



**Council for Security Cooperation in the Asia-Pacific**

## **MEMORANDUM 8**

### **THE WEAKEST LINK? SEABORNE TRADE AND THE MARITIME REGIME IN THE ASIA PACIFIC**

The international system is undergoing a period of dramatic change, not only in response to the threat of terrorism and the invasion of Iraq but also due to changes brought about by globalization and interdependence. International and regional organizations, even those with an economic focus such as APEC, have been addressing security issues. Secure and efficient trade is a priority for governments and businesses in this region which accounts for nearly fifty per cent of the world's trade, most of which is transported over sea.

One of the weakest links in managing this period of change is the lack of an effective maritime regime that provides security and certainty for regional supply chains. Shipping and seaborne trade are vital to these supply chains but are threatened by maritime terrorism and increasing incidence of hijacking, and armed attacks against ships, as well as by other crimes at sea, such as piracy, drug trafficking and people smuggling.

Weaknesses with the current maritime regime include: lack of maritime awareness; ineffective arrangements for maritime jurisdiction and enforcement; differing interpretations of the Law of the Sea; weak regional participation in legal instruments that deal with maritime terrorism; and the lack of capacity of many regional economies to implement new standards in ship security, cargo and port security, and seafarers' documentation.

Regional cooperation is essential to overcome these weaknesses and ensure efficient implementation of maritime security initiatives. APEC, which is an association of economies, can play a key role in this area. APEC's informal structure and focus on markets could allow it to deal with issues which, if addressed in more formal settings, are prone to second best solutions.

The Asia Pacific has an enormous stake in securing shipping and seaborne trade. Most of the world's top mega-ports are in APEC economies. East Asian seas, particularly the strategic straits of Southeast Asia that are linked with vital energy routes from the Indian Ocean, are the convergence of much shipping traffic in the Asia Pacific. Sea transport of goods and passengers is essential in the archipelagos of Japan, the Philippines and Indonesia. The extent of shipping traffic and the unique geographical features of the region present both opportunities and challenges for maritime security.

Moreover, features of the supply chains that characterize trade in the region exacerbate the risk to economic growth. Over the past twenty years complex supply chains have been created where component parts are assembled in a variety of locations. This has had great benefits for consumers and

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producers. However, a broken link in a supply chain will have severe repercussions both up and down the production process.

To ensure that the regional supply chain is protected and to provide greater certainty in the maritime regime, we recommend:

- Improved arrangements for maritime jurisdiction and enforcement.
- Enhanced regional frameworks for maritime enforcement and cooperation.
- Harmonization of maritime laws.
- More extensive and coordinated programs of capacity to support higher standards of maritime security.
- Introduction of a coordinated maritime monitoring and information exchange system.
- Consideration of a regional law of the sea arrangement.

### **Regional supply chains**

Supply chains involve the provision of a variety of services, which link the original producer of a good and its final consumer. The aim is to build supply chains so that merchandise is produced and distributed at the right quantities, to the right locations and at the right time, in order to minimise system-wide costs while satisfying service level requirements. Maritime transport plays a key role in meeting these requirements along with other logistic services. The logistics systems were designed on the presumption of low levels of uncertainty in the supply processes. The systems are calibrated very finely and substantial costs are incurred if the presumption of security, that is, the ability to control the flow of goods, is not met. The change in the perception of the risk of terrorist attack and its consequences has that effect.

The risk of terrorist attack can be reduced by government policy responses leading to new security standards. But those responses themselves may also add to costs and make it more difficult for logistics service providers to meet performance targets. New technology to support approved measures may produce other benefits, associated with the production of information which is valuable for shippers. However, the costs and benefits of particular government responses should still be subject to close scrutiny.

Costs associated with logistics form a large part of the overall costs in supply chains, to varying degrees between sectors of the economy. They may on average account for 10% of the wholesale price of merchandise in developed economies, and could be as high as 50 to 60% for some perishable products. Measures taken to secure transportation which have significant effects on the costs of delivery can therefore contribute to significant changes in product prices. Such measures need careful consideration, especially where the competitiveness of landed products depends on the terms of access to international transport.

