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Keywords

Crimes, International Criminal Law, Terrorism

THE RIGHT OF VISIT AND THE 2005 PROTOCOL ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

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I. INTRODUCTION

On October 14, 2005, a second Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 Convention)¹ was adopted at the International Maritime Organization (IMO).² The 1988 Convention had been developed as a response to the hijacking of the Italian vessel, the *Achille Lauro*, in Egyptian waters, and the murder onboard of a United States national. Austria, Egypt and Italy proposed the adoption of a treaty under the auspices of the IMO to set forth “comprehensive requirements for the suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives; jeopardise the safety of persons and property; seriously affect the operation of maritime services and, thus, are of grave concern to the international community as a whole.”³ The importance of this treaty at the time of its adoption was that it identified certain unlawful acts against ships and provided bases by which states could establish jurisdiction over the perpetrators of those unlawful acts.⁴ What was missing from the 1988 Convention was effectively a means to apprehend offenders. The inclusion of a procedure in the 2005 Protocol to allow states to board ships marks a shift from merely

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1. Int'l Maritime Org. [IMO], Convention from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter 1988 Convention].

2. IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, Nov. 1, 2005, available at <http://www.state.gov/t/isn/trty/81727.htm> [hereinafter 2005 Protocol]. The first protocol was issued when the convention itself came out. IMO, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, IMO Doc. SUA/CON/16/Rev.1, reprinted in 27 I.L.M. 685 [hereinafter Fixed Platforms Protocol].

3. Capt. Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INT'L J. MARINE & COASTAL L. 327, 328 (2003).

4. As Halberstam notes, “its operative provisions deal not so much with the suppression of such acts, as with the apprehension, conviction and punishment of those who commit them.” Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 292 (1988).

providing lawful bases to establish jurisdiction to creating the means to exercise jurisdiction.⁵

Following the terrorist attacks on the United States on September 11, 2001, the potential for comparable attacks in the maritime industry was increasingly appreciated. The Assembly of the IMO decided in Resolution 924 to review existing legal and technical measures to prevent and suppress terrorist acts against ships both at port and at sea, as well as improve security aboard and ashore.⁶ The Secretary-General of the IMO stated that the adoption of the 2005 Protocol “mark[ed] the completion of the tasks set by the IMO Assembly in resolution A.924(22).”⁷

The initial focus on revisions to the 1988 Convention concerned the expansion of offenses under Article 3 over which states parties could establish jurisdiction, rather than the inclusion of ship-boarding provisions to enforce jurisdiction.⁸ This suggestion emerged in August 2002 following discussions among a Correspondence Group established by the United States.⁹ As the 1988 Convention needed updating to reflect developments from subsequent counter-

5. “Article 6 of the SUA Convention deals with States Parties’ rights and obligations to establish jurisdiction, whereas this provision [in the 2005 Protocol] concerns the right to exercise jurisdiction.” IMO, IMO Legal Comm., *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, para 59, IMO Doc. LEG 89/16 (Nov. 4, 2004).

6. See Hesse, *supra* note 3, at 329. One of the key developments in addressing ship and port security was the adoption of the International Ship and Port Facility Security Code (ISPS Code). This Code was developed as an amendment to the 1974 Safety of Life at Sea Convention and came into force on July 1, 2004. The ISPS Code is enshrined in Regulation XI-2/3 of the 1974 Safety of Life at Sea Convention. Final Act of the International Convention for the Safety of Life at Sea, Regulation XI-2/3, Nov. 1, 1974, 32 U.S.T. 47, 14 I.L.M. 959 [hereinafter SOLAS]. Part A of the Code sets out mandatory security-related requirements for governments, port authorities and shipping companies. Part B then comprises of a series of non-mandatory guidelines as to how these requirements might be met.

