

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

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004) [2004] ATNIF 15

Nature and timing of proposed treaty action

1. The proposed treaty action is to accede to the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (ReCAAP), done at Tokyo on 11 November 2004.
2. 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. Article 18(5) of ReCAAP provides that the Agreement is open for accession by any State not listed in Article 18(1) (which comprises those States involved in the negotiation of ReCAAP). Article 18(5) provides that a State wishing to accede must notify the ReCAAP depositary, the Government of Singapore, of its intention to accede to ReCAAP. The depositary will advise all Contracting Parties of this notification and, if no written objection is raised within 90 days, Australia may deposit an instrument of accession with the depositary. After a further 60 days Australia would become a Contracting Party to ReCAAP.
4. Subject to consideration by the Joint Standing Committee on Treaties (JSCOT) and the Executive Council, it is proposed the Government of Australia notify the depositary of our intention to accede to ReCAAP after accession has been approved.

Overview and national interest summary

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 (piracy being an incident occurring on the high seas, whereas incidents of armed robbery occur within a State's jurisdiction). It serves as a platform for communication and information exchange among Contracting Parties to improve incident responses. Information is collected and disseminated by the ReCAAP ISC. ReCAAP also facilitates capacity building initiatives to improve the response capability of Contracting Parties in dealing with piracy and robbery at sea.
6. The Guide to Australian Maritime Security Arrangements (GAMSA) recognises eight maritime security threats to Australia's national interests, including piracy, robbery and violence at sea. 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 risk¹. 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 the South East Asia region.

7. The Office of the Inspector of Transport Security stated in its 2010 *International Piracy and Armed Robbery at Sea Security Inquiry Report* that the risk of piracy within the Australian region is assessed as 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 owner or operator². As such, ReCAAP membership will offer benefits to Australia's sea trade by facilitating regional cooperation to mitigate the risk of piracy and robbery at sea. Equally, accession to ReCAAP will underscore Australia's commitment to the eradication of piracy and the maintenance of secure and safe trade via the sea.

8. We are a trading nation and, as such, the security of shipping lanes throughout Asia and of the maritime approaches to Australia is essential for our international trade. Ships carry 99.5% of Australia's trade by volume and 74% by value. In 2008-09, the value of the Australian economy was about \$1.2 trillion, with seaborne trade contributing \$368 billion, comprising exports valued at \$202 billion and imports at \$166 billion³.

Reasons for Australia to take the proposed treaty action

9. 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 ten per cent of the Earth's surface and accounts for the carriage of 99 per cent of Australia's trade by sea. For vessels transiting to and from Australian ports, piracy potentially impacts on ship routing, cargo competitiveness, crew safety and maritime insurance premiums. Each of these factors has the potential to contribute to increased costs for Australia's maritime cargo interests. ReCAAP provides a vehicle to facilitate closer engagement with regional states to mitigate risks to those interests and Australia's vital trade routes.

10. 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 ReCAAP 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. Accession to ReCAAP would also provide Australian flagged vessels, or foreign vessels transiting to or from Australia, with a more robust appreciation of the collective counter-piracy effort and therefore a greater sense of security when transiting the region.

11. The 2011 ReCAAP Annual Report (January – December 2011) indicates that 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 ReCAAP commenced reporting in 2007. The Report suggests that this decline can be attributed to the

¹ CEO Shipping Australia presentation at the International Cargo Handling Co-ordination Association (ICHCA) conference, Melbourne 8 May 2012, titled *Global Developments in Shipping from an Australian Perspective*

² Office of the Inspector of Transport Security piracy inquiry report, p. 34

³ http://www.navy.gov.au/Publication:Semaphore_-_Issue_4,_May_2011

littoral States increasing their surveillance profile and bolstering policing efforts in their respective maritime domains.

12. Activities conducted under ReCAAP enhance maritime domain awareness and facilitate improved maritime security through coordinated information sharing arrangements and capacity building initiatives.

13. In addition, it is important that Australia accede to ReCAAP as soon as practicable, as engagement with this organisation will further enhance Australia's reputation as a responsible maritime security nation and underline our commitment to regional counter-piracy initiatives.