In adopting measures to enhance the security of shipping and seaborne trade, a balance must be struck, therefore, between tighter security and the efficient flow of trade. These measures should also accord with international law, in particular the international law of the sea. The objective should be a stable maritime regime with the free and uninterrupted flow of seaborne trade, and nations able to pursue their maritime interests and manage their marine resources in accordance with agreed principles of international law.

### **Information sharing: maritime awareness**

There is a need to increase awareness of maritime issues and activities, including potential threats to the security of shipping and sea-borne trade. This has to be based on the free flow of information between and among members that will enable better coordination, cooperation, and joint actions to collectively address maritime security challenges.

Data on maritime activity, to the extent that it exists at present, is not shared at a regional level. Arrangements for the exchange of maritime information are underdeveloped. In particular, there is not a good, consolidated database of what ships are moving where in the region and with what cargo. Significant barriers exist to the availability of this data, including commercial confidentiality.

## **Good order at sea**

A clear understanding of the maritime regime is vital for establishing an efficient framework for seaborne trade. While the 1982 UN Convention on the Law of the Sea (UNCLOS) established a legal framework, regional States have made declarations and statements on signing, ratifying or acceding to the Convention (UNCLOS) or have domestic legislation that indicate different interpretations of particular Law of the Sea issues<sup>1</sup>. These differing positions, as well as the lack of clarity in certain provisions of UNCLOS, may complicate the ability of the region to implement effective measures to ensure the security of shipping and seaborne trade.

## ***Jurisdiction and enforcement***

Effective arrangements for maritime jurisdiction and enforcement, including for cooperation between neighboring economies, are fundamental to good order at sea. They are a significant deterrent to illegal activities at sea. To some extent the incidence of illegal activities at sea is due to deficiencies in existing arrangements, including weak maritime surveillance and enforcement capabilities. The ability of the region to deal with maritime terrorism would be significantly enhanced by improving current arrangements.

Jurisdiction by a State might be exercised as a flag State over vessels flying its flag; as a coastal State over waters under its jurisdiction; as a port State over vessels entering internal waters; as an archipelagic or straits State over waters within their sovereignty; as a State of nationality of natural or legal persons engaged in illegal activities; or through the exercise of universal jurisdiction on the high seas as permitted by international law (e.g. against piracy).

States have competence relative to matters within their jurisdiction and their jurisdictional competence varies in different maritime zones. Most armed attacks against ships occur in the territorial sea or archipelagic waters of a coastal State and are thus within the sole jurisdiction of that State. Similarly, acts of maritime terrorism are more likely within territorial seas and archipelagic waters, including international straits. Under current international law, there is no right of visit or arrest in these waters by a warship of another State. Furthermore, UNCLOS places no specific obligation on a coastal or archipelagic State to take measures to strengthen maritime security or suppress acts of terrorism in waters under its sovereignty.

The sensitivity of regional economies to matters of sovereignty and jurisdiction must be recognised in the development and implementation of measures to facilitate maritime security. Regional cooperation is essential but States are much less willing to cooperate when they perceive cooperation is compromising their sovereignty and independence of action.

## ***Boundary delimitation***

Boundary delimitation between opposite and/or adjacent States would assist cooperation to achieve law and order at sea. Regional States should move expeditiously to resolve existing boundary disputes to ensure that jurisdiction might properly be exercised in applicable zones. If boundaries cannot be resolved, economies should be prepared to enter into some form of provisional arrangements for the maintenance of law and order in the disputed area without prejudice to their positions in the boundary negotiations.

## ***Rights of visit***

UNCLOS Article 110 identifies the circumstances when a warship might be entitled to board another vessel on the high seas including exclusive economic zones (EEZs). Under existing provisions of this Article, warships have no right to board another vessel on the high seas that is suspected of terrorist activity. An exception is established if the flag State expressly consents to the visit either on an *ad hoc* basis for a particular vessel or consents on a general basis through a bilateral agreement. A regional protocol might be developed that admits these circumstances as an exception to UNCLOS Article 110.

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<sup>1</sup> All CSCAP members have now ratified UNCLOS with the exception of Cambodia, North Korea, Thailand and the United States. The European Community has formally confirmed its participation in UNCLOS. The declarations, and statements made by States on signing, ratifying or acceding to UNCLOS are available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)

## Legal instruments

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) 1988 (the *Rome Convention*) is the leading international instrument dealing with maritime terrorism. A protocol to the Convention extends its application to offences committed on fixed platforms on the continental shelf (the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf) (“SUAPROT”). Ninety-five States are now parties to the *Rome Convention* but relatively few of these are in the Asia Pacific<sup>2</sup>.

