Submission to the Joint Standing Committee on Treaties

Headquarters Agreement between the Government of Australia and the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels (Hobart, 23 June 2008)

Andrew Serdy

School of Law

University of Southampton

Summary

Although there can be no objection in principle to Australia hosting the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels, the legal process to bring this about has taken a wrong turning. As a result, the making of regulations under the *International Organisations (Privileges and Immunities) Act 1963* will not be sufficient for Australia to comply with its obligations under the Treaty; the Act itself requires amendment. In failing to indicate this, the National Interest Analysis (NIA) is seriously defective. Since the delay such an amendment will cause creates an opportunity to remedy at the same time a second problem affecting the Secretariat's international legal personality, the Committee should consider withholding support for the Treaty until this is done.

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1. Because of the unusual nature of the international governance arrangements established by the Agreement on the Conservation of Albatrosses and Petrels (ACAP, [2004] ATS 5), including the infirmity of the legal foundations on which the Secretariat's personality rests, the National Interest Analysis (NIA) seriously misdescribes and underestimates the complexity of the changes to Australian law that will need to be made in order for Australia to be able to carry out its obligations under this Treaty.

2. The root of the problem is that international secretariats as such are rarely given legal personality, because usually the same treaty that creates a secretariat also establishes a more appropriate body on which to confer personality, namely an international organisation. This is seen in the treaties creating the two international organisations currently headquartered in Australia:

- Article VII of the Convention on the Conservation of Antarctic Marine Living Resources ([1982] ATS 9) creates in paragraph 1 the Commission for the Conservation of Antarctic Marine Living Resources, and paragraph 2 of the same Article defines which States may become a Member of the Commission. Article VIII confers legal personality on the Commission and provides for the privileges and immunities to be enjoyed by the Commission and its staff in the territory of a State Party to be determined by agreement

between the Commission and the State Party concerned. This is the basis for the subsequent Headquarters Agreement between the Government of Australia and the Commission for the Conservation of Antarctic Marine Living Resources ([1986] ATS 21).

- Similarly, paragraph 1 of Article 6 of the Convention on the Conservation of Southern Bluefin Tuna ([1994] ATS 16) creates the Commission for the Conservation of Southern Bluefin Tuna, and paragraph 9 of the same Article gives it legal personality and is the basis for the Headquarters Agreement between the Government of Australia and the Commission for the Conservation of Southern Bluefin Tuna ([1999] ATS 6).

3. By contrast, although paragraph 17 of the NIA speaks of regulations to be made under the *International Organisations (Privileges and Immunities) Act 1963* ("the 1963 Act") to bring the Secretariat within its operation, this is not possible, because ACAP does not create any international organisation in the sense of that Act. Instead, there is scope for decisions to be made under ACAP by a body known as the Meeting of the Parties (Article VIII), but there is no suggestion that this body has an identity independent of the States who are the parties to ACAP. Indeed the reason why it is the Secretariat that is given personality in Resolution 2.1 of the Meeting of the Parties, adopted in 2006, is precisely that there is no organisation available on which to confer personality. (Note that both the Commissions mentioned in paragraph 2 above have secretariats – see Articles XVII and 10 respectively of their constitutive treaties – but that the legal person is in each case the Commission, not the secretariat.)

4. How, then, does this affect Australia's ability under its existing domestic law to give effect to the obligations in the Treaty? By sections 5 and 6 of the 1963 Act read together, an international organisation can only have privileges and immunities conferred on it if Australia and at least one other country, or persons representing Australia and at least one other country, are members. The ACAP Secretariat, however, by its very nature cannot have members in that sense: a basic obligation of the staff of any international secretariat is not to seek or accept instructions from, i.e. not to represent, any individual State. As things stand, therefore, with one exception[1] regulations cannot be made for the Secretariat under the 1963 Act. It is possible that regulations automatically expiring after 12 months might be made under section 7 to cover persons attending individual sessions of the Meeting of the Parties – indeed it is not clear why this was not done for the 2004 session in Hobart – but these cannot extend to the Secretariat.

5. For the same reason, paragraph 18 of the NIA is clearly incorrect. Either a different provision of the Migration Regulations from the ones described will need to be utilised, or those Regulations do not cover the situation at all and would themselves have to be amended if Australia is to be able to implement the relevant obligations it will have under the Treaty.

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[1] There is no problem with recognition of the Secretariat's personality in Australia's domestic law, as the *International Organisations (Privileges and Immunities) Act 1963* has a special provision in section 12A allowing any international body to have such personality conferred on it even if it does not meet the conditions set out in the Act for privileges and immunities in general. This is not so much for the benefit of the Secretariat as of those dealing with it in its day-to-day operations; legal certainty is assisted by having an identifiable legal person able to enter into contracts, own property and sue and be sued.