Obligations

14. Article 2(1) provides that Contracting Parties shall implement ReCAAP in accordance with national laws and regulations, and subject to their available resources or capabilities. Article 2(2) provides that nothing in ReCAAP shall affect Contracting Parties' rights or obligations under existing international agreements or international law.

15. In accordance with their national laws and regulations and applicable rules of international law, Contracting Parties are required to make every effort to take effective measures to:

- prevent and suppress piracy and armed robbery against ships (Article 3(1)(a));
- arrest pirates or persons who have committed armed robbery against ships (Article 3(1)(b));
- 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 (Article 3(1)(c)); and
- rescue victim ships and victims of piracy or armed robbery against ships (Article 3(1)(d)) within the Contracting Parties' maritime jurisdiction.

16. Article 4 establishes the ReCAAP ISC, located in Singapore and consisting of a small Secretariat and a Governing Council composed of representatives of all Contracting Parties. The Executive Director of the Secretariat is responsible for the day-to-day operations of the ISC (Article 4(8)). Under Article 4(4), Contracting Parties are required to send one representative to the annual Governing Council meetings in Singapore.

17. The functions of the ISC are set out in Article 7 of ReCAAP and 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, wherever possible, of imminent threats of piracy or armed robbery against ships; and preparing statistics and reports on the basis of information received. Article 6 provides that 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 may be agreed upon by the Governing Council.

18. Contracting Parties are obliged to designate a Focal Point to take responsibility for communication with the ReCAAP ISC (Article 9(1)). The Focal Point is responsible for maintaining lines of communication with other competent national authorities, such as rescue centres, and relevant non-government organisations (Article 9(3)).

19. Contracting Parties shall make every effort to require their ships, ship owners or ship operators, to the extent mandated by domestic administrative requirements, to promptly notify relevant national authorities of any incidents of piracy or armed robbery at sea (Article 9(4)).

20. Contracting Parties, subject to their national laws and regulations, are required to transfer any relevant information they receive about piracy or armed robbery at sea to the ReCAAP ISC via their designated Focal Point (Article 9(5)). 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 (Article 9(6)).

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 rescue victims of piracy or armed robbery against ships (Article 10). Article 11 requires any Contracting Party that has received such a request to make every effort to take effective and practical measures to respond to the request, within the limits permitted by its national laws and regulations and applicable rules of international law, and to notify the ISC of the measures taken.

22. Contracting Parties shall, subject to their national laws and regulations, endeavour to extradite pirates or persons 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 (Articles 12 and 13).

23. Article 14 encourages Contracting Parties to cooperate to the fullest extent possible with other Contracting Parties that request capacity-building assistance, subject to available resources and capabilities. Such cooperation may include technical assistance such as educational and training programs to share experiences and best practice.

Implementation

24. Obligations under Article 3(1)(a),(b) and (c) of ReCAAP are already met under Australian law in Part IV of the *Crimes Act 1914*. 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.)

25. The obligation set out in Article 3(1)(d), to rescue victim ships and victims of piracy or armed robbery at sea, is met through Australia's existing SFA arrangements, which are consistent with Article 100 of the *United Nations Convention on the Law of the Sea* (UNCLOS, [1994] ATS 31) and IMO Maritime Safety Committee Circulars (IMO MSC.1/Circ. 1073, 1333 and 1334). A

coordinated response to an incident of piracy or armed robbery within Australia's Security Forces Authority Area (SFAA, concurrent with Australia's MSRR) would be coordinated by Border Protection Command (BPC), in accordance with whole of Government action to prevent and suppress piracy and armed robbery against ships.

26. Article 4(4) of ReCAAP is currently met, and would continue to be met, by Australia's SFA representative Commander Border Protection Command attending Governing Council meetings in Singapore.

27. To satisfy Article 9(1) of ReCAAP, BPC, as the SFA for Australia's SFAA, would be designated as Australia's ReCAAP Focal Point.

