

National Interest Analysis [2013] ATNIA 13

with attachment on consultation

**Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported
and Unregulated Fishing**

(Rome, 22 November 2009)

[2010] ATNIF 41

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009) [2010] ATNIF 41

Nature and timing of proposed treaty action

1. It is proposed that Australia ratify the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (the Agreement) as soon as practicable after consideration by the Joint Standing Committee on Treaties. In accordance with its Article 29, the Agreement will enter into force 30 days after the Depository (the Director General of the Food and Agriculture Organization of the United Nations (FAO)) receives the twenty-fifth instrument of ratification, acceptance, approval or accession.
2. The Agreement was approved by FAO Conference Resolution 12/2009 at the thirty-sixth session of the FAO in Rome, Italy, on 22 November 2009 and was opened for signature on that day. Australia signed the Agreement on 27 April 2010. As at 14 May 2013, the Agreement had received 23 signatures, two instruments of ratification, one acceptance and two accessions.

Overview and national interest summary

3. The Agreement requires port States to take action against operators known to be, or suspected of, illegal, unreported and unregulated fishing or activities in support of such fishing (IUU fishing). Port State measures include: denying entry to port; denying the use of port for landing, transshipping, packaging and processing of fish; and undertaking port inspections. These measures assist port States in preventing illegal, unreported and unregulated catches from reaching markets. To strengthen these port State measures, the Agreement introduces corresponding requirements on flag States. These include ensuring flag State vessels cooperate with port inspections undertaken pursuant to the Agreement, and that flag States take appropriate follow-up action if their vessels are found to be engaging in IUU fishing.
4. The Agreement promotes the objective of preventing, deterring and eliminating IUU fishing through the implementation of effective port State measures, and thereby ensuring the long-term conservation and sustainable use of living marine resources and marine ecosystems. Ratification of the Agreement will further enhance Australia's international reputation as a responsible fishing nation as well as protecting Australia's marine ecosystems from the detrimental effects of IUU fishing. It will enable Australia to apply internationally agreed standards for port State measures that deter IUU fishing and provide a basis for greater cooperation between Australia and other States to reduce IUU fishing activities. Australia's fishing industries and communities are expected to benefit from ratification of the Agreement; it will have a deterrent effect on IUU fishing, which has a negative impact on Australia's harvest of fish stocks within and beyond its exclusive economic zone.

Reasons for Australia to take the proposed treaty action

5. The Agreement is the first global legally-binding instrument specifically directed at combating IUU fishing. IUU fishing is recognised globally as a threat to the management and conservation of living marine resources and marine ecosystems and, in particular, to sustainable fisheries. It is defined in the Agreement by reference to paragraph 3 of the 2001 FAO *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU). Accordingly, the Agreement would apply to a wide range of fishing activities and activities in support of such fishing, including:

- fishing in waters within the jurisdiction of a coastal State without the coastal State's consent;
- fishing in contravention of a conservation and management measure adopted by a regional fisheries management organisation (RFMO) to which the flag State of the vessel is a party;
- fishing in violation of national laws or international obligations;
- failing to report (or misreporting) fishing activities, in contravention of national laws and regulations or reporting procedures established by RFMOs;
- fishing in an area governed by an RFMO by a vessel without nationality, or flagged to a State that is not a Party to that organisation;
- fishing in an area governed by an RFMO in a manner that is inconsistent with or contravenes conservation and management measures adopted by that organisation;
- (where there is no established RFMO) fishing in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law;
- landing, packaging, processing, transshipping or transporting of fish taken through one of the fishing activities described above; and
- providing personnel, fuel, gear or other supplies in support of one of the fishing activities described above.

6. Australia has a strong interest in measures intended to deter IUU fishing. IUU fishing threatens the Australian harvest of fish stocks within and beyond its exclusive economic zone, such as in the southern Indian and Antarctic Oceans. Deterrence of IUU fishing contributes to the protection of the Australian fishing industry and communities dependent upon this industry for their economic well-being.