7. Press Release, IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference (Oct. 17, 2005), available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

8. Neither the Note by the Secretariat nor the initial US proposal referred to boarding provisions, but instead focused on the scope of offenses and the regulations on jurisdiction and extradition. See IMO, *Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol): Note by the Secretariat*, IMO Legal Comm., 84th Sess., Agenda item 6, IMO Doc. LEG 84/6 (March 13, 2002) [hereinafter *Review of SUA Convention and Protocol*]; IMO, *Review of SUA Convention and Protocol: Proposed modifications to update the SUA Convention*, IMO Legal Comm., Agenda item 6, IMO Doc. LEG 84/6/1 (Mar. 22, 2002) submitted by the United States; *Review of SUA Convention and Protocol: Proposed amendments*, IMO Legal Comm., Submission by Turkey, 84th Sess., Agenda item 6, IMO Doc. LEG 84/6/2 (Mar. 22, 2002); see also IMO, *Report of the Legal Committee on the Work of its Eighty-Fourth Session*, IMO Legal Comm., 84th Sess., Agenda item 14, IMO Doc. LEG 84/14 (May 7, 2002), Annex 2, “Terms of Reference of the Correspondence Group Regarding the 1988 SUA Convention and the 1988 SUA Protocol.”

9. See IMO Legal Comm., 85th Sess., Agenda Item 4, *Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol): Draft Amendments to the SUA Convention and SUA Protocol*, IMO Doc. LEG 85/4 (Aug. 17, 2002).

terrorism treaties,¹⁰ the United States similarly proposed that the amendments should take into account ship-boarding provisions that had developed through the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,¹¹ the Protocol against the Smuggling of Migrants by Land, Sea and Air,¹² as well as agreements relating to cooperation in suppressing illicit maritime trafficking in narcotic drugs and psychotropic substances in the Caribbean.¹³ In drawing on these treaties, the amendments to the 1988 Convention thus expanded not only to reflect developments in relation to the suppression of international terrorism, but also to create a new legal basis by which states will be able to exercise the right of visit on the high seas. The United States, a key participant in negotiations, considers that the 2005 Protocol “establish[es] the most well-developed boarding procedures and safeguards in any instrument of its type.”¹⁴

This Article focuses on the ship-boarding aspect of the new agreement, as the 2005 Protocol represents the latest exception to the traditional rules relating to the exclusive jurisdiction of the flag state over its vessels when those vessels are on the high seas. This innovation is important when considered in light of the United States’ recent efforts under the Proliferation Security Initiative (PSI) to establish a regime intended to prevent the movement of weapons of mass destruction, their delivery systems and related materials between states and non-state actors of

10. See e.g., International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, U.N. GAOR, 52nd Sess., U.N. Doc. A/Res/52/164 (Jan. 9, 1998), *reprinted in* 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, U.N. GAOR, 54th Sess., U.N. Doc. A/Res/54/109 (Dec. 9, 1999), *reprinted in* 39 I.L.M. 270 (2000); International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res. 766, U.N. GAOR, 59th Sess., U.N. Doc. A/Res/59/766 (Apr. 4 2005), *reprinted in* 44 I.L.M. 815 (2005).

11. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. ESCOR, U.N. Doc. E/Conf.82/15 (Dec. 20, 1988), *reprinted in* 28 I.L.M. 497 (1989).

12. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 383, 55th Sess., U.N. Doc. A/RES/55/383 (Nov. 15, 2000), *reprinted in* 40 I.L.M. 335, 384 (2001).

13. See Agreement Between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, U.S.-Haiti, Oct. 17, 1997, 1997 U.S.T. Lexis 128; Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, U.S.-Hond., Mar. 29, 2000, 2000 U.S.T. Lexis 159; Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicar., June 1, 2001, 2001 U.S.T. Lexis 63; Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air, U.S.-Guat., June 19, 2003, *available at*
<http://guatemala.usembassy.gov/uploads/images/COB7Ud11HS7y04mWhEcLNg/usguatmaritimeagree mente.pdf>

14. International Conference on the Revision of the SUA Treaties, Submission by the United States, *Consideration of a Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and a Draft Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988*, ¶ 3, IMO Doc. LEG/CONF.15/14 (Sept. 22, 2005), *available at* <http://www.state.gov/t/isn/trty/58319.htm> [hereinafter *Consideration of a Draft Protocol to SUA*].

