



Agreement on the Conservation of Albatrosses and Petrels

Second Meeting of Advisory Committee

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Draft Budget 2007-2009

Author: United Kingdom

Comments by the United Kingdom on Draft ACAP Headquarters Agreement

Parties

We have some questions concerning the choice of the Secretariat as the party to this Agreement and its legal capacity to enter into an international agreement with the Government of Australia. We are in correspondence with Australian Government lawyers on this point and anticipate that our concerns may be resolved shortly.

In short, our query is whether a Secretariat, which is not itself an international organisation but merely an administrative organ serving the Meeting of Parties, can have international legal personality and capacity to enter into a treaty, and be the subject of privileges and immunities. Normally these are conferred on an international organisation rather than its Secretariat; for example, in the case of both the International Whaling Commission and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Commission itself is the party to the relevant headquarters agreement and is the subject of privileges and immunities.

We note however one or two recent examples in the field of international environmental law where a secretariat has been created to serve a treaty body such as a Conference or Meeting of Parties without the establishment of an international organisation, and privileges and immunities have been conferred on that Secretariat by the Host Government.

We consider that it is in the interests of ACAP and its Parties that there be a headquarters agreement concluded with the Host Government which defines the privileges and immunities enjoyed by the Secretariat and its staff in the territory of Australia.

Our tentative conclusion is that it is open to the Meeting of Parties to confer international legal personality and capacity on its Secretariat, limited to the functions which it needs to perform on the international plane, principally concluding the headquarters agreement with Australia. For carrying out its functions within the territory of Australia, the Secretariat will need legal personality and capacity under the domestic law of Australia. It will be important to ensure that the resolution by which the Meeting of Parties defines the personality and capacity of the Secretariat is appropriately drafted. The UK believes that the legal capacities conferred by the resolution should be restricted to those functionally necessary. Given that any future Meeting of Parties could adopt another resolution to confer further functions and capacities, the UK suggests that it is not necessary to anticipate all possible future requirements at this stage.

The United Kingdom wishes to draw to the attention of other Parties that under existing UK legislation on international organisations it would not be open to the UK to confer legal capacity or privileges and immunities on the Secretariat in the territory of the United Kingdom. We assume that this does not present any difficulty, as there is no proposal for these to apply in territory other than Australia, even if meetings are held elsewhere in the future.

Article 1 - Definitions

Article 1(k)

We query whether the Secretariat should be given or assumed to have authority to decide to convene meetings of States Parties to ACAP. Any decision to convene a meeting of States Parties should be taken by the MoP, or the Advisory Committee or by Parties in accordance with Article VIII.3.

(Cf: CCAMLR Headquarters Agreement, Article 1(j), which refers to meetings convened by the Commission, not by the Secretariat.)

We therefore propose that the words "at the request of Parties" be inserted after "Secretariat", and the insertion of "such" before "delegations" for clarity, so that sub-para (k) would read:

""Representatives" means representatives of Parties to ACAP in attendance at conferences or meetings convened by the MOP or by the Secretariat **at the request of Parties**, and includes delegates, alternates, advisers and secretaries of **such** delegations;"

Article 2 - Legal capacity

We have some concerns about conferring such wide capacities on the Secretariat to act without reference to the Parties, particularly in relation to immovable property and legal proceedings, where the financial and other implications may be considerable.

We note that Article 2 of the Headquarters Agreement for the Secretariat of the Antarctic Treaty (HQA-ATS) is similar but contains the additional sentence: "The Secretariat may exercise its legal capacity only to the extent authorised by the ATCM".

We suggest addition of the same sentence here (with "Meeting of Parties" in place of "ATCM").

We do not consider that this would impose any inconvenient restriction, give that the Meeting of Parties may adopt further resolutions in the future authorising the exercise of legal capacity, either in generic guidance or ad hoc for specific proposed acts.

Article 6 - Immunities of the Secretariat

Para 1: We are unclear as to the meaning of this provision and would welcome clarification. Does it envisage certain activities being governed by international law? We assume this provision may have been modelled on a similar provision in another headquarters agreement. However, in light of the limited nature of the Secretariat's international legal personality we wonder if there are any types of activities Australian law would not cover?

