

**DOCUMENTS TABLED ON 2 FEBRUARY 2010:**

- **National Interest Analysis [2010] ATNIA 17**  
**with attachment on consultation**
  
- **Measure 16 (2009)**  
**Amendment of Annex II to the Protocol on Environmental**  
**Protection to the Antarctic Treaty [1998] ATS 6**  
**Baltimore, 17 April 2009**  
**[2010] ATNIF 1**



# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

### Measure 16 (2009)

### **Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic Treaty [1998] ATS 6 Baltimore, 17 April 2009 [2010] ANIF 1**

#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is the entry into force of amendments to Annex II to the *Protocol on Environmental Protection to the Antarctic Treaty* [1998] ATS 6 (the Protocol).
2. The Protocol commits Contracting 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 Antarctica. Annex II to the Protocol sets out measures for the conservation and protection of Antarctic fauna and flora.
3. Pursuant to Art 9 of the Protocol and Art IX of the *Antarctic Treaty* [1961] ATS 12, amendments to annexes to the Protocol may be formulated by the representatives of Consultative Parties<sup>1</sup> at the annual Antarctic Treaty Consultative Meeting (ATCM) via a measure for recommending to their governments. The amendments to Annex II to the Protocol were unanimously adopted at ATCM XXXII on 17 April 2009 in Measure 16 (2009), *Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic Treaty*.
4. Pursuant to Art 9 of Annex II to the Protocol, Measure 16 (2009) will automatically become effective one year after the close of ATCM XXXII (that is on 17 April 2010), unless one or more of the Contracting Parties notifies within the timeframe that it wishes an extension of that period, or that it is unable to approve the measure. Once effective, measures are legally binding on all Contracting Parties.
5. The effect of Measure 16 (2009) is to provide greater safeguards and protection for the conservation of Antarctic fauna and flora under Annex II to the Protocol.

#### **Overview and national interest summary**

6. The amendments to Annex II resulting from Measure 16 (2009) represent the first step in a rolling review of all annexes to the Protocol, and are the result of eight years of formal and informal negotiations, which began in 2001. Australia was the principal proponent of the review of Annex II and the resulting measure.

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<sup>1</sup> Consultative Parties include all original signatories to the Antarctic Treaty and all parties that acceded to the Treaty and are demonstrating their interest in Antarctica by conducting substantial scientific research activity there, in accordance with Art IX(2). Consultative Parties have voting status at ATCMs. Contracting Parties whose representatives were entitled to participate in the meetings in this context can also be read as Consultative Parties.

7. Measure 16 (2009) makes a series of minor modifications to Annex II to the Protocol, which are intended to improve the process for listing species for special protection, extend the protection of native flora and fauna to include invertebrates, broaden provisions for introduction of non-native species and diseases to include unintended introductions, and make minor editorial updates.

8. These amendments to Annex II enhance the protection of the Antarctic environment under the Protocol, to which Australia has been strongly committed since its inception.

## **Reasons for Australia to take the Proposed Treaty Action**

9. Australia has been a Consultative Party to the Antarctic Treaty since it came into force in 1961. The Antarctic Treaty is a multilateral agreement which commits the Contracting Parties to ensure that Antarctica is used exclusively for peaceful purposes, guarantees freedom of scientific research, promotes international scientific cooperation, allows for inspection of all operations, sets aside the potential for disputes over territorial sovereignty in Antarctica, and provides for regular meetings between the parties. The Protocol is a multilateral agreement under the Treaty which commits parties to the protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science.

10. Australia has a large territorial claim and an extensive research program in Antarctica. Australia took a leading role in the formation of the Antarctic Treaty and the Protocol, and successive Australian governments have viewed maintenance of the Treaty and associated agreements as a high priority. Australia is a strong advocate for the importance of the Treaty and has actively contributed to the development of the additional instruments of the Antarctic Treaty system, including the Protocol.

## **Obligations**

11. The following new obligations arise for Contracting Parties to the Protocol as a consequence of the amendments to Annex II.

12. A number of the amended provisions of Annex II to the Protocol expressly oblige Contracting Parties to provide equivalent protection to Antarctic invertebrates to that currently applicable to native mammals, birds and plants under Annex II, including:

- an obligation to limit the taking of native invertebrates under permits issued under Art 3 of Annex II to those that are strictly necessary to meet the purpose of the permit (Art 3(3)(a));
- an obligation to accord special protection to invertebrates when designated as a Specially Protected Species by Contracting Parties (Art 3(4));
- an obligation to prohibit the issuing of permits for an invertebrate listed as a Specially Protected Species, excepting for a compelling scientific purpose (Art 3(8)(a));
- an obligation to prohibit the use of lethal techniques on invertebrates listed as Specially Protected Species, except where there is no other suitable technique (Art 3(9)); and
- an obligation to obtain and exchange information as to the status of native invertebrates in the Antarctic Treaty area (Art 6(1)(a)).

13. The amended provisions of Annex II to the Protocol also refer to the criteria and procedures for designating and managing Specially Protected Species. Consultative Parties will be obliged to provide input to determine agreed procedures and criteria for designation of a Specially Protected Species (Art 3(5)) and to participate and contribute in the review and provision of advice on these criteria (Art 3(6)). In some instances Consultative Parties may be obliged to submit a proposal and justification to the ATCM for the designation of a species as a Specially Protected Species (Art 3(7)).

