

Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)

Introduction

- 2.1 On 21 August 2012, the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* (ReCAAP) was tabled in the Commonwealth Parliament.

Background

- 2.2 ReCAAP's origins can be traced back to regional concerns about incidents of piracy and armed robbery against ships, dating back to the 1990s, particularly through the Strait of Malacca – the waterway between the Malay Peninsula and Indonesia. Each year more than 80,000 ships pass through the Indian and Pacific oceans. At one stage, the Strait of Malacca and the straits of Singapore were the most heavily pirated areas in the world, peaking with 75 reported attacks in 2000. These incidents threatened maritime navigation, caused economic disruption, increased operating costs and, in some cases, resulted in the loss of life.¹
- 2.3 In response, the Japanese government hosted the Asia Anti-Piracy Challenge Conference in 2000, where participants agreed to broaden

¹ Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

regional cooperation to combat piracy. In 2002, 16 countries – the ASEAN countries plus six others – started to draft what would eventually become ReCAAP, which was finalised in November 2004. In that year, Singapore, Indonesia and Malaysia commenced coordinated counter-piracy patrols, which resulted in a significant drop in attacks, down to 38 in 2004 and then down to 10 attacks in 2005. With ReCAAP's finalisation in 2004, greater information exchange was facilitated to combat piracy and armed robbery at sea, which then helped inform patrolling programs.²

- 2.4 ReCAAP is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia. ReCAAP entered into force on 4 September 2006 and the ReCAAP Information Sharing Centre (ReCAAP ISC) was established on 29 November 2006. To date, 18 States have become Contracting Parties to ReCAAP.³
- 2.5 ReCAAP establishes a framework for cooperation amongst States, through information sharing, capacity building and cooperative arrangements in combating the threat of piracy and armed robbery against ships in Asia.⁴ Information is collected and disseminated by the ReCAAP ISC. ReCAAP also facilitates capacity building initiatives to improve Contracting Parties' response capabilities.⁵

Overview and national interest summary

- 2.6 The following summary of the proposed treaty action and its claimed benefits is taken from the National Interest Analysis (NIA).
- 2.7 The security of shipping lanes throughout Asia and of Australia's maritime approaches is essential for our international trade. Ships carry 99.5 per cent of Australia's trade by volume and 74 per cent by value. In 2008-09, the value of the Australian economy was about A\$1.2 trillion, with seaborne trade contributing A\$368 billion.⁶ Each year, about A\$130

2 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

3 National Interest Analysis [2012] ATNIA 18 with attachment on consultation *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* [2004] ATNIF 15 (Hereafter referred to as 'NIA'), para 2.

4 Piracy being an incident occurring on the high seas, whereas incidents of armed robbery occur within a State's jurisdiction.

5 NIA, para 5.

6 NIA, para 8. This is cited from http://www.navy.gov.au/Publication:Semaphore_-_Issue_4_May_2011.

billion worth of Australian trade is transported through the historically high-risk areas in the Strait of Malacca.⁷

- 2.8 Accession to ReCAAP would enable Australian maritime authorities to draw on the experience and expertise offered by this forum to promote a broader focus on piracy and robbery, particularly noting that Australia's maritime industry identifies piracy as a risk. Access to information-sharing arrangements under ReCAAP will also assist in lessening the risk of piracy incidents and, as a result, commercial costs for sea-borne trade in South-east Asia.⁸
- 2.9 The Office of the Inspector of Transport Security assesses that the risk of piracy within the Australian region is low. However, the threat towards Australian cargo transported via international shipping is as high as it is for any other international shipping country or ship operator. ReCAAP membership offers benefits to Australia's sea trade by facilitating regional cooperation to mitigate the risk of piracy and robbery, and accession to ReCAAP will underscore Australia's commitment to the eradication of piracy and the maintenance of secure and safe sea-borne trade.⁹