7. Australia plays an important role internationally in promoting strengthened and effective fisheries management practices, including with respect to combating IUU fishing. Australia is a key driver in promoting collaborative action to improve fisheries governance under the *Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing in South East Asia* (RPOA-IUU). This is a voluntary ministerial initiative of eleven countries (including Australia) with the aim of promoting responsible fisheries practices and combating IUU fishing in the South East

Asian region. The RPOA-IUU draws upon the IPOA-IUU, which contains guidelines for port State access, information to be collected from fishing vessels and a process for actions to be taken where IUU fishing is suspected. The Agreement complements actions taken under these non-binding instruments. Ratifying the Agreement will strengthen the framework that Australia has assisted in developing to prevent significant adverse impacts of IUU fishing in the region.

8. The obligations under the Agreement are consistent with Australia's obligations under the *United Nations Convention on the Law of the Sea* ([1994] ATS 31) and the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* ([2004] ATS 26) to cooperate to conserve living marine resources. The Agreement will assist in strengthening international efforts to reduce problems associated with the practice of IUU fishing.

9. It is important that Australia ratify this Agreement as soon as practicable. Australia was active in the negotiation of the Agreement and ratification will further enhance Australia's reputation as a responsible fishing nation and underline Australia's commitment to effective fisheries management practices.

Obligations

10. The Agreement introduces four key mechanisms to prevent, deter and eliminate IUU fishing, namely: preventing entry to port; preventing the use of the port; imposing requirements to inspect vessels; and requiring States to take action if IUU fishing is reported to them following the taking of other measures under the Agreement. These measures will make it more difficult for the products of IUU fishing to enter the market, making IUU fishing more difficult and less profitable, and therefore less attractive. In addition, the Agreement introduces mechanisms for information-sharing in order to facilitate implementation of the Agreement.

11. The Agreement would apply to most foreign-flagged vessels seeking entry to and use of Australian ports (Article 3(1)). It establishes a system of *minimum* standards for port State measures for the purpose of monitoring and controlling the activity of foreign fishing vessels and determining whether there is any involvement with IUU fishing. Parties could apply *additional* port State measures provided that they are consistent with international law (Article 4(1)(b)). Further, the Agreement contains provisions intended to assist developing countries in meeting their obligations under the Agreement (Article 21).

Entry to, and use of, ports

12. Australia would be obliged to designate and publicise the ports to which vessels may request entry (Article 7(1)). 'Vessels' are defined broadly to include both fishing vessels and support vessels, such as supply and freezer vessels (Article 1(j)). Vessels wishing to access these ports would be required to request permission for port access ahead of time, and transmit information on their activities and the fish they have on board (Article 8 and Annex A). This would give Australian authorities an opportunity to identify in advance vessels of potential concern, and to determine whether to allow or deny the vessel entry into its port (Article 9(1)).

13. Australia would be required to deny the vessel *entry* into its port if it has 'sufficient proof' that the vessel has engaged in IUU fishing, for example, where the vessel is on an IUU

list of an RFMO (Article 9(4)). However, Australia could allow the entry of such a vessel where it intends to inspect the vessel and take action which is as effective as denying entry (such as seizing the catch), provided this is consistent with international law and Australia does not allow the use of its port (Article 9, paragraphs (5) and (6)).

14. Australia would be required to deny the *use* of its designated ports for landing, transshipping and processing of fish, and for port services such as refuelling, resupplying and repair, to foreign vessels which may have engaged in, or supported, IUU fishing (Article 11).

15. Vessels that require entry to port due to force majeure or distress would not be subject to the above requirements (Article 10). In addition, Australia could not deny the use of its port to a vessel where such use would be essential to the safety or health of the crew or the safety of the vessel, or (where appropriate) for the scrapping of the vessel (Article 11(2)).

Port inspections

16. Australia would be required to ensure that there is sufficient capacity to conduct inspections at its designated ports, and that these ports and its inspectors are adequately equipped and trained (Article 7(2) and Article 13).

