

## **The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; and**

## **The Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms**

### **NATIONAL INTEREST ANALYSIS**

#### **Executive summary**

The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ('the 2005 SUA Protocols') amend the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ('the SUA Treaties'), which New Zealand ratified in 1999 and implemented through the Maritime Crimes Act 1999.

2 The 2005 SUA Protocols ensure that the maritime security framework established under the SUA Treaties is capable of responding to contemporary threats. Specifically, the 2005 SUA Protocols introduce new offences relating to: maritime terrorism; the illicit trafficking by ship of weapons of mass destruction, their delivery systems and related materials; and the transportation by ship of fugitives.

3 The 2005 SUA Protocols also introduce a ship boarding regime consistent with existing international law, and they apply certain mechanisms established in the SUA Treaties to those new offences.

4 The 2005 SUA Protocols are regarded by the international community and the United Nations system as two of the core 16 international counter-terrorism instruments. The United Nations General Assembly, in adopting the Global Counter-Terrorism Strategy in 2006, called on all states to consider without delay the implementation of existing international conventions and protocols against terrorism. New Zealand has to date ratified 12 of those 16 instruments.

5 Implementation of the 2005 SUA Protocols would strengthen New Zealand's support for global counter-terrorism and non-proliferation efforts, and help ensure that New Zealand's domestic maritime security framework is consistent with international best practice. The 2005 SUA Protocols have particular relevance to New Zealand as a coastal nation dependent on the security of its shipping routes.

6 This National Interest Analysis concludes that the benefits to New Zealand from ratifying the 2005 SUA Protocols outweigh any associated costs. There are no significant risks or disadvantages identified that would argue against New Zealand becoming party to the 2005 SUA Protocols.

### **Nature and timing of proposed binding treaty action**

7 New Zealand signed the 2005 SUA Protocols in January 2007.

8 As at 5 June 2009 the Protocols were not yet in force. Article 17 of the SUA Protocol on Maritime Navigation and Article 8 of the SUA Protocol on Fixed Platforms note that states may express their consent to be bound by the respective texts by the deposit of an instrument of ratification, acceptance, approval or accession. It is proposed that New Zealand deposit its two instruments of ratification with the Secretary-General of the International Maritime Organisation, as depository, as soon as practicable after the completion of the necessary domestic processes including the passage of legislative amendments. It is considered likely that at least one, if not both of the 2005 SUA Protocols will be in force by that time.

9 The 2005 SUA Protocols have similar entry into force provisions, but one is contingent on the other. The SUA Protocol on Maritime Navigation will enter into force 90 days after the deposit of the 12th instrument of ratification. As at 5 June 2009 it was not in force as only eight states had ratified. Once in force, the Protocol will enter into force for other states 90 days after they deposit their instrument of ratification. The SUA Protocol on Fixed Platforms will enter into force 90 days after the deposit of the third instrument of ratification so long as the SUA Protocol on Maritime Navigation is itself in force. As at 5 June 2009 six states had ratified, but it was not in force as the SUA Protocol on Maritime Navigation was not yet in force. Once in force, the SUA Protocol on Fixed Platforms will enter into force for other states 90 days after they deposit their instrument of ratification.

### **Reasons for New Zealand becoming party to the treaties**

10 Following the 11 September 2001 terrorist attacks in the United States, the international counter-terrorism framework, consisting at that time of 12 international counter-terrorism instruments, was critically examined to identify where gaps existed and where the framework needed strengthening. Through that examination several gaps were found in the maritime area, governed by the SUA Treaties.

11 While the SUA Treaties covered ships and fixed platforms as potential targets of terrorist activity, they did not adequately address the use of ships or fixed platforms either for terrorist acts or in enabling terrorist acts.

12 Three years of negotiations followed under the auspices of the International Maritime Organisation ('IMO'), which concluded in 2005 with the adoption of the SUA Protocols at a diplomatic conference in London. The primary purpose of the 2005 SUA Protocols is to introduce new offences into the structure provided by the SUA Treaties, including: the use of ships or fixed platforms for terrorist activity; the use of ships for the illicit trafficking of weapons of mass destruction, their delivery systems and related materials; and the transportation by ship of fugitives (including terrorist fugitives).