Reasons for Australia to take the proposed treaty action

- 2.10 Under International Maritime Organization (IMO) Security Forces Authority (SFA) arrangements, Australia is responsible for a Maritime Search and Rescue Region (MSRR) that covers just over 10 per cent of the Earth's surface and accounts for the carriage of 99 per cent of Australia's trade by sea. ReCAAP provides a vehicle to facilitate closer engagement between regional states and Australia to mitigate risks and to protect Australia's vital trade routes.¹⁰
- 2.11 As a Contracting Party to ReCAAP, Australia would benefit by increased visibility and awareness to monitor emerging regional threats; learn from the experience and expertise of other Contracting Parties; and gain access to a regional maritime security network comprising national authorities who are also responsible for managing the threat of piracy and armed robbery in our immediate region.¹¹
- 2.12 Instances of piracy and robbery against ships in Asia declined by seven per cent in 2011. This was the largest year-on-year decrease since

7 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

8 NIA, para 6.

9 NIA, para 7.

10 NIA, para 9.

11 NIA, para 10.

ReCAAP commenced reporting in 2007. The ReCAAP Annual Report suggests that this decline can be attributed to the littoral States increasing their surveillance profile and bolstering policing efforts in their respective maritime domains.¹²

2.13 Activities conducted under ReCAAP enhance maritime domain awareness and facilitate improved maritime security through coordinated information-sharing arrangements and capacity-building initiatives. In addition, Australia's ascension to ReCAAP will further enhance Australia's reputation as a responsible maritime nation and underline our commitment to regional counter-piracy initiatives.¹³

2.14 Australia's Border Protection Command, tasked with being the lead agency for Australia's engagement, is very positive on ReCAAP: 'joining ReCAAP serves Australia well.'¹⁴ The treaty has even served as a model for further international agreements.

ReCAAP is proven to be an excellent model for how information sharing, collaborative capacity building and cooperative arrangements can reduce the threat of piracy and armed robbery at sea within the region. ReCAAP is also a best practice model that has been used by the International Maritime Organisation as a model for the Djibouti Code of Conduct, an arrangement that deals with the regional threat of Somali based piracy.¹⁵

Obligations

2.15 Contracting Parties shall implement ReCAAP in accordance with national laws and regulations, and subject to their available resources or capabilities. Nothing in ReCAAP shall affect Contracting Parties' rights or obligations under existing international agreements or international law.¹⁶

2.16 Contracting Parties are required to take effective measures to:

- prevent and suppress piracy and armed robbery against ships;
- arrest individuals who have committed armed robbery against ships;

12 NIA, para 11.

13 NIA, paras 12 – 13.

14 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 6.

15 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

16 NIA, para 14.

- seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and
 - rescue victim ships and victims of piracy or armed robbery against ships within the Contracting Parties' maritime jurisdiction.¹⁷
- 2.17 Article 4 establishes the ReCAAP ISC, located in Singapore and consisting of a small Secretariat and a Governing Council composed of Contracting Parties' representatives. The Executive Director of the Secretariat is responsible for the ISC's day-to-day operations. Contracting Parties are required to send one representative to the annual Governing Council meetings in Singapore.¹⁸
- 2.18 The ISC's¹⁹ functions include: managing the expeditious flow among the Contracting Parties of information relating to incidents of piracy and armed robbery against ships; collecting, collating and analysing information transmitted by the Contracting Parties concerning piracy and armed robbery against ships; providing alerts to the Contracting Parties of imminent threats of piracy or armed robbery against ships; and preparing statistics and reports from information received.²⁰
- 2.19 Contracting Parties are obliged to designate a Focal Point to take responsibility for communication with the ReCAAP ISC. The Focal Point is responsible for maintaining lines of communication with other competent national authorities, such as rescue centres, and relevant non-government organisations.²¹
- 2.20 Contracting Parties shall make every effort to require their ships, ship owners or ship operators to promptly notify relevant national authorities of any incidents of piracy or armed robbery at sea, and are required to transfer any relevant information they receive about piracy or armed robbery at sea to the ReCAAP ISC. Contracting Parties must also promptly disseminate any ReCAAP ISC alerts about imminent threats of piracy or armed robbery to ships transiting any identified threat areas.²²
- 2.21 A Contracting Party may request any other Contracting Party, through the ISC or directly, to cooperate in detecting, arresting or seizing persons, vessels or aircraft involved in piracy or armed robbery against ships, or to