28. As a multi-agency operational authority with well-established networks, BPC already satisfies Article 9(3) by leading and coordinating whole-of-government maritime security operations to protect Australia's interests concerning various civil maritime security matters. BPC works closely with the Australian Maritime Safety Authority (AMSA) in response to AMSA's requests for assistance involving safety at sea incidents within Australia's MSRR.

29. Australian ships, ship owners and ship operators already observe a series of notification and incident reporting measures relevant to Article 9(4). These include:

- The *International Convention for the Safety of Life at Sea 1974* (SOLAS, [1983] ATS 22), notification of incidents using the Global Maritime Distress and Safety System (GMDSS). All passenger and cargo ships of 300 gross tonnage and upwards undertaking international voyages are required to carry equipment, such as the GMDSS, which is designed to improve the chances of rescue following an accident or incident. The GMDSS also notifies other vessels in the vicinity of a ship in distress. This includes incidents of piracy or armed robbery at sea. GMDSS alerts and subsequent incident reports are automatically provided to BPC, the designated ReCAAP Focal Point.
- Ship security plans under Sections 61 and 62 of the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) for regulated Australian ships. Section 16 of the MTOFSA defines a 'regulated Australian ship' to include a passenger ship that is used for overseas or inter-State voyages, a cargo ship of 500 gross tonnage or more that is used for overseas or inter-State voyages, or a mobile offshore drilling unit that is on an overseas or inter-State voyage. Furthermore, sub regulation 4.45(j) of the MTOFSA requires that ship security plans must contain 'procedures for reporting, occurrences which threaten the security of the ship'. Once approved, the ship operator must comply with the plan and failure to comply is an offence under section 63 of the MTOFSA. A ship operator for a security regulated Australian ship can include in their ship security plan a range of counter-piracy ship security measures, including piracy incident reporting processes.
- AMSA Marine Notice 15/2009 on piracy and armed robbery against ships. Advice pursuant to IMO Circular MSC.1/Circ.1334 states that there is a 'vital need to report attacks, both successful and unsuccessful, to the authorities of the relevant coastal State and to the ships' own maritime Administration'.

- The Inspector of Transport Security (ITS) advisory guidelines on counter-piracy and armed robbery at sea. Issued in December 2009, the guidelines remind ship owners and operators of the obligations under the mandatory International Ship and Port Facility Security Code (ISPS Code) and advocate use of ship security plans.
- The Australian Ship Reporting System (AUSREP), operated by AMSA, provides an Out of Area (OOA) reporting facility for Australian ships operating in piracy threat areas. AUSREP OOA provides an effective reporting mechanism for ships to report piracy or armed robbery incidents using an extensive reporting system.

30. The measures described above demonstrate that Australia's current framework is sufficient to meet the essential information-sharing objectives of Article 9(4). Australia's maritime compliance and reporting regime is strong and effective.

31. Information transfers between Australia's Focal Point to the ReCAAP ISC under Article 9(5), as well as prompt incident alert dissemination to ships transiting identified threat areas under Article 9(6), would be facilitated through minimal adjustments to existing AMSA and BPC work practices. BPC would engage closely with AMSA and the maritime industry to determine appropriate methods for circulating ReCAAP incident alerts within Australia's area of responsibility. Under the terms of ReCAAP, Australia would not be obliged to share information that is subject to a national security classification.

32. 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 as a result of Australia's ReCAAP membership.

33. The Attorney-General's Department has advised that minor amendments to Australia's extradition and mutual assistance regulations will be required to ensure that Australia is able to respond to requests for extradition and mutual legal assistance arising under Articles 12 and 13.

Costs

34. 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, including Australian Defence Force surveillance programs and Customs and Border Protection sponsored capability and capacity building events. Furthermore, Article 2(1) provides that Contracting Parties shall implement this Agreement "subject to their available resources and capabilities."

35. The establishment of Australia's Focal Point would be incorporated under existing operational structures within BPC.

36. There are no assessed contributions. However, voluntary monetary contributions or hosting of capacity building activities are strongly encouraged under Articles 6 and 14 of ReCAAP. Based on contributions made by other comparable Contracting Parties, voluntary payments are estimated to cost Australia around

\$150,000 per annum. Funds have been provided in BPC's budget for the financial year 2012/13 for this purpose.