The Legal Committee of the International Maritime Organization (IMO) is considering possible amendments to the SUA Convention and its Protocol to strengthen the means of combating unlawful acts against the safety of maritime navigation, including terrorist acts. Amendments to SUA and SUAPROT are necessary in light of the need for a global response and enhanced cooperation to deal with the threat of international terrorism.

Action is required to ensure that States in the region are prepared to ratify SUA and SUAPROT and to put in place regional and sub regional agreements to ensure cooperation. A key provision in these agreements should be advanced approval for boarding by another Party to the agreement. The agreements should also provide for advanced approval by the coastal or archipelagic State of boardings of foreign vessels within their waters by another Party to the regional agreement, if approval of the flag State has been obtained in advance or on an *ad hoc* basis.

## The challenge posed by security measures

Implementation of security measures will be affected by differences in technological capabilities, economic situation, human resource skills and governance systems between regional economies. There are also wide differences in the capacity and industry situations of developed and developing economies. New international measures for the security of shipping are generally optimized for developed economies and challenge the capacity of developing economies that may have other priorities of poverty alleviation and development.

Capacity comprises institutional arrangements, resources (human and financial) and legal frameworks. Institutional arrangements include established practices of cooperation and coordination between the public and private sectors and between government agencies, as well as habits of cooperation and dialogue with equivalent agencies in neighboring economies. These practices are underdeveloped in the region at present. Even within economies, there may be little dialogue between agencies which are now required to cooperate to meet the new security threats, including the implications for the costs of international business discussed above.

Strategies for both ‘prevention’ and ‘cure’ are required. Different agencies are involved in the implementation of these strategies, and they may design their systems and procedures according to different approaches to the management of risks. Some agencies operate in both fields or prevention or cure, but others may be more specialized. There is an interaction between the strategies of cure and prevention which also has to be taken into account in the design of policy. Structures of agencies for these purposes also differ between economies which further complicates the development of international cooperation.

## Ship security: the ISPS code

New security arrangements for ships under the International Ship and Port Facility Security (ISPS) Code include ship security plans, ship security officers, company security officers, and certain onboard equipment, including automatic information systems (AISs) and ship security alert systems. When activated, the ship security alert system transmits an alert to a competent authority designated by the administration of the flag State identifying the ship, its location and indicating that the security of the ship has been threatened.

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<sup>2</sup> As of 31 October 2003, 95 States were parties to the SUA Convention (84 to its Protocol), including in the Asia-Pacific region: Australia, Canada, Chile, China, India, Japan, Federated States of Micronesia (convention only), Marshall Islands, Mexico, Myanmar, New Zealand, Pakistan, Palau, Republic of Korea, Russia, Seychelles, Sri Lanka (convention only), United States, Vanuatu and Vietnam. Singapore lodged its instrument of accession to the SUA Convention on 3 February 2004.

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### ***Cargo and port security***

Measures to ensure the security of ports and cargoes raise difficult issues. These relate to increased costs and burden-sharing, port efficiency, discriminatory trade regimes, fears over encroachment of sovereignty, and even questioning of the real effectiveness of such extensive and potentially expensive measures. Security inspection of all cargoes is impossible. Developing economies in the region have already raised their concerns about the burdens they face in meeting the new security requirements for maritime transport by the deadline of mid 2004. They are concerned not only at the requirements established in the multilateral institutions, but also at those imposed by developed country trading partners.

A terrorist attack that disrupted one of the regions mega-ports would have a devastating effect on regional trade, and the risk that outcome will be taken into account by shippers and shipping companies. Enhanced cargo and port security is essential in these ports and substantial costs are incurred even if governments take no action. The question is then the specification of the roles of the public and private sectors in developing and cooperating in the implementation of efficient responses to the change in perception of security risks. There is also strong mutual interest, which is already evident, in cooperation among developed and developing economies in developing the appropriate implementation capacity at all points along the supply chain.