17 NIA, para 15.

18 NIA, para 16.

19 ReCAAP ISC homepage: <<http://www.recaap.org/>> accessed 13 September 2012.

20 NIA, para 17.

21 NIA, para 18.

22 NIA, paras 19 - 20.

rescue victims of piracy or armed robbery against ships. Contracting Parties that have received such a request are required to respond and to notify the ISC of the measures taken.²³

2.22 Contracting Parties shall endeavour to extradite individuals who have committed armed robbery against ships and render mutual legal assistance in respect of offences described in ReCAAP, at the request of another Contracting Party.²⁴

2.23 Contracting Parties are encouraged to cooperate to the fullest extent possible with other Contracting Parties that request capacity-building assistance, subject to available resources and capabilities.²⁵

Jurisdiction

2.24 The responsibilities and jurisdiction of individual nations under ReCAAP was of interest to the Committee. Border Protection Command (BPC) described the cooperative nature of counter-piracy agreements:

...there are national sensitivities about security related cooperation between countries. One of the important elements of counter-piracy is that it is shared; it does avoid some of those sensitivities and therefore it does provide us with a framework for dialogue and cooperation that can work quite effectively and that builds a stronger foundation for other security matters.²⁶

2.25 In terms of Australia's particular responsibilities, BPC explained that:

At the moment our responsibilities are bound to the security forces authority area of Australia. I give the example of an Australian warship that may be patrolling on the high seas – conducting visits overseas or deploying to an operational area. It does have an obligation already to be able to assist in an act of piracy; under the conventional law of the sea there is an obligation that exists on nations in a similar manner to providing safety of life at sea, to be able to interdict to stop an act of piracy if able to do so.²⁷

2.26 But given this obligation of an Australian vessel to respond while on the high seas, a question then arose about legal jurisdictions and whether

23 NIA, para 21.

24 NIA, para 22.

25 NIA, para 23.

26 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 7.

27 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 7.

Australian citizens serving on Australian vessels could be tried in foreign courts should there be injuries or fatalities as a result of an Australian interdiction. BPC explained that ultimately Australian personnel on Australian ships cannot be arrested by foreign authorities without the consent of the Australian Government:

Accession to ReCAAP does not affect the potential or actual liability of ADF members or Australian Government personnel undertaking anti-piracy operations.

The national jurisdiction that will apply to a given incident, and whether there may be competing claims to jurisdiction, will depend on the circumstances of the incident, including the location of the vessel(s) at the time of the incident, who was on which vessel when the incident occurred (ie victim(s) and alleged offender(s)), the nationality of the victim(s) and alleged offender(s), the nationality of the vessel (i.e. the flag State of the vessel) and whether States with a possible claim to jurisdiction seek to exercise that jurisdiction.

Where there are competing claims to jurisdiction, these issues may be resolved through diplomatic avenues. If a foreign state sought to exercise jurisdiction over someone in Australia or in Australian custody, issues of extradition and mutual assistance in criminal matters would be considered by the Attorney-General.

The principle of sovereign immunity applies to Australian Government and military vessels. Therefore foreign law enforcement authorities cannot undertake law enforcement action on board such vessels. As such, Australian personnel on board those vessels cannot be arrested by foreign authorities without the consent of Australia.

Where relevant Australian domestic criminal law has extra-territorial application, Australia may give consideration to domestic prosecution of the alleged offender.²⁸

Implementation

- 2.27 Obligations under Article 3(1)(a),(b) and (c) are already met under Australian law in Part IV of the *Crimes Act 1914*. The obligation to rescue ships and victims of piracy or armed robbery is met through Australia's existing Security Forces Authority (SFA) arrangements. A coordinated response to an incident of piracy or armed robbery within Australia's

