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Submission to the Joint Standing Committee on Treaties

Southern Indian Ocean Fisheries Agreement (Rome, 29 December 2006)

and

Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 14 November 2009).

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Summary

The Committee should support action by Australia to become party to both Treaties, but at the same time seek more information and make specific recommendations on some of the loose ends left by the National Interest Analyses: (1) the concept of "responsible fishing nation"; (2) the delay in bringing one of the Treaties before the Committee, needlessly risking the loss of the claimed benefits of Australia becoming an original party; (3) the uncertainty left as how to some of the obligations under the Treaties are to be implemented; and (4) the desirability of a long-term investment within the Australian Government in international fisheries law expertise.

Both Treaties represent useful steps forward in the management of international fisheries, the 2009 Treaty in particular having perhaps the most effective mechanism in any such treaty to date for States to make collective decisions on fisheries management that maximise the chances of the stocks being well managed. As a consequence, nothing in what follows should be taken as a reason for the Committee to recommend against proceeding to take binding treaty action. There are, however, a number of statements in the National Interest Analyses (NIAs) raising implications, some of them moderately disturbing, that the Committee may wish to explore further with Government witnesses in its forthcoming hearings on the Treaties.

(1) Paragraphs 5 and 11 of the NIA for the 2006 Treaty and paragraphs 5 and 10 of the NIA for the 2009 Treaty state that ratification of each would enhance Australia's reputation as a "responsible fishing nation". While the wisdom of taking on international obligations of any kind solely or primarily for reputational reasons may be doubted, that is not in itself a cause for criticism here, as the other reasons given in the NIAs for Australia to become a party to both Treaties are sound enough. More worrying, however, is the appearance in an official document of this type of the nebulous phrase "responsible fishing nation". The Committee should press Government witnesses on what precisely they understand by this term, in other words what a responsible fishing nation does, or refrains from doing, that distinguishes it from other nations engaged in fishing. Ideally the response would be that a responsible fishing nation accepts and applies the full rigours of the international law doctrines of State responsibility to fishing conducted wholly or partly on the high

seas, as the best available tool in international law for ensuring that overfishing results in adverse legal consequences that dissuade States from authoring or tolerating it. Yet that is unlikely to be the response given, as the available evidence (see A. Serdy, "Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?" (2010) 15 *Ocean and Coastal Law Journal* 23-84) suggests that neither Australia nor any other State actually does promote State responsibility in any systematic way. Rather, the origin of the phrase appears to lie in the Cancún Declaration of 1992 adopted under the aegis of the Food and Agriculture Organization of the United Nations (FAO),[1] in which "responsible" seems to be no more than a term of general approbation devoid of any specific meaning, and subsequently this use has been perpetuated by the FAO Code of Conduct for Responsible Fisheries.[2] For as long as it continues to be nothing more than a rhetorical device, however, it cannot actually do anything to further the cause of the long-term biological and economic health of the fisheries in question. Thus, if Government officials cannot provide a sensible meaning for the phrase, this would indicate not only that it ought not to have been used in the NIAs, but also that from now on it should be avoided in all other contexts too.

(2) Paragraph 11 of the NIA for the 2006 Treaty opens by stating that "It is important that Australia ratify this Agreement as soon as practicable." Further on it expands on this:

> It is necessary that Australia be among the original ratifying Parties in order to participate as a member at the first Meeting of the Parties, at which important rules and procedures will be adopted. These include decisions that will affect Australia's future participation in the Agreement, such as the rules of procedure, the financial regulations and the formula for budgetary contributions (which will govern the level of annual membership fees required from each Contracting Party).

Parallel statements in respect of the 2009 Treaty are spread over paragraphs 10 and 11 of the NIA for the latter. If this argument had been confined to the 2009 Treaty it would be self-evidently true and could be allowed to pass without comment. As regards the 2006 Treaty, however, while the reasoning in the last two sentences quoted is still correct, it needs to be asked why, since the Government wishes to pursue the benefits for Australia of being an original party, it has left the bringing of this Treaty before the Committee to such a late juncture that, with only one more ratification or accession needed to bring it into force, there is no longer any certainty that Australia will actually be among the original parties. Paragraph 3 states that Australia's ratification will bring the Treaty into force, but that is true only if no other State takes the equivalent step in the interim. If another State does act before Australia, the 90-day period before the Treaty's entry into force will probably allow Australia (subject to issue (3) below) to deposit its instrument of ratification in time to attend the first session of the Meeting of the Parties as a party to the Treaty, which does not prescribe by when that session must be held – but that desirable outcome can no longer be guaranteed. As it is now nearly five years since the Treaty's adoption, the Government has had

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[1] Declaration of the International Conference on Responsible Fishing, Cancún, Mexico, 6-8 May 1992, <http://legal.icsf net/icsflegal/uploads/pdf/instruments/res0201.pdf>.