### ***Seafarers' documentation***

About seventy per cent of the world's seafarers are sourced from regional economies. Research has revealed an extremely high level of fraudulent certificates held by seafarers. A new International Labour Organization (ILO) Convention adopted in June 2003 provides for new seafarer identification documents with a biometric fingerprint. The task of enhancing security by improving the quality of seafarer documentation is challenging.

Further challenges are associated with the provision of training for seafarers to operate within the new maritime security guidelines. Cooperation between economies, alongside private sector participation in the provision of training services, may be required to avoid bottlenecks appearing in the training pipeline.

## **Regional Cooperation**

Improved regional cooperation to enhance the security of shipping and seaborne trade is essential. Given the challenges that have been outlined above and the stake that the Asia Pacific has in preventing terrorist attacks in the most efficient manner a strong case exists for action by regional bodies such as APEC and the ASEAN Regional Forum.

### ***Harmonizing maritime laws***

Difficult jurisdictional issues arise from overlapping and conflicting claims to offshore islands and reefs, EEZs and continental shelves. These are aggravated by uncertainties in various legal regimes (including piracy). It would be helpful if neighbouring economies could harmonize their maritime laws as far as possible and agree on particular issues where uncertainty exists. However, regional economies have radically different legal systems and harmonizing maritime laws entirely is unrealistic. The real challenge is to improve the regional framework for maritime enforcement and cooperation. Improving piracy law (and courts systems for offenders) in some jurisdictions should be a high priority.

### ***Capacity building and technology***

Particular attention must be given to capacity building in the fields of legislation and regulation, information exchange, surveillance and maritime law enforcement. It is important to promote awareness and links between different agencies, institutions and forums concerned with managing maritime affairs. Training and education are important devices for developing an environment conducive to regional cooperation.

Although they may incur significant setup costs, technologies that support security objectives may have significant additional benefits. For example, container tracking systems should also reduce container crime.

Security related technologies are changing rapidly and preferably regulation should be by establishing principles rather than processes or practices. Best practice today may not be that of tomorrow and the market should be encouraged to develop options for meeting security objectives at lowest possible cost.

### **Coordinated maritime monitoring**

Maritime surveillance and enforcement in the East Asian seas would be significantly enhanced by the introduction of a coordinated regional maritime monitoring system. Its purposes would include support for law and order at sea; enhancement of regional capabilities to deal with terrorism, piracy and armed attacks against shipping; weather forecasting; marine safety and environmental protection.

This system would provide a capability for the long-range identification and tracking of ships using the East Asian seas. Arrangements for coordinating responses to a ship security alert required by the ISPS Code could be incorporated into the monitoring system.

### **Regional law of the sea arrangement**

A regional arrangement might be considered that redresses the current limitations on the regional capability to respond to threats to maritime security. This protocol might include the following points:

- The obligation of all parties to cooperate to ensure maritime security;
- The obligation of coastal and archipelagic States to take measures to ensure the security of all vessels exercising legitimate passage rights in waters under their sovereignty;
- The obligation of coastal and archipelagic States to cooperate with the international community to combat terrorist threats to shipping in international sea lanes within their sovereignty;
- The need for user economies to provide financial and technical assistance to enable coastal and archipelagic States to fulfill their obligations to enhance maritime security.

### **Guidelines for Action**

The following principles are offered as guidelines for further action to enhance the security of shipping and seaborne trade:

- Effective maritime jurisdiction and enforcement requires close and meaningful coordination, including arrangements for information sharing, at all levels.
- New regional agreements and protocols might be required to ensure this cooperation.
- Public and private partnerships are essential at both an economy and regional level.
- Local arrangements for maritime security need to be streamlined with as far as possible, one point of contact for industry.
- Human capacity should be enhanced through local and regional training and educational programs. Cooperative regional programs will be particularly beneficial.
- Regulation should normally be by establishing principles rather than processes or practices.

The measures described in this memorandum would not just enhance the security of shipping and seaborne trade but would also assist regional security and economic development more generally. The benefits are not just related to the anti-terrorism task but would improve law and order at sea in the region generally and lead to an improved trading environment. Effective action to combat maritime terrorism would benefit both the regional economy and regional security.

CSCAP commend the principles in this memorandum to regional Governments, APEC and the ARF.

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