6. It appears, therefore, that the 1963 Act will need to be amended before Australia can take binding treaty action, as otherwise Australia will not be able to implement all of its obligations under the Treaty. Since this is unlikely to be achieved quickly, it would be preferable to take the opportunity that thereby arises for ACAP itself also to be amended to put the Secretariat's personality on the secure legal footing that is required for its smooth operation. That footing is currently insecure because the origin of the international legal personality of the Secretariat is not, as noted above, in ACAP. Rather, it came as an afterthought:[2] in 2006, in adopting the text of the present Treaty, the second session of the Meeting of the Parties in Resolution 2.1 agreed (in operative paragraph 2) that the Secretariat should have international legal personality, and "capacity limited to the extent necessary to conclude the Headquarters Agreement with the Government of Australia and to implement its provisions". Evidently it had been belatedly realised that, without international legal personality, the Secretariat would have been incapable of being party to any bilateral agreement of treaty status.

7. While Resolution 2.1 may on the surface appear to cure the lack of personality, it is only a temporary amelioration rather than a lasting solution, and can be expected to become progressively less effective over time. This is because ACAP itself is silent on the status of decisions adopted by the Meeting of Parties. Again, there is a clear contrast with the two Conventions mentioned in paragraph 2 of this submission. Under Article IX(6)(b) of the Convention on the Conservation of Antarctic Marine Living Resources, conservation measures adopted by the Commission become binding upon all Members 180 days after notification by the Commission of their adoption, subject to an objection procedure not relevant for present purposes. The Convention on the Conservation of Southern Bluefin Tuna provides in Article 5(1) that "Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8." Within Article 8, paragraph 7 specifies that management measures for southern bluefin tuna taken under paragraph 3 become binding on all parties.

8. This is not merely a distinction without a difference. The crucial factor is that under the formulations of the two conventions, decisions are also binding on those States acceding to the relevant convention after the adoption of the decision. This is not so for ACAP. By Article 3 ACAP imposes a variety of obligations on the parties, but since a blanket ban on the taking of albatrosses and petrels and their eggs is already written into paragraph 2, the Meeting of Parties does not need to devise management measures; accordingly, its decisions are assumed to be of a recommendatory character. Thus the absence of any legal mechanism to require compliance of new parties with pre-existing measures of the Meeting of Parties was not necessarily an oversight; the drafters of ACAP could reasonably have formed the view that it was simply unnecessary.

9. The effect of this is that, while, thanks to the 2006 resolution, the Secretariat's international legal personality may be recognised by Australia and the other parties to ACAP at the time of the resolution's adoption, there is no obligation on any State that has acceded to ACAP since then, such as Norway which did so in 2007, or any other State that accedes in future, to extend similar recognition to the Secretariat. To do so would require an amendment of ACAP that makes clear that the Secretariat has such personality, and it is this course that the Committee should now require

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[2] In conformity with Article VIII(11) of ACAP, Resolution 1.1 establishing the Secretariat was adopted by the Meeting of the Parties at its first session in 2004, but with no mention of its legal personality.

the Australian Government to pursue. In the meantime, there is a risk that Australia's legal interests in a future dispute with the Secretariat may be prejudiced by the fact that only some rather than all other parties to ACAP recognise its international legal personality.

Conclusion

10. This submission does not dispute that, in the words of paragraph 5 of the NIA, "The establishment of a permanent Secretariat is crucial to guiding the future work of ACAP." What this Treaty has highlighted, however, is that the 1963 Act does not adequately cover the situation of treaties that, like ACAP, create a secretariat, but not as part of any international organisation of which Australia and other countries, or persons representing them, are members. At the very least, therefore, binding treaty action will need to be delayed until the 1963 Act and if necessary the Migration Regulations have been amended to allow Australia to comply with the Treaty's terms. It is also regrettable that, because of the deficient drafting of ACAP, one of the matters essential for such a permanent secretariat – a sound legal basis for its international personality – is not, and could not have been, provided by this Treaty. While it may be conceded that this second problem would not have been enough on its own to warrant delaying taking binding action on the Treaty, it should first be fixed now that the delay made inevitable by the need to resolve the first problem has created an opportunity to do so.

11. Since the current interim secretariat arrangement appears according to the NIA to have been working well, it is suggested that no harm will come from leaving this in place until a fully secure legal basis for the Secretariat's operations in Hobart can be created. While it is unfortunate that this will delay the process and frustrate for a time the expectations of other parties to ACAP, the alternative would put Australia in a position of taking on international obligations with which its domestic law does not presently allow it to comply. This is something that Australia has always sought to avoid and which runs counter to the aim expressed in paragraph 5 of the NIA of increasing Australia's standing in international affairs. The Committee should therefore consider declining for the time being to endorse the taking of binding action in relation to this Treaty, and instead recommending that the Australian Government negotiate an amendment to ACAP to confirm the Secretariat's international legal personality for all parties.

12. In addition, the Committee might well wish to make known its displeasure to the Government at such a misleading NIA being placed before it, and ask the Government witnesses at the hearing on this Treaty how such an unsatisfactory state of affairs was allowed to develop to the point where a negative recommendation from the Committee itself is now the last available remedy.