13 New Zealand implemented the SUA Treaties through the Maritime Crimes Act 1999. With respect to the 2005 SUA Protocols, while New Zealand's existing criminal legal framework in part covers the new offences, legislative amendment is required to implement the full scope of those offences. The 2005 SUA Protocols offences are also discrete offences, with high thresholds, to which number of specific mechanisms must apply including broad extraterritorial jurisdiction and the ship boarding regime. It is therefore proposed that the Maritime Crimes Act 1999 be amended to reflect the requirements of the SUA Protocols. The amended act would hold in one place all SUA related international obligations, and as such would continue to provide a useful standalone legislative guide for implementing agencies and the public alike.

14 Implementation of the 2005 SUA Protocols by way of legislative amendment to the Maritime Crimes Act 1999 would be consistent with New Zealand's support for the Global Counter Terrorism Strategy, endorsed by the United Nations General Assembly in 2006 (resolution 60/288; and reaffirmed in 2008 in resolution 62/272), which calls on all United Nations Member States to consider without delay the implementation of existing international conventions and protocols against terrorism. New Zealand has to date ratified 12 of the 16 core counter-terrorism instruments, with the 2005 SUA Protocols being two of the four outstanding.<sup>1</sup> In addition, it would be consistent with New Zealand's strong support for the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism.

15 Not to take treaty action with respect to the 2005 SUA Protocols would be at odds with New Zealand's established position on counter-terrorism and non-proliferation issues, and New Zealand's commitment to the development of international rules in the maritime security area – as evidenced through New Zealand's implementation of the SUA Treaties and New Zealand's active involvement in the negotiation of the 2005 SUA Protocols. It would also be divergent from the positions of New Zealand's main security partners, which are also working toward ratification of the 2005 SUA Protocols.

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<sup>1</sup> The other two instruments are the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism and the 2005 Amendments to the Convention on the Physical Protection of Nuclear Material. Ratification of those treaties is subject to the passage of the Radiation Safety Bill (Health portfolio).

16 The overriding objective of the proposed treaty action would be to update and strengthen New Zealand's ability to deal with maritime security challenges, by ensuring that an appropriate legislative framework was in place. There is no satisfactory non-legislative implementation option that has been identified.

### **Advantages and disadvantages to New Zealand of the treaties entering into force and not entering into force for New Zealand**

#### **(i) Advantages to New Zealand of the Treaties Entering into Force**

17 There are potentially a number of advantages to becoming a party to the 2005 SUA Protocols:

- implementation of the 2005 SUA Protocols would help strengthen New Zealand's legal framework that underpin necessary maritime security, counter-terrorism and counter-proliferation action. Maintaining an up-to-date and effective counter-terrorism and counter-proliferation legal framework is a core security issue and is one of a number of factors which may act as a deterrent to potential terrorists and proliferators;
- implementation would move New Zealand closer to ratification of all 16 core counter-terrorism instruments, as called for by the United Nations General Assembly;
- implementation would be consistent with New Zealand's broader position on counter-terrorism and non-proliferation issues, and New Zealand would be continuing to endorse and contribute to widely-supported multilateral efforts which promote international solutions to pressing problems;
- implementation would also be consistent with New Zealand's support for the Proliferation Security Initiative<sup>2</sup> (PSI) Statement of Principles. New Zealand is an active member of PSI's 20-country 'steering group' – the Operational Experts Group (OEG) – and the importance of timely ratification of the 2005 SUA Protocols is frequently emphasised in OEG discussions. The Protocols are seen by lead PSI nations, such as the United States, as a cornerstone of the Initiative and an important tool in to combating terrorism and the proliferation of weapons of mass destruction; and
- implementation of the 2005 SUA Protocols would also be valuable in the context of New Zealand's support for the Global Initiative to Combat

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<sup>2</sup> The PSI is a voluntary international initiative focused on counter-proliferation.

Nuclear Terrorism<sup>3</sup> and in bolstering New Zealand's ability to respond to some of the threats contemplated under that Initiative.