Para 2(g): We assume it was intended to refer to Article 24, not 25. But we have reservations about Article 24 (please see below), so this sub-paragraph will need review in light of the outcome on Article 24.

Article 8 - Flag and emblem

The reference to "its flag and emblem" is inappropriate as the Secretariat does not have a flag or emblem. If any flag or emblem exist or are to be adopted, they should be for the ACAP. Either this should be redrafted as follows:

"The Secretariat shall be entitled to display the flag and emblem of ACAP on the premises and means of transport of the Secretariat" (the additional reference to the Executive Secretary seems superfluous)

OR this article could be deleted.

Article 9 - Exemption from direct taxes

This exemption is limited to direct taxes. The wording is slightly different from the equivalent provision in the Headquarters Agreement of CCAMLR, Article 8 of which reads "...all direct taxes including income tax, capital gains tax and corporation tax.."

Query: Why are the examples of CTT and CT not included expressly here? Are they within the exemption?

Also, Article 8 of the HQ Agreement of CCAMLR provides for exemption from municipal taxes. Is this what is meant by local taxes in Article 9?

Article 10 – Exemptions or refund of customs and excise duties and refund for value-added tax

Para 2 provides exemption for goods over \$500. Does this mean that each individual item has to be over \$500 to be exempt, or simply that the Secretariat must aggregate their claims and submit lists which total at least \$500? We assume the latter and suggest clarification to put this beyond doubt.

Article 11 - Re-sale

We assume that the first "article XX" should read "Article 10" and "articles XX or XX" should read "Article 16". (We also wondered whether the intention was for there to be a reference to Article 17, but took the view that this is not necessary because Article 17.1(e) already contains restrictions on re-sale.)

Article 13 - Communications

Para 2: This requires the consent of "the Government" which is defined in Article 1 as the Federal Government. We wonder whether giving permission for the installation and use of radio transmitters is a Federal responsibility? Or is the intention that the Secretariat should channel its request through the Federal Government, which will then contact the appropriate authority on its behalf?

Article 15 - Representatives in attendance at meetings convened by the Secretariat

Please see our comments above on the definition of "Representatives" in Article 1(k). For the same reason, we suggest that in the heading to this Article be reworded: "Representatives in attendance at ACAP meetings"

Para 3: We suggest deleting "four weeks" before "prior to their arrival". Bearing in mind that this article applies to representatives attending short meetings, not coming to reside in Australia, the names might sometimes not be decided much in advance of the meeting. Moreover, if the definition of "representative" is clarified so as to include representatives

Para 5: In the first sentence we suggest replacing "the Secretariat" with "ACAP".

Article 16 - Executive Secretary

We suggest replacing "a spouse and dependent children under the age of eighteen years old" with "the members of their family which form part of the household", as this is more flexible and may better accommodate diversity in personal relationships, as recognised in Australian law and practice. This would be consistent with Article 19(b) of this draft (and see Article 16 of the HQ Agreement of the Antarctic Treaty Secretariat).

We are also open to any other more flexible formulations.

Article 17 - Staff Members

Para 2: Replace "their spouse and dependent children under the age of 18 years forming part of their household" with "members of his or her family forming part of the household". (See Article 17.2 of HQ Agreement of the ATS).

Para 3

This provides that any staff member who is a national or permanent resident of Australia shall have no privileges and immunities. However it is usual to confer immunity on nationals and residents of the Host State in respect of acts and things done by them in the course of their official activities including words spoken or written. (See Article 17 of HQ Agreement of the ATS).

See Article 18.1(b) which gives experts inviolability for all their official papers, documents and materials. Shouldn't staff have the same?

Article 18 - Experts

Para 3: As for Article 17.3, we suggest that Australian nationals and residents should have the immunity conferred by para 1(a) and (b). (See Article 18 (a) and (b) of HQ Agreement of the ATS, which does confer such immunities on Argentine nationals.)

Article 19 - Visas

We note the difference in formulation of this draft from that used in Article 19 of the HQ Agreement of CCAMLR and Article 19 of the HQ Agreement of the ATS, both of which confer the right of entry into, stay in and exit from, the Host Country, and also require the Host Government to grant visas, where required, without wait or delay, and without fee. Is there a reason for the different formulation? Could the precedents be followed here?