proliferation concern. There have been considerable doubts about the legality of various aspects of the PSI,¹⁵ and the participants in the regime have recognized that their current authority is limited to maritime areas and vessels under their jurisdiction.¹⁶ The United States now views the 2005 Protocol as:

establish[ing] an international legal basis to impede and prosecute the trafficking of [weapons of mass destruction], their delivery systems and related materials on the high seas, helping implement our common obligations under UN Security Council resolution 1540 and closing loopholes that proliferators or terrorists might use to transfer [weapons of mass destruction], their delivery systems and related materials.¹⁷

The 2005 Protocol, as a new development in the law of the sea, is intended to enhance maritime security and counter-terrorism efforts, but must still be considered as part of a broader body of law regulating rights and duties in different maritime areas. The history of the law of the sea has been entrenched in the principle of *mare liberum*, the freedom of the seas. As described by McDougal and Bourke in 1962:

By appropriate accommodation and compromise, a public order of the seas has been maintained to permit states to send their argosies to all the four corners of the world and to take adequate account of both the general security interest of the community of the states and the special security interest of particular states.¹⁸

The law of the sea has traditionally encapsulated an appropriate balance between inclusive claims (accommodating all states) and exclusive claims (those benefiting single states) in order to achieve a common interest.¹⁹ Although the predominant emphasis in the law of the sea has been that the common interest is achieved through maintaining the freedoms of the high seas and respecting flag state authority in these areas, these central motivations may no longer be completely appropriate given the recent claims to undertake various measures for

15. See, e.g., Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 256-69 (2005); Stuart Kaye, *The Proliferation Security Initiative in the Maritime Domain*, 35 Isr. Y.B. Hum. Rts. 205, 224-29 (2005).

16. See generally *Fact Sheet, Proliferation Security Initiative: Statement of Interdiction Principles*, U.S. Dept. of State (Sept. 4, 2003), <http://www.state.gov/t/isn/rls/fs/23764.htm> [hereinafter *Statement of Interdiction Principles*].

17. Consideration of a Draft Protocol to SUA, *supra* note 14, ¶ 3.

18. MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 54 (Yale University Press) (1962).

19. "[T]he common interest is in an accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost." MCDUGAL & BURKE, *supra* note 18, at 52. Drawing on McDougal and Burke's analysis, this Article refers to inclusive interests as those that are shared by the international community; inclusivity promotes the idea that the law of the sea should be constructed and understood in a way that supports common use of an area so that a mutual benefit is shared by the vast majority. Exclusive interests are held by one particular state and are asserted against the rights and responsibilities of all other states; exclusivity is premised on the notion that one state should have the authority to reach decisions over ocean space and use without necessarily accounting for the interests of others (beyond a due regard requirement).

the enhancement of maritime security. This Article therefore examines the 2005 Protocol against this history and argues that a paradigm shift may be needed in order fully to meet modern interests in maritime security. The common interest in ensuring maritime security may mean that a readjustment in the balance of exclusive and inclusive interests has become necessary.

The second Part of this Article describes in greater detail the traditional paradigm in which the law of the sea operates, namely, the foundational concept of *mare liberum* and the concomitant authority accorded to states over their vessels on the high seas. Having established this basis, the Article turns in Part Three to certain limited exceptions to the traditional paradigm whereby the right of visit has been recognized at different times for the advance of particular social interests, and highlights the way that adherence to the freedom of the high seas and flag state control have moderated the contours of these exceptions. These categories of exceptions have not been closed, however, and Part Four addresses the possibility of allowing for further encroachments on the freedom of the seas through treaty. In view of these limited instances where the right of visit may be exercised, the discussion in Part Five then turns to the interaction of security interests vis-à-vis the right of visit and how current concerns about security are putting pressure on the traditional rules relating to the use of force and motivating states to develop a variety of means to meet their key interests in enhancing maritime security. Part Six explores the right of visit under the 2005 Protocol against the background of the traditional paradigm and previous efforts to improve maritime security. When the ambiguities and gaps in the 2005 Protocol are exposed, it raises the important question of whether there is a need for a paradigm shift so as better to accommodate exclusive and inclusive interests in achieving the common goal of ensuring the safety and security of international shipping.