(ii) *Disadvantages to New Zealand of the Treaties Entering into Force*

18 There are no disadvantages identified from implementing the 2005 SUA Protocols, although there are potential costs involved with enforcement action.

*Overall Assessment of the Advantages and Disadvantages to New Zealand*

19 The advantages of becoming Party to the 2005 SUA Protocols substantially outweigh any disadvantages.

**Legal obligations which would be imposed on New Zealand by the treaty action, the position for reservations to the treaties, and an outline of any dispute settlement mechanisms**

20 States Parties to the SUA Protocol on Maritime Navigation agree to amend the 1988 SUA Convention, and States Parties to the SUA Protocol on Fixed Platforms agree to amend the 1988 SUA Protocol. States Parties then adhere to the SUA Treaties as amended, subject to any reservations made.

*Obligations from the SUA Protocol on Maritime Navigation*

21 As a State Party to the SUA Protocol on Maritime Navigation, New Zealand would agree to implement the offence provisions in Articles 3bis, 3ter and 3quater and ensure that appropriate penalties are provided for those offences, which, under Article 5, must take into account the grave nature of those offences. The offences fit into three main categories – maritime terrorism, the illicit trafficking by ship of weapons of mass destruction, their delivery systems and related materials, and the transportation by ship of fugitives. These offences are covered in more detail under the 'Implementation' heading below.

22 New Zealand would also be obliged to extend certain provisions from the 1988 SUA Convention to the new offence provisions. This includes provisions on jurisdiction and extra-territorial jurisdiction (where New Zealand has the ability to prosecute for certain offences which occur beyond its borders), extradition, the powers of ships masters, the provision of mutual legal assistance, and the requirement for the consent of the Attorney-General to prosecute.

23 In addition, New Zealand would be obliged to ensure that its law enforcement agencies or other authorised officials were empowered to act pursuant to the ship boarding regime established under Article 8bis.

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<sup>3</sup> The GICNT is a similar initiative to the PSI, but focused specifically on nuclear/radiological terrorism.

24 Finally, New Zealand would be obliged to cooperate with other States Parties in the prevention of the new offences (as other States Parties would be obliged to cooperate with New Zealand), to furnish information as appropriate to other States Parties and to ensure that where, as a result of the commission of one of the new offences a ship and its passengers/and or crew were delayed or detained, that delay or detention was not undue (Articles 12 and 13).

#### *Obligations from the SUA Protocol on Fixed Platforms*

25 As a State Party to the SUA Protocol on Fixed Platforms New Zealand would agree to implement the new offence provisions under Articles 2bis and 2ter, which primarily relate to terrorist acts involving a fixed platform. Those offences are covered in more detail under the 'Implementation' heading below.

26 As with the SUA Protocol on Maritime Navigation, New Zealand would also be obliged to extend to the new offences under the SUA Protocol on Fixed Platforms certain existing mechanisms established under the 1988 SUA Protocol.

#### *Reservations and Disputes*

27 Article 16 of the 1988 SUA Convention (which is also applied to the 1988 SUA Protocol by way of Article 1 of that Protocol) permits reservations to the dispute provisions, but there is no broader statement in the remainder of that Convention, or in the 2005 SUA Protocols, on reservations. Accordingly, reservations are permitted so long as they conform with the rules established in Section 2 of the Vienna Convention on the Law of Treaties.

28 Article 16 of the 1988 SUA Convention states that any dispute which is unable to be settled through negotiation within a reasonable time shall, at the request of one of the parties, be submitted to arbitration. If within six months of that request the parties are unable to agree on the organisation of the arbitration, any one party may refer the dispute to the International Court of Justice in conformity with the Statute of the Court.

#### **Measures which the Government could or should adopt to implement the treaties, including specific reference to implementing legislation**

29 While some aspects of the 2005 SUA Protocols are already considered to be provided for, in whole or in part, by New Zealand's existing criminal legal framework, legislative amendment is required to ensure that the domestic framework is wholly in line with the obligations under the Protocols. As noted above at paragraph 13, there are also additional benefits to retaining all SUA related provisions in the one legislative toolbox.