14. The amended provisions of Annex II to the Protocol also provide for enhanced obligations on Contracting Parties to prevent the unintentional and accidental non-native species and disease introduction. The introduction of all non-indigenous living organisms will be prohibited except in accordance with a permit (Art 4(1)). Contracting Parties will be obliged under Art 4(5) to remove or dispose of any non-native species introduced without a permit where feasible and to take reasonable steps to control the harm caused by the introduction.

15. Article 4(7) will oblige Contracting Parties to require precautions to be taken to prevent the accidental introduction of micro-organisms not present naturally in the Antarctic Treaty area.

16. With respect to permits for the introduction of non-native species, Contracting Parties will be obliged under Art 4(3) to require a rationale to justify the proposed introduction of non-native living organisms into the Antarctic Treaty area. Article 4(3) will also impose limitations on the permitted purpose of importation – import for controlled use (cultivated plants and their reproductive propagules) and import for controlled experimental use (species of living organisms). Article 4(4) will oblige Contracting Parties to require, as a condition of the issue of a permit, that any species which is the subject of such a permit be removed from the Antarctic Treaty area or disposed of by incineration prior to expiration of the permit.

17. Article 4(8) will augment the obligations on Contracting Parties to take all appropriate efforts to ensure that poultry and avian products imported into Antarctica are free from contamination by disease, including the requirement that any products not consumed be removed or disposed of by incineration to eliminate the risk of introduction of micro-organisms.

18. Article 4(9) will change the obligations on Contracting Parties from the avoidance of importation of non-sterile soil into the Antarctic Treaty area, to a prohibition on the introduction of non-sterile soil including the requirement to ensure against the unintentional importation of non-sterile soil to the maximum extent practicable.

19. Article 6(1)(a) will augment requirements for the exchange of information by creating a new obligation for Contracting Parties to make arrangements for this exchange to be undertaken annually.

## **Implementation**

20. Australia's obligations under Annex II to the Protocol are implemented in domestic law through the *Antarctic Treaty (Environment Protection) Act 1980* (the Act). Amendment to the Act will be required to implement the new obligations described in the previous section into Australian domestic law.

## **Costs**

21. There are no foreseeable financial costs to Australia associated with compliance with the proposed treaty action.

## **Regulation Impact Statement**

22. The Australian Antarctic Division of the Department of the Environment, Water Heritage and the Arts has assessed the implementation of the amendments to Annex II to the Protocol against the criteria in *The Best Practice Regulation Handbook*. This regulatory action has no impact on business and individuals or on the economy and a Regulation Impact Statement or Business Cost Calculator report is not required. The Office of Best Practice Regulation has confirmed that no further regulatory impact analysis is required (OBPR ID: 10577).

### **Future treaty action**

23. The Antarctic Treaty may be amended at any time in accordance with the provisions of Art XII. Article XII(1) provides for such amendment when there is unanimous agreement of the Contracting Parties whose representatives are entitled to participate in consultative meetings. Any such modification or amendment enters into force when the depository government (the United States of America) has received notice from all such Contracting Parties that they have ratified it. Pursuant to Art 25(1), the Protocol may be amended by the same procedure as the Treaty. Article 9(3) of the Protocol provides that annexes may be adopted and become effective via Art IX of the Treaty, although an annex may provide for amendments to become effective on an accelerated basis.

24. Consultative Parties are vested with the authority to create and adopt measures by virtue of provisions under the Antarctic Treaty. Pursuant to Art XI of the Treaty, representatives of Contracting Parties at ATCMs may formulate measures for recommendation to their governments.

25. The Protocol is currently the only protocol to the Antarctic Treaty. There are no other protocols proposed for the Treaty. The Protocol is accompanied by six annexes.

26. Any agreement to amend Annex II or any proposed amendment to the Protocol would constitute a separate treaty action and would have to satisfy Australia's domestic treaty making process.

### **Withdrawal or denunciation**

27. If Australia decides not to accept Measure 16 (2009), the measure and the resulting amendments to Annex II to the Protocol would not enter into force.

28. Annex II forms part of the Protocol (Art 9 of the Protocol). The Protocol contains an extremely limited right of withdrawal in Art 25(5)(b) where a permissible modification or amendment has been proposed to Art 7 (which prohibits all activities relating to Antarctic mineral resources, except for scientific research) but has not entered into force within three years of its adoption (which requires ratification or approval by 3/4 of Consultative Parties). However, the amendment or modification must have been adopted at a Review Conference called under Art 25(2) of the Protocol, which may not take place until 50 years after the entry into force of the Protocol (i.e. until 2048).

29. The Antarctic Treaty also contains a specific withdrawal provision in Art XII, 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 (i.e. not approved by all relevant Contracting Parties). In such a case, Australia could withdraw

from the Treaty under Art XII(2)(c) by giving notice to the depository government; such withdrawal would take effect two years after this notice was received.

30. Australia may withdraw as a party to either the Antarctic Treaty or the Protocol at any time by consent of all parties after consultation with other contracting states, in accordance with Art 54(b) of the *Vienna Convention on the Law of Treaties* [1974] ATS 2.

31. Withdrawal is considered a formal treaty action and would require satisfaction of Australia's domestic treaty requirements including tabling in parliament with a National Interest Analysis and consideration by the JSCOT.

### **Contact Details**

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## ATTACHMENT ON CONSULTATION

**Measure 16 (2009)**  
**Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic**  
**Treaty [1998] ATS 6**  
**Baltimore, 17 April 2009**  
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### **Consultation**

32. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the amendment of Annex II to the Protocol was provided to State and Territory representatives for consideration at its meeting in March 2009 and remained on the schedule of treaties since that time. No requests for further information or comments on the amendment of the annex have been received to date.