17. The Agreement would commit Australia to conducting regular inspections of vessels accessing its designated ports, and outlines a set of standards that would be used during those inspections. These would include conducting reviews of ship papers, surveying fishing gear, examining catches and checking a ship's records to reveal if it has engaged in IUU fishing (Article 12, Article 13 and Annex B). The Agreement also sets out risk-based criteria for determining which vessels to inspect. Parties are also required to seek to agree on the minimum levels for inspection of vessels through, as appropriate, RFMOs, the FAO or otherwise.

18. Where, following a port inspection, Australia would have clear grounds for believing that a vessel has engaged in IUU fishing, it would be required to deny the vessel the use of its port for landing, transshipping, packaging and processing of fish. Australia would also be required to notify the flag State and, as appropriate, RFMOs and relevant coastal States (Article 11).

Flag state obligations

19. As a flag State, Australia would be obliged to take a range of measures to ensure that Australian-flagged fishing vessels comply with the Agreement (Article 20). These would include:

- requiring Australian-flagged vessels to cooperate with port State inspections carried out under the Agreement;
- encouraging Australian-flagged vessels to land, tranship, package and process fish, and use other port services, in ports of States that apply the Agreement;
- requesting the port State to which an Australian-flagged vessel is seeking access to deny the use of its port, where Australia has clear grounds to believe that the vessel has engaged in IUU fishing; and

- undertaking appropriate follow-up action in response to any inspection reports indicating that a vessel flying its flag has engaged in IUU fishing.

Information-sharing mechanisms

20. The Agreement would require Australia to collaborate in the creation of an information-sharing mechanism to enable countries to share details on vessels which are associated with IUU fishing (Article 16). Australia would also be under a general obligation to take measures to exchange information among relevant national agencies, and to exchange information with relevant States, the FAO and other international organisations and RFMOs, in order to promote the effective implementation of the Agreement (Article 5(c) and Article 6 respectively).

Implementation

21. The obligations under the Agreement could be implemented under existing Commonwealth legislation or administratively through the application of Standard Operating Procedures and other arrangements.

22. In particular, certain obligations are implemented under the *Fisheries Management Act 1991* and the *Fisheries Administration Act 1991*. No amendments are required to these Acts or other Commonwealth legislation to implement the obligations under the Agreement.

23. Standard Operating Procedures and associated guidelines are applied by officers in conducting port inspections of (domestic and) foreign-flagged vessels in Australian ports. Some revisions would need to be made to these Standard Operating Procedures and guidelines so that their application to foreign vessels seeking access to Australian ports fully aligns with the requirements of the Agreement. In addition, administrative arrangements would need to be put in place to enable relevant data collection and information sharing, and application forms for foreign fishing vessels seeking access to Australian ports would need to be amended. It is expected that the necessary administrative amendments will be in place by mid-2013.

Costs

24. The entry into force of the Agreement would not impose a significant burden or cost on the Australian Government. Many obligations imposed by the Agreement have already been implemented and are met through the current activities of the Australian Fisheries Management Authority (AFMA) and the Department of Agriculture, Fisheries and Forestry.

25. The Australian Government would need to: maintain a workforce of officers with the appropriate port inspection skills, who can be mobilised as required; provide training; maintain a current port list; maintain Standard Operating Procedures; and work with other countries in sharing information. However, foreign fishing vessel visits to Australian ports are uncommon. Port inspections will not require a workforce dedicated to this task and will be undertaken by officers as part of a wider set of duties. Consequently the ongoing financial commitment is expected to be minimal.

26. In line with AFMA's cost recovery impact statement, costs associated with Australian fishing vessels are partially attributed to industry and partially to government. However, Australian fishing vessels are already required to comply with similar monitoring, control and surveillance standards for fishing operations in Australia's waters and no significant new

costs are anticipated. The Agreement would apply similar obligations to foreign fishing vessels.

