

**National Interest Analysis [2011] ATNIA 13
with attachment on consultation**

**Measure 1 (2005) Annex VI to the Protocol on Environmental Protection to the
Antarctic Treaty: Liability arising from environmental emergencies
(Stockholm, 17 June 2005)**

[2011] ATNIF 7

Regulation Impact Statement

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Measure 1 (2005) Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability arising from environmental emergencies (Stockholm, 17 June 2005) [2011] ATNIF 7

Nature and timing of proposed treaty action

1. The proposed treaty action is the approval of Measure 1 (2005) *Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability arising from environmental emergencies* (the Measure). The Measure was adopted unanimously by the Consultative Parties to the *Antarctic Treaty* [1961] ATS 12 (the Treaty) at the 28th Antarctic Treaty Consultative Meeting (ATCM) on 17 June 2005.
2. Pursuant to Article IX of the Treaty and Article 9 of the *Protocol on Environmental Protection to the Antarctic Treaty* [1998] ATS 6 (the Protocol), Measures for the governance of the Treaty area and annexes to the Protocol may be adopted by the representatives of Consultative Parties at the annual ATCM for recommending to their governments.
3. The Measure will enter into force when approved by all Consultative Parties to the Treaty. There are 28 Consultative Parties to the Treaty as at April 2011.
4. The Measure will apply to particular activities in the Treaty area. According to Article VI of the Treaty, the Treaty area is the area south of 60° south latitude.

Overview and national interest summary

5. The Measure will enhance the protection of the Antarctic environment by establishing an environmental liability regime for activities conducted in the Treaty area. It will oblige tourist, government and non-government operators within Australia's jurisdiction to undertake reasonable preventative measures to: (a) reduce the risk of environmental emergencies and their potential adverse impact, (b) establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment, (c) take prompt and effective response action to environmental emergencies arising from activities, and (d) maintain adequate insurance or other financial security to cover potential liability arising from those activities. Implementation of the Measure is consistent with Australia's long-standing governance aims for the Antarctic region.

Reasons for Australia to take the Proposed Treaty Action

6. Australia has been a Consultative Party to the Treaty since it came into force in 1961. The Treaty is a multilateral agreement that: (a) requires the Contracting Parties to ensure that Antarctica is used exclusively for peaceful purposes, (b) guarantees freedom of scientific research, (c) promotes international scientific cooperation, (d) allows for the inspection of facilities between Contracting Parties, (e) sets aside the question of territorial sovereignty in Antarctica, and (f) provides for regular meetings between the Contracting Parties.

7. A large proportion of Antarctica is within Australia's jurisdiction. Australia also has an extensive research program in the Antarctic. Australia took a leading role in the formation of the Treaty, and successive Australian governments have viewed the implementation of the Treaty and associated agreements as a high priority. Australia is a strong advocate for the Treaty and has actively contributed to the development of the additional instruments in the Treaty system, including the Protocol.

8. Australia was instrumental in the negotiation and agreement of the Protocol and has been a Contracting Party to the Protocol since it came into force in 1998. The Protocol commits the Parties to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems. The Protocol includes six technical annexes, five of which have entered into force, which establish a comprehensive regime regulating human activities in the Antarctic.

9. Approval by all Consultative Parties to the Treaty of the Measure (including Australia) will result in the entry into force of Annex VI to the Protocol, which contains rules and procedures on liability for environmental emergencies occurring in the Antarctic. Antarctica is a physically remote, inhospitable, unpredictable and potentially dangerous region. The requirements under the Measure are outlined in Annex VI to the Protocol that is attached to the Measure. These requirements establish a liability regime in relation to environmental emergencies caused by tourist, governmental and non-governmental operators, to further the protection of the Antarctic.

Obligations

10. The Measure will apply to all activities undertaken in the Treaty area by operators, including governmental activities conducted through the national program and tourist or other non-governmental activities conducted by operators (Article 2(c)). For the purposes of the Measure, an operator does not include a natural person who is an employee, contractor, subcontractor or agent of or who is in the service of an Australian operator, and does not include a legal person that is a contractor or subcontractor acting on behalf of a governmental operator (Article 2(c)).

11. The Measure contains four primary obligations. Under the Measure, a Contracting Party is obliged to require an operator:

- to undertake reasonable preventative measures to reduce the risk of environmental emergencies and their potential adverse impact (Article 3);
- to establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment, and to cooperate in the formulation and implementation of such contingency plans (Article 4);

- to take prompt and effective response action to environmental emergencies arising from the activities (Article 5(1)); and
- to maintain adequate insurance or other financial security to cover potential liability for failure to take prompt and effective response action (Article 11).