[2] FAO, *Code of Conduct for Responsible Fisheries*, adopted at the 28th session of the Conference of the FAO, 20-31 October 1995, <www fao.org/DOCREP/005/v9878e/v9878e00.htm>.

ample time to take the necessary steps to become party to it, and the Committee would be justified in asking DAFF witnesses to explain why, in view of the argument made in paragraph 11 of the NIA, it was not done considerably earlier. The administrative convenience of waiting until the 2009 Treaty was ready to bring before the Committee, so that the two could be taken together, does not outweigh the unnecessary, because easily avoidable, risk being run.

(3) In this respect, paragraph 21 of the NIA for the 2006 Treaty is also incomplete, as is paragraph 18 of the NIA for the 2009 Treaty which is in the same terms. These say that "[m]ost" of Australia's obligations under the Treaties can be implemented administratively or under the *Fisheries Management Act 1991*. It is to be hoped that this is simply bad drafting, i.e. that "most" is just an excessively tentative substitute for "all", but if not, then it necessarily implies that some obligations cannot be implemented in this way, yet there is no information on what these are, or in what other way it is proposed to implement them. It would be natural for the Committee to insist on an answer to this question, particularly given that, should it transpire that legislation is after all needed to allow Australia to comply with its obligations under the 2006 Treaty, any realistic hope of Australia becoming an original party to it would disappear.

(4) Finally, the question of the costs of becoming party to the two Treaties is addressed, again in identical language, in paragraphs 22 and 24 of the NIA for the 2006 Treaty and paragraphs 19 and 21 of the NIA for the 2009 Treaty, first in terms of there being no significant cost burden for Australia, and then conceding that there will be staff and travel costs in preparing for and attending meetings of the bodies created by each of the Treaties. If that is so, it suggests that more attention ought to be paid to the necessity of securing long-term funding to allow a proper level of representation of Australia's interests at those meetings, especially since Australia by becoming party to the Treaties will go from being a member of four international fisheries management bodies to being a member of six. It has regrettably not always been the case that resources have allowed officials from one or both of the Department of Foreign Affairs and Trade and the Attorney-General's Department to travel to meetings of such bodies, in which issues of international fisheries law can arise at any time because of their powers to adopt decisions binding on the parties to the treaty in question. The drafting of such decisions in fisheries commissions around the world, including those of which Australia is a member, has over the years been patchy at best, creating risks of unintended consequences, ineffectiveness in achieving the intended aim or avoidable disputes. Part of the reason is that, unlike the larger international organisations such as the United Nations and its Specialised Agencies, the commission secretariats are too small to permit the employment of a full-time legal officer. In these circumstances, the next best alternative which many other States of a size comparable to Australia have adopted – Canada being a case in point – is to appoint specialist international fisheries law advisers in either the foreign or fisheries ministry who have relatively long tenure and thus build up a good institutional memory of the instruments adopted, the intent behind their wording and their cumulative legal effect. The outposting of an Attorney-General's Department official to DAFF's Fisheries branch is a step in the right direction. Even so, the Committee may consider that to safeguard Australia's legal interests in international fisheries, it would be worthwhile for a permanent position of this nature to be created in one or other of DAFF and the Departments mentioned, at a sufficiently senior level to ensure that the turnover of individuals occupying the position in the years ahead is low and that long service in it is not seen as a career-limiting move.

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Conclusion

This submission agrees with most of the arguments advanced in the NIAs for Australia to become party to both Treaties. In addition, however, it urges that, rather than simply expressing approval for this step, the Committee could do a service to Australia's protection of its economic and legal interests in the fish stocks to be managed under those and similar treaties to which Australia is already party by taking a close interest in some of the implications of those arguments and formulating recommendations accordingly.