Article 20 - Objective and waiver of privileges and immunities

Para 1: Suggest deletion of "to staff members and experts" and After "Secretariat" insert "and", so that this sentence reads:

"Privileges and immunities provided for in this Agreement are granted to ensure the independence of the persons to whom they are accorded in the exercise of the functions of the Secretariat **and** to achieve the purposes of the ACAP."

(as there are other subjects of P&I granted by this Agreement, eg the premises of the Secretariat, its records, means of transport, goods, and representatives of Parties attending meetings. These immunities are covered by the second part of this sentence ie they are to achieve the purposes of ACAP.).

Para 4: The second sentence gives a misleading impression. Article XIV of ACAP provides for arbitration between States Parties. The Secretariat cannot be party to arbitration under this article.

If the dispute concerned the refusal of a State Party to waive the immunity of its representative, that Party and Australia might decide to go to arbitration, though it is doubtful whether such a dispute would be justiciable as there is no legal obligation to grant a waiver. If there were a dispute within

the MOP over whether to waive the immunity of a staff member, this would be a political dispute, settled by a vote, in which Parties are free to cast their vote according to political considerations. We therefore question the usefulness of this sentence and tentatively suggest its deletion.

Article 22 - Appointments, identity cards

Para 1: This seems to require the Executive Secretary to notify his/her own appointment. We propose to replace "The Secretariat shall notify...." with "The Meeting of Parties, through its Chairperson or other office-holder, shall notify....".

The reference to spouse etc should be changed to members of their families, etc. (in line with paras 3 and 4).

Article 23 - Consultations

This article, among others, raises the possibility that an urgent matter arises a long time before the next MoP, which cannot await the next MoP for resolution, or which ought to be reported to the Parties promptly.

It might be useful to acknowledge this possibility in this Agreement, for example, by adding some words to this article such as:

"In cases of urgency or major importance, the Secretariat shall notify the Parties directly."

It might also be desirable to include in the Rules of Procedure some requirement and mechanism for the Secretariat to consult or inform the Parties about important decisions which cannot await the MoP (see for example the Rule 46 of the Rules of Procedure of the Antarctic Treaty Consultative Meeting).

(Rule 24 of the ACAP Rules of Procedure for the MoP provides for intersessional voting on a proposal submitted by a Party. It does not require or facilitate consultation at the initiative of the Secretariat on matters arising under the Headquarters Agreement).

Article 24 - Settlement of Disputes

We are unsure of the utility of this article.

Even if it were possible to confer on the Secretariat the capacity to submit a case to international arbitration, we do not think this would be appropriate. Such a decision should only be taken by the MoP. Article XIV of ACAP provides in paras 2-4 for reference of a *technical* dispute to a *technical* arbitration panel. This would not have the legal expertise necessary for resolving a dispute about the interpretation or application of this agreement. Para 5 cross-refers to Article XII of the Convention, which provides for arbitration, in particular at the Permanent Court of Arbitration at The Hague. The above comments apply.

If Article 23 is not considered adequate to cover dispute settlement, we could include a provision along the lines of Article 24 of HQA-ATS. Alternatively, we could delete everything after "may be submitted to an arbitral tribunal." Anything more prescriptive is unlikely to be workable.

Article 25 - Entry into force and termination

Para 1: there must be a requirement for the MoP to approve the Agreement and authorise the Secretariat to sign it. We suggest that the agreement enter into force on signature by the Government and the Executive Secretary, with a requirement that the latter have the prior approval of the MoP.

Para 2:

The Secretariat ought not have the power to decide on termination. It should be by joint decision of the MoP and the Host Government on an agreed date, or on a date to be agreed by the Secretariat and Host Government, OR by unilateral decision of either the Host Government or the MoP, after a specified period of notice. (See Article 25 HQ Agreement of the ATS, but note that the party there is not the Secretariat but the ATCM).

Alternatively, it could be expressed as a requirement for notification by the Government or the Secretariat, provided it is stipulated that the Secretariat may only act in accordance with a decision of the MoP.

Article 26 - Amendment

This formulation is acceptable.