

DOCUMENTS TO BE TABLED ON 23 FEBRUARY 2010:

- **National Interest Analysis [2010] ATNIA 3**
with attachment on consultation

- **Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, done at Paris 8 January 2007**
[2007] ATNIF 1

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

**Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, done at Paris 8 January 2007
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Nature and timing of proposed treaty action

1. The nature of the proposed treaty action is entry into force of the *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands* (the Treaty) through an exchange of notes. Article 13(1) of the Treaty provides that it will enter into force on the date on which the Parties have notified each other in writing, through diplomatic channels, that their internal procedures necessary for its entry into force have been met.

2. The timing of the proposed treaty action is as soon as practicable after JSCOT's consideration and enactment of legislative amendments necessary to implement the Treaty. The French Government has completed its internal treaty making processes.

3. The Treaty builds on the *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Cooperative Fisheries Surveillance Treaty)* [2005]ATS 6. Article 2 of Annex III of the Cooperative Fisheries Surveillance Treaty provides that the Parties may conclude agreements or arrangements that may also provide for law enforcement operations possibly accompanied by forcible measures.

4. Article 1(2) of the Treaty states that it has the same area of application as the Cooperative Fisheries Surveillance Treaty, which applies in an 'Area of Cooperation' comprising the territorial seas and exclusive economic zones surrounding the Australian territory of Heard Island and the McDonald Islands and the French Southern and Antarctic Territories (Article 1). In cases of hot pursuit (see paragraph 16), the Treaty may apply beyond this Area in relation to infringements which occurred inside it.

Overview and national interest summary

5. The Treaty creates a framework for cooperation between Australia and France to tackle illegal, unreported and unregulated (IUU) fishing within the Australian and French waters covered by the Treaty. IUU fishing within the Area of Cooperation continues to be a serious threat to the marine environment and the sustainability of valuable fish stocks that are legitimately harvested by Australian (and other) fishing operators. The Treaty provides that 'Controllers' (ie fisheries enforcement officers) of one Party may undertake enforcement action onboard an authorised vessel of the other Party against alleged IUU fishing vessels in the waters of the Controller's Party.

Reasons for Australia to take the proposed treaty action

6. Illegal fishing in the Southern Ocean is a considerable threat and valuable Patagonian toothfish have been targeted by foreign fishing vessels in Australia's exclusive economic zone (EEZ) around Heard Island and the McDonald Islands. Australia and France have neighbouring EEZs in the Southern Ocean and share a common interest to protect the valuable fisheries resources within it. Australia and France are both Members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and promoting cooperative enforcement of our respective fisheries laws demonstrates Australia's commitment to ensuring that fisheries resources in the Southern Ocean are sustainably managed. The Treaty also ensures that legitimate Australian fishers are not impacted upon by IUU fishers in Australia's EEZ around Heard Island and the McDonald Islands.

7. The remoteness of Australia's southern waters and the harsh weather conditions that are prevalent in that region make the task of enforcing Australia's fisheries laws difficult and expensive. Close cooperation between countries which share similar concerns about IUU fishing is one of the most effective ways to address this problem. This Treaty will provide for cooperative enforcement of Australia's fishing laws and reinforce the presence of Australian fisheries enforcement officers in Australia's EEZ around Heard Island and the McDonald Islands.

8. Australia has undertaken cooperative enforcement of suspected illegal fishing vessels on an *ad hoc* basis in the past. The Treaty formalises the cooperative fisheries enforcement activities between Australia and France and provides a strong legal basis for future enforcement actions.

Obligations

9. The objective of the Treaty is to enhance cooperative enforcement of fisheries laws in the Area of Cooperation. Controllers conduct 'cooperative enforcement activities' (ie enforcement activities by an authorised vessel of one Party in the EEZ/maritime zones of the other Party) aboard an authorised vessel of the other Party, with the consent of the other Party. Cooperative enforcement activities include boarding, inspection, hot pursuit, apprehension, seizure and investigation of fishing vessels that are believed to have violated applicable fisheries laws (Article 1(4) of the Treaty).

10. Under Article 3 of the Treaty, cooperative enforcement activities shall only be undertaken when there is a Controller on board an authorised vessel of the other Party. In other words, an Australian Controller may enforce Australian fisheries laws within the Australian EEZ around Heard Island and the McDonald Islands on board a French authorised vessel, and vice versa. Cooperative enforcement activities shall only be conducted in conformity with the law applicable in the maritime zone in which the activities are undertaken, or in the case of hot pursuit, the maritime zone from which a hot pursuit is commenced.

11. The Party whose authorised vessel, and its crew, is undertaking cooperative enforcement activities on behalf of the other Party shall take appropriate measures to ensure that the laws of the other Party are observed and respected.

12. Pursuant to Article 5, officers of one Party shall enjoy immunity from the criminal, civil and administrative jurisdiction of the other Party for acts performed in the course of carrying out

cooperative enforcement activities. A Party shall, where one of its officers has allegedly breached the laws of the other Party, ensure appropriate action, consistent with its laws and regulations, is taken against its officers.

13. Article 6 provides for post-apprehension cooperation. Vessels seized by a Party in the maritime zone of the other Party, or following hot pursuit undertaken from the other Party's maritime zone shall, together with the persons, equipment and any documents and catch on board, be handed over as soon as possible to the authorities of the other Party.

14. Article 7 requires the Party conducting cooperative enforcement activities to report those activities to the other Party. Parties are also required under Article 10 to exchange information about cooperative enforcement activities.