30 The amendment, in the form of a Maritime Crimes (2005 Protocols) Bill, would give effect to the new offences across three main areas.

*i. Maritime terrorism*

31 Article 3bis of the SUA Protocol on Maritime Navigation and Article 2 bis of the SUA Protocol on Fixed Platforms make it an offence intentionally, for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act:

- to use, or threaten to use, against or on a ship or discharge from a ship any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that is likely to cause death or causes or is likely to cause serious injury; or
- to discharge, or threaten to discharge, from a ship, oil, liquefied natural gas, or other hazardous or noxious substances, which are not covered above, in such quantity or concentration that is likely to cause death or causes or is likely to cause serious injury or damage; or
- to use, or threaten to use, a ship in a manner that is likely to cause death or causes or is likely to cause serious injury or damage.

*ii Trafficking in WMD and related material*

32 Article 3bis of the SUA Protocol on Maritime Navigation makes it an offence to intentionally transport on board a ship:

- any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organisation to do or to abstain from doing any act; or
- any biological, chemical or nuclear weapon, knowing it to be a biological, chemical or nuclear weapon; or
- any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement; or
- any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose.

33 However, under Article 3bis of the SUA Protocol on Maritime Navigation there are limited exemptions for transports of the kind referenced in bullet points 3 and 4 under paragraph 32 to ensure that those controls will not limit the rights of states that are party to the Treaty on the Non-Proliferation of Nuclear Weapons.

*iii Transporting fugitives*

34 Article 3ter of the SUA Protocol on Maritime Navigation makes it an offence to intentionally transport a person on board a ship with the intent to help that person to avoid prosecution:

where the person assisting:

- knows that the person being transported has committed an act that constitutes an offence under the 1988 SUA Convention, as amended by the SUA Protocol on Maritime Navigation; or
- knows that the person being transported has committed an act that constitutes a crime against any of the terrorism conventions specified in Article 7 the SUA Protocol on Maritime Navigation; all of which are already offences under New Zealand law.

*iv Other offences*

35 Article 3quater of the SUA Protocol on Maritime Navigation and Article 2ter of the SUA Protocol on Fixed Platforms extend an existing offence under the SUA Treaties – unlawful and intentional killing or injuring in connection with the commission or attempted commission of any of the SUA Treaties offences – to the new 2005 SUA Protocols offences listed above. Those articles also extend various secondary liability provisions from the SUA Treaties and introduce several new forms of secondary liability including participation and organisation. The secondary liability provisions apply to all relevant SUA offences.

*Penalties*

36 The new offences must also be accompanied by appropriate penalties. In the case of offences under the SUA Protocol on Maritime Navigation, Article 5 would require New Zealand, as a State Party, to make those offences punishable by penalties which take into account the grave nature of those offences.

*Ship boarding regime and entry into fixed platforms*

37 It is also necessary to implement a legislative ship boarding framework, in line with Article 8bis of the SUA Protocol on Maritime Navigation. An explicit

legislative regime would enable agencies to conduct effective enforcement operations on the territorial seas, the contiguous zone, or the high seas where Maritime Crimes Act 1999 offences were involved (with appropriate variations according to the maritime zone and applicable law). Enforcement agencies would be better positioned to ensure that procedures were legally compliant well in advance of an incident occurring, thereby mitigating the risk of prosecution of enforcement agencies and officials, and reducing the likelihood of failed prosecutions against Maritime Crimes Act 1999 offenders. Agencies would be able to formulate standard operating procedures for enforcement operations in line with the legislated regime, which would facilitate opportunities for realistic training. Enforcement agencies would therefore be well prepared for real-time incidents. Furthermore, a boarding regime would enhance the decision-making ability of enforcement officials during actual boarding operations. The net result would be to ensure legally compliant boarding operations in line with New Zealand's international obligations. Reliance on New Zealand's existing ship boarding frameworks in the Customs and Excise Act 1996 and the Fisheries Act 1996 would not provide a sufficient basis for the conduct of enforcement operations in respect of the Maritime Crimes Act 1999 offences.