37. There is no known compliance cost associated with this venture for industry.

Regulation Impact Statement

38. The Office of Best Practice Regulation was consulted and confirmed that a Regulation Impact Statement is not required.

Future treaty action

39. Any amendment to ReCAAP requires the consent of all Contracting Parties (Article 19). Amendments will enter into force 90 days after their acceptance by all Contracting Parties. Acceptance of amendments would be subject to Australia's domestic treaty processes.

Withdrawal or denunciation

40. Any Contracting Party may withdraw from ReCAAP at any time. The withdrawal will be effective 180 days after an instrument of withdrawal is lodged with the depositary (Article 20).

41. Withdrawal from ReCAAP would be subject to Australia's domestic treaty processes.

Contact details

Border Protection Command
Australian Customs and Border Protection Service

ATTACHMENT ON CONSULTATION

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CONSULTATION

42. The State and Territory governments have been notified of Australia's proposed accession to ReCAAP through the Commonwealth/State/Territory Standing Committee on Treaties (SCOT). Information on Australia's proposed accession to ReCAAP has been included in the schedules of treaty activity provided to State and Territory representatives since February 2006. SCOT has not requested further information or provided any comments. ReCAAP is not likely to have an impact on the States or Territories and does not require State or Territory cooperation for its domestic implementation.

43. Industry consultation commenced in 2011 and included presentations at key industry forums and direct discussions with peak industry body representatives.

44. Letters were sent to the following industry bodies seeking input from their membership on how ReCAAP reporting mechanisms would best be implemented without creating additional burden to industry:

- Australian Petroleum Production & Exploration Association Ltd (APPEA);
- Australian Shipping Association (ASA); and
- Shipping Australia Limited (SA).

45. Presentations about Australia's proposed accession to ReCAAP were made at the following forums:

- Oil and Gas Security Forum;
- Maritime Industry Security Consultative Forum; and
- Marine Safe Forum.

46. The industry consultation phase was finalised in April 2012 and formal responses received from the three industry bodies mentioned above. Overall, industry's response has been positive, as there is common recognition of the benefits of Australia's accession to ReCAAP. Industry indicated its willingness to work closely with Government on methods to implement the reporting requirements of ReCAAP. It should be noted that the general professional conduct of seafarers (Masters) is such that it would be considered their duty to report incidents to assist in the reduction or interdiction of piracy and armed robbery against shipping.

47. APPEA offered general support and is optimistic about the opportunity to strengthen government-to-government relationships and encourage better information sharing through ReCAAP. In APPEA's view, essentially, ReCAAP aims to protect industry assets. APPEA expressed interest in further understanding 'how the information obtained through Australia's involvement in ReCAAP would be shared with industry'.

48. ASA agreed with the implementation strategy mentioned above, noting that it 'seems sensible'. ASA acknowledged that this strategy was unlikely to be onerous on ship reporting requirements. ASA suggested that notification of high risk piracy areas on the high seas should be sent to vessels prior to departure from the Australian reporting area. The notification should also include 'a short note on precautions being taken—convoy/security personnel/extra speed with subsequent notification' on 'entering and exiting the area'.

49. SA noted that their membership trading internationally all operated or were involved with foreign flag ships which operate under their respective Flag State requirements. However, they provided their support to the Australian Government intention to accede to the ReCAAP regional agreement.

50. The Government acknowledges concerns raised by the maritime industry about information sharing arrangements and jurisdictional reach. Concerns expressed by some industry members included handling of commercial-in-confidence information, the dissemination of information to industry about incidents of piracy and armed robbery, and whether new legislative reporting provisions would be implemented. Consequently BPC, as the proposed Australian ReCAAP Focal Point, has worked closely with industry to develop the implementation strategy proposed above.

51. The maritime industry, seafarers and the maritime law enforcement community all stand to benefit from enhanced communications and information exchange among participating governments. Maritime industry involvement can greatly assist in the improvement of incident response by Contracting Parties, help to provide more accurate statistics on piracy and armed robbery incidents, and enhance maritime domain awareness.