Regulation Impact Statement

27. The Office of Best Practice Regulation, Productivity Commission has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

28. Amendments to the Agreement could be proposed by any Party after a period of two years from the date the Agreement enters into force. A proposed amendment would need to be made in writing to the Depositary, with an accompanying request for the convening of a meeting of the Parties. The FAO would convene a meeting of the Parties to consider the proposed amendment unless, within six months from the circulation of the proposal, one half of the Parties objected to the request (Article 33, paragraphs (1) and (2)).

29. An amendment to the Agreement would need to be adopted by consensus of the Parties present at the meeting at which it is proposed for adoption. An amendment would enter into force for the Parties who have ratified, accepted or approved it on the ninetieth day after the deposit of the instruments of ratification, acceptance or approval by two-thirds of the Parties to this agreement. The amendment would enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendment (Article 33, paragraphs (3) and (4)).

30. An amendment to an Annex to the Agreement may be adopted by two-thirds of the Parties present at a meeting where the proposed amendment is considered. The amendment would enter into force for those Parties that have expressed their acceptance from the date of its acceptance by one-third of the Parties. Thereafter, the amendment would enter into force for each remaining Party when the Depositary receives its acceptance.

31. Any amendments to the Agreement would be subject to Australia's domestic treaty processes.

Withdrawal or denunciation

32. Any Contracting Party could withdraw from the Agreement at any time after the expiry of one year from the date the Agreement entered into force for that Contracting Party. The withdrawal would become effective one year after written notice is received by the FAO (Article 35).

33. Withdrawal from the Agreement would be subject to Australia's domestic treaty processes.

Contact details

Fisheries Regulation and Governance, Fisheries Branch
Sustainable Resource Management Division
Department of Agriculture, Fisheries and Forestry

ATTACHMENT ON CONSULTATION

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CONSULTATION

Commonwealth departments and agencies

- Attorney-General's Department
- Australian Fisheries Management Authority
- Australian Maritime Safety Authority
- Department of Foreign Affairs and Trade
- Department of Infrastructure and Transport
- Department of Sustainability, Water and the Environment

34. Commonwealth departments and agencies were consulted throughout the intergovernmental consultation process for the negotiation of the text for the Agreement (2008 to 2009). Interdepartmental meetings were held regularly between relevant Commonwealth departments and agencies in the development phase, and Commonwealth departments and agencies were directly involved in the development of an agreed whole-of-government Australian negotiating position. Approval of the Australian negotiating position was sought from relevant ministers prior to each intergovernmental consultation.

35. The Department of Agriculture, Fisheries and Forestry led Australia's delegation to the technical consultations, which included an officer from the Attorney-General's Department. A representative from the NGO, Pew Charitable Trusts, attended one technical consultation.

36. On 15 October 2009 approval was sought of the text for the Agreement from the Attorney-General and the Ministers for Foreign Affairs and for Infrastructure, Transport, Regional Development and Local Government. All three agreed to the text.

National Resources Management Marine and Coastal Committee

37. The Natural Resources Management Marine and Coastal Committee was an intergovernmental (Commonwealth/State/Territory) committee (now disbanded) that advised the Natural Resources Management Standing Committee and Ministerial Council on matters of national significance relating to the conservation and ecologically sustainable development of marine and coastal ecosystems and resources.

38. States and Territories were informed of the progress of the Agreement on 17 May 2010 via their involvement in the Marine and Coastal Committee, under the Natural Resource Management Ministerial Committee.

Standing Committee on Treaties

39. States and Territories were also notified about the progress of the negotiations through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). The schedule of treaties distributed to SCOT members provided notification of the negotiation and

signature of the Agreement and that the Agreement was under review prior to ratification. Information on the Agreement and its prospective entry into force was provided to SCOT in September 2010.

40. A draft National Interest Analysis was circulated to SCOT representatives on 8 November 2012. No concerns regarding the Agreement were raised.

Multilateral treaties list

41. The *List of Multilateral Treaty Actions Under Negotiation or Consideration* is a list that is tabled in the Commonwealth Parliament approximately every six months and is available through the internet. It lists multilateral treaties under negotiation, consideration or review by the Australian Government for signature or adherence. The Agreement was added to this list in 2010.