28 Border Protection Command, *Submission 1*, pp. 1 - 2.

- Security Forces Authority Area (SFAA, concurrent with Australia's MSRR) would be coordinated by Border Protection Command (BPC).²⁹
- 2.28 Australia's SFA representative Commander Border Protection Command is already attending the Governing Council meetings in Singapore. BPC would be designated as Australia's ReCAAP Focal Point. BPC already leads and coordinates whole-of-government maritime security operations to protect Australia's interests regarding civil maritime security matters. BPC works closely with the Australian Maritime Safety Authority (AMSA)³⁰ in response to AMSA's requests for assistance involving safety at sea incidents within the MSRR.³¹
- 2.29 Australian ships, their owners and operators already observe a series of notification and incident reporting measures. Australia's current framework is sufficient to meet ReCAAP's essential information-sharing objectives.³²
- 2.30 Information transfers between Australia's Focal Point to the ReCAAP ISC, as well as prompt incident alert dissemination to ships transiting identified threat areas, would be facilitated through minimal adjustments to existing AMSA and BPC procedures. Under ReCAAP, Australia would not be obliged to share information that is subject to a national security classification.³³
- 2.31 Furthermore, upon accession to ReCAAP, Australian Government agencies will: conduct a comprehensive education campaign notifying relevant maritime industry participants about reporting requirements under ReCAAP; consider amendments to existing notifications to reinforce reporting regime requirements; and conduct a review of mechanisms to facilitate information sharing.³⁴
- 2.32 The Attorney-General's Department has advised that minor amendments to Australia's extradition and mutual assistance regulations will be needed

29 NIA, paras 24 – 25. Part IV criminalises acts of piracy and armed robbery against ships and provides specified authorities with the power to seize pirate controlled vessels and arrest alleged pirates. (The definition of piracy in the *Crimes Act 1914 (Cth)* covers both the ReCAAP definitions of piracy and armed robbery against ships, as the *Crimes Act 1914 (Cth)* definition applies both on the high seas and within Australia's territorial sea.) For further information on the Border Protection Command, see <<http://www.bpc.gov.au/>>, accessed 20 September 2012.

30 For further information on the Australian Maritime Safety Authority, see <<http://www.amsa.gov.au/>>, accessed 20 September 2012.

31 NIA, paras 26 – 28.

32 NIA, paras 29 – 30. See NIA for specific details.

33 NIA, para 31.

34 NIA, para 32.

so that Australia is able to respond to requests for extradition and mutual legal assistance.³⁵

Costs

- 2.33 ReCAAP's entry into force for Australia would not impose a significant cost burden on the Australian Government. Many ReCAAP obligations are already met through existing activities. Furthermore, Article 2(1) provides that Contracting Parties shall implement this Agreement 'subject to their available resources and capabilities.' Australia's Focal Point would be incorporated into existing BPC structures.³⁶
- 2.34 The ISC will be funded through, host country financing and support, voluntary contributions by Contracting Parties, international organisations and other entities; and any other voluntary contributions as agreed upon by the Governing Council.³⁷
- 2.35 There are no assessed contributions. However, voluntary monetary contributions or hosting of capacity building activities are strongly encouraged. Based on contributions made by other comparable Contracting Parties, voluntary payments are estimated to cost Australia around A\$150,000 per annum. Funds have been provided in BPC's budget for the financial year 2012/13 for this purpose. There is no known compliance cost associated with this venture for industry.³⁸

Conclusion

- 2.36 The Committee notes that despite the high profile of piracy in recent times, particularly in the Gulf of Aden and off Somalia, attacks in those regions are decreasing. Similarly, in South-East Asia, the incidence of piracy is also reducing.³⁹ This is not only through measures like sea patrols being conducted in choke points such as the Strait of Malacca and the Straits of Singapore, but also through agreements such as ReCAAP.
- 2.37 The Committee also notes that Australian personnel serving in the Royal Australian Navy or in Border Protection Command have a set of legal protections which mean that ultimately Australian personnel on

35 NIA, para 33.

36 NIA, paras 34 – 35.

37 NIA, para 17.

38 NIA, paras 36 – 37.

39 Mrs Paula Watt, Director, Counter Terrorism Policy Section, Counter Terrorism Branch, International Security Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 29 October 2012, p. 6.

Australian ships cannot be arrested by foreign authorities without the consent of the Australian Government.

- 2.38 Given the agreement's success in fostering cooperation, and the high dependence that Australia has on maritime trade, the Committee supports the Treaty and recommends that binding treaty action be taken.

Recommendation 1

The Committee supports the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* and recommends that binding treaty action be taken.