12. The Measure provides for the liability of an operator where the operator has not taken the required response action in relation to an environmental emergency arising from its activities. Liability is strict (Article 6(3)). The Measure establishes exemptions from, and limits to, liability. The limits on liability relating to events involving ships reflect the limits contained in the *Protocol of 1996 to Amend the Convention on the Limitation of Liability for Maritime Claims of 19 November 1976* [2004] ATS 16 (the Maritime Claims Protocol).

13. In the event that an operator fails to undertake a prompt and effective response action (Article 5(2)), a Contracting Party is obliged to impose additional requirements on the relevant operator, including:

- to pay compensation to a Party that undertakes the prompt and effective response action in the operator's place (Article 6(1)); and
- to pay an amount to an international fund established under the Measure in circumstances where no prompt and effective response action was undertaken by anyone (Article 6(2)(a)). The fund will be set up to compensate Contracting Parties that have taken response action but cannot receive full compensation from the responsible operator.

Implementation

14. Australia's obligations under the Treaty and Protocol are implemented in domestic law through the *Antarctic Treaty Act 1960* (Cth) and *Antarctic Treaty (Environment Protection) Act 1980* (Cth). These Acts require amendment to implement the obligations under the Measure into Australian domestic law.

Costs

15. There are no foreseeable financial costs to Australia associated with compliance with the proposed treaty action. Australia has in place procedures to promptly and effectively respond to environmental emergencies arising from its national program activities in the Antarctic.

Regulation Impact Statement

16. A Regulation Impact Statement is attached.

Future treaty action

17. Article XII(1) of the Treaty provides that the Treaty may be amended by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the ATCMs. Any such modification or amendment enters into force when the depositary government (the United States of America) has received notice from all such Contracting Parties that they have ratified it.

18. In addition, the Treaty enables Consultative Parties to adopt and amend Measures. Any amendment of the Measure would constitute a separate treaty action and would have to satisfy Australia's domestic treaty making process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

19. If Australia decides not to approve the Measure, the Measure and its obligations will not enter into force for any of the Contracting Parties.

20. Article 25 of the Protocol allows a Party to withdraw from the Protocol where a permissible modification or amendment to Article 7 (which prohibits all activities relating to Antarctic mineral resources, except for scientific research) has been proposed at a Review Conference (which may only be called 50 years after the entry into force of the Protocol), but has not entered into force within three years of its adoption (which requires ratification or approval by three quarters of the Consultative Parties).

21. Article XII(2) of the Treaty provides that a Contracting Party may withdraw from the Treaty where a modification or amendment to the Treaty has been proposed at a conference to review its operation, but has not entered into force within two years of its adoption (ie. has not been approved by all relevant Contracting Parties). In such a case, Australia could withdraw from the Treaty by giving notice to the depositary government. Such withdrawal would take effect two years after the notice was received.

22. In accordance with Article 54(b) of the *Vienna Convention on the Law of Treaties* [1974] ATS 2, Australia may withdraw from the Treaty or the Protocol at any time by consent of all the Parties.

23. Withdrawal is a formal treaty action and would be subject to Australia's domestic treaty requirements including tabling in Parliament with a National Interest Analysis and consideration by the Joint Standing Committee on Treaties.

Contact Details

Sea Law, Environment Law and Antarctic Section
International Organisations and Legal Division
Department of Foreign Affairs and Trade

Territories, Environment and Treaties Section
Australian Antarctic Division
Department of Sustainability, Environment, Water, Population and Communities

ATTACHMENT ON CONSULTATION

Measure 1 (2005) Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability arising from environmental emergencies (Stockholm, 17 June 2005) [2011] ATNIF 7

CONSULTATION

State and Territory Governments

24. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Measure was provided to State and Territory representatives for consideration at the SCOT meeting in July 2006. The Measure has remained on the Schedule of Treaties since that time. SCOT has not requested further information or provided any comments on the Measure to date.

Public Consultation

25. The Department of Foreign Affairs and Trade convened consultative meetings with the Australian Antarctic tourism industry and non-governmental organisations before the ATCM that adopted the Measure. The views expressed at the meetings were taken into account in developing Australia's position on the proposals to be considered by the ATCM.

26. Subsequent to the adoption of the Measure, consultations were undertaken with Australian Antarctic tourism and non-governmental organisations on its potential impact. These consultations informed the regulatory impact analysis.