15. Under Article 9 on international cooperation, each Party is required to use its best efforts, including diplomatic efforts, to ensure that fishing vessels considered to be fishing illegally are apprehended and that illegal catches are seized or denied transshipment in their respective ports or the ports of other States.

16. Article 4 of the Treaty permits an authorised vessel of one Party to take over a hot pursuit commenced by an authorised vessel of the other Party. Both Australia and France are Parties to the United Nations Convention on the Law of the Sea (UNCLOS) [1994] ATS 31. Under Article 111(2) of UNCLOS, countries may conduct a hot pursuit beyond the boundaries of their EEZs of vessels suspected of illegal activity (including IUU fishing within their EEZ). Hot pursuit may only be commenced after a visual or auditory signal to stop has been given to the pursued vessel and it must continue without interruption. Such a hot pursuit can lead to the boarding of the vessel on the high seas and the subsequent investigation and prosecution by the pursuing country. Reliance on the right of hot pursuit under Article 111 of UNCLOS has entitled Australia under international law to pursue and apprehend suspected illegal fishing vessels outside of Australia's EEZ in several instances in the past.

Implementation

17. The Treaty will be implemented within the framework of Australia's existing laws and policies relating to IUU fishing activity. Amendments to the *Fisheries Management Act 1991* are required to give effect to the immunity provided for French officers in the Treaty, to ensure that Australian officers have sufficient powers to perform expected functions under the Treaty and to enable French officers to assist Australian officers undertaking enforcement activities.

18. No changes to the existing roles of the Commonwealth or the States and Territories will arise as a consequence of implementing the Treaty.

Costs

19. Pursuant to Article 8 of the Treaty, the costs incurred during cooperative enforcement activities shall be borne by the Party undertaking them. The proceeds from any sale of vessels, fishing equipment, fuel and lubricant, or catch which has been forfeited following cooperative enforcement activities shall belong to the Party whose laws are believed to have been violated.

Where the costs borne by one party far exceed the costs borne by the other Party, the Parties may agree to recover those additional costs.

20. The costs resulting from the implementation of the Treaty will be minor and will be met through departmental budgets. Some costs, such as holding periodic government-to-government consultations (as required by Article 11) would likely be incurred even in the absence of the Treaty as Australia would expect to consult with France on IUU fishing issues in the normal course of events. The Treaty may result in savings to Australia over the long term by provide it with an opportunity to extend its presence in the Southern Ocean.

Regulation Impact Statement

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

Future treaty action

22. Article 13(2) of the Treaty provides that the Treaty may be amended at any time by common consent of the Parties. Any amendment would take effect once the Parties have notified each other in writing, through diplomatic channels, that their internal processes necessary for its entry into force have been met.

23. Any future amendments would be subject to Australia's treaty making processes.

Withdrawal or denunciation

24. Article 14(2) of the Treaty provides that the Treaty shall remain in force until the expiration of six months after a notification of withdrawal or denunciation is received by the other Party. However, the obligation under Article 10(2), which prohibits unauthorised disclosure of information received under the Treaty to third parties, shall continue indefinitely unless waived in writing. Withdrawal by Australia would also be subject to our domestic treaty making processes.

25. Under Article 14(1), the Treaty is also terminated if the Cooperative Fisheries Surveillance Treaty is terminated.

Contact details

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CONSULTATION

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CONSULTATION

26. The following Australian Government agencies were consulted during the negotiation and conclusion of the Treaty during formal interdepartmental committees and informal working groups:

- Department of Agriculture, Fisheries and Forestry;
- Australian Customs and Border Protection Service;
- Attorney-General's Department;
- Department of the Environment and Heritage (now the Department of the Environment, Water Resources, Heritage, and the Arts (DEWHA)); and
- Australian Government Antarctic Division (now the Australian Antarctic Division of DEWHA).

27. All relevant Australian Government agencies support the binding treaty action to bring the Treaty into force.

28. The Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) contacted the following relevant organisations:

- Bass Strait Central Zone Scallop Fishery Management Advisory Committee
- Southern Bluefin Tuna Management Advisory Committee
- Northern Prawn Fishery Management Advisory Committee
- South East Trawl Fishery Management Advisory Committee
- Australian Fisheries Management Authority
- Southern and Western Tuna and Billfish Fisheries Management Advisory Committee
- Great Australian Bight Management Advisory Committee
- Western Deepwater Trawl Fisheries Management Advisory Committee
- Gillnet, Hook and Trap Fishery Management Advisory Committee
- Sub-Antarctic Management Advisory Committee
- Small Pelagic Fishery Management Advisory Committee
- Tasmanian Aquaculture and Fisheries Institute
- Greenpeace/Deep Sea Conservation Coalition
- Chisholm Institute
- University of Tasmania
- Antarctic Tasmania, Department of Economic Development
- Petuna Sealord Pty Ltd
- Stambo's Group of Companies
- Austral Fisheries Pty Ltd

29. Responses were received from Antarctic Tasmania, the Sub-Antarctic Fisheries Management Advisory Committee and the Southern Bluefin Tuna Management Advisory Committee, which supported Australia's ratification of the Treaty.

30. The Treaty has also been discussed on several occasions at the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) Consultative Forum. No objections to the Treaty have been raised in this forum.

31. State and Territory Governments have been advised of this proposed treaty action through the Commonwealth-State Standing Committee on Treaties' Schedule of Treaty Action.