38 In addition, it is proposed that the opportunity is taken while developing a ship boarding regime to also consider and as appropriate extend the powers of entry and action relating to Maritime Crimes Act 1999 offences involving fixed platforms on the continental shelf.

#### *Existing mechanisms*

39 The proposed legislative amendment would also need to extend to the new offences, as required by the 2005 SUA protocols, certain existing provisions from the SUA Treaties which were legislated for in the Maritime Crimes Act 1999. This includes provisions such as extraterritorial jurisdiction, which would ensure that New Zealand has the necessary jurisdiction to prosecute certain offences that occur beyond New Zealand's borders.

#### *Non-legislative implementation*

40 Aside from the legislative amendments detailed above, other aspects of the 2005 SUA Protocols, including broader cooperation obligations, would be implemented through changes to the policy and practice of relevant agencies.

### **Economic, social, cultural and environmental costs and effects of the treaty action**

41 The implementation of the 2005 SUA Protocols would not be expected to have any economic, social, cultural or environmental effects in New Zealand.

### **The costs to New Zealand of compliance with the treaties**

42 There may be minimal cost in the future associated with the attendance at meetings of States Parties, should these be called to amend the treaties or to consider other matters. However, such meetings are not required to be held at specific intervals.

43 The other potential future cost is to those agencies which would enforce the obligations under the 2005 SUA Protocols in the event of an offence being threatened, attempted or committed. This is however no different than with other offences under New Zealand law.

### **Completed or proposed consultation with the community and parties interested in the treaty action**

44 The following government departments were consulted: Ministry of Transport, New Zealand Customs Service, New Zealand Police, New Zealand Defence Force, Ministry of Defence, Maritime New Zealand, the New Zealand Security Intelligence Service, the Treasury and the Ministry of Fisheries. There were no sections of the public identified as having specific interests in the implementation of these particular counter-terrorism instruments.

### **Subsequent protocols and/or amendments to the treaties and their likely effects**

45 Under Article 20 of the SUA Protocol on Maritime Navigation the Secretary-General of the International Maritime Organisation would be required to convene a conference of States Parties for revising or amending the Protocol, at the request of one third of States Parties, or ten States Parties, whichever is higher. The rule for the SUA Protocol on Fixed Platforms is the same under Article 11 of that Protocol except that the threshold applied is at the request of one third of States Parties, or five States Parties, whichever is higher.

46 Article 22 of the SUA Protocol on Maritime Navigation allows additional relevant counter-terrorism treaties to be listed in the Annex to the 1988 SUA Convention. If proposed by a State Party and the treaty in question is open to the participation of all states, in force, and has been ratified by at least twelve States Parties to the SUA Protocol on Maritime Navigation, then the Secretary-General of the International Maritime Organisation is required to circulate that proposal to all States Parties. The consent of at least twelve States Parties is required for it to be adopted.

### **Withdrawal or denunciation provisions in the treaties**

47 Under Article 19 of the SUA Protocol on Maritime Navigation States Parties may denounce the Protocol by the deposit of an instrument of

denunciation with the Secretary-General of the International Maritime Organisation. That denunciation will take effect one year after the deposit of that instrument, or such longer period as may be specified in the instrument. Under Article 10 of the SUA Protocol on Fixed Platforms the same rule applies to that Protocol.

### **Adequacy statement**

48 As there would be no significant impact on New Zealand's economic growth forecast as a result of the implementation of the 2005 SUA Protocols but legislative change is required, the determination of this National Interest Analysis's adequacy has been made jointly by the Ministry of Foreign Affairs and Trade and the Ministry of Justice.

49 This extended National Interest Analysis follows strictly the guidelines under the Standing Order 389, thoroughly establishing the rationale for New Zealand's implementation of the 2005 SUA Protocols. The view of the Ministry of Foreign Affairs and Trade and the Ministry of Justice is that the paper clearly demonstrates that the benefits of implementation outweigh the identified costs and risks.

### **Tokelau**

50 Tokelau has been consulted on New Zealand's proposed treaty action and has requested that New Zealand's implementing legislation be extended to Tokelau.

Ministry of Foreign Affairs and Trade  
Ministry of Justice  
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