II. THE TRADITIONAL PARADIGM: FLAG STATE JURISDICTION AND THE FREEDOM OF THE HIGH SEAS

For almost four hundred years, the foundational concept for the law of the sea has been the principle of *mare liberum*, the freedom of the high seas. The wide expanses of the oceans have traditionally been regarded as areas that no state could control and hence over which no state could claim dominion or sovereignty.²⁰ Any developments in the law of the sea have been premised on the idea that the oceans, barring a narrow strip of water subject to coastal state sovereignty,²¹ are open to all users and that any claims to ocean space or use were to be viewed as encroachments on these freedoms of the high seas.²² The emphasis has thus been

20. Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 707-08 (2001).

21. United Nations Convention on the Law of the Sea, art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.").

22. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 161 (3rd ed. 1999) (describing the compromise proposal of the exclusive economic zone (EEZ) to prevent the institution of the 200-mile territorial sea); *id.*, at 144 (discussing the debated status of the continental shelf); *id.*, at 77-79 (setting

on retaining inclusive enjoyment of this ocean space, and only permitting exclusive claims to prevail if they “serve the common interest where the impacts of use are especially critical for a particular state and the restrictions upon inclusive use are kept to the minimum.”²³

Instead of claims of rights or control over this ocean space, a state has authority over the vessels that ply these areas under the flag of that state. Garvey has proclaimed that “[f]lag state jurisdiction [is]...a highly significant embodiment of the general principle of freedom of the seas.”²⁴ It is the very fact that the high seas are open to all states that no one state is then able to exert control or authority over the vessels traversing the oceans unless that vessel has a tie to that particular state. As observed in the 1817 judgment of *Le Louis*:

In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another... [N]o nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.²⁵

This Part examines in more detail the traditional paradigm of the high seas freedoms and flag state control.

A. *The Freedom of the High Seas*

Writing in 1608, Hugo Grotius argued that the very nature of the oceans demanded that they be available to all users.²⁶ Unlike land territory, which can be occupied, guarded and secured against invasion, the physical characteristics of the oceans mean that the high seas do not comparably permit the same level of control.²⁷ Grotius equally appreciated the economic importance of the high seas constituting a *res communis*, as the ability of ships to transport people and goods around the globe without passage becoming subject to a state's control would facilitate international trade.²⁸ This economic interest was also manifested in the desire to maintain fishing grounds in as wide an area as possible.²⁹ The shared interest in this freedom of navigation would allow not only the movement of goods

out the controversy relating to the breadth of the territorial sea).

23. MCDUGAL & BURKE, *supra* note 18, at 749.

24. Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SECURITY L. 125, 132 (2005).

25. *Le Louis*, (1817) 165 Eng. Rep. 1464, 1479.

26. HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 28 (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1633) (“[T]he sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.”).

27. See Brilmayer & Klein, *supra* note 20, at 707-08.

28. Grotius was particularly arguing the case of the Dutch East Indies Company at the time (as the very title of the work suggests), against Portuguese claims of sovereignty over the Indian Ocean. See GROTIUS, *supra* note 26, at 38, 42.

29. See GROTIUS, *supra* note 26, at 32.

and people, but also permit unhindered passage of naval fleets of the maritime powers to areas of political and military influence.³⁰ At a time when shipping provided the only means for states to communicate with overseas colonies and dominions, the importance of securing the means for this assertion of authority was evident.

Even with considerable technological advances, the common interest that prevailed was to permit the ongoing characterization of ocean areas as *mare liberum* and thus maintain the freedoms of the seas. During one of the first major efforts to codify the law of the sea at the 1958 Conference on the Law of the Sea, the Soviet Union affirmed the continuing relevance of the traditional paradigm:

[T]he principle of the freedom of the high seas had been for centuries reaffirmed in the effort to combat attempts by states to secure mastery over large maritime areas. The freedom of the high seas meant that they were open to all states on an equal footing, and that no state could claim sovereignty over them to the detriment of others; it was satisfactory to note that in modern times that principle had acquired a new and practical meaning for the peoples of countries which had recently won their independence.³¹

Whenever states have sought to extend their sovereignty or jurisdiction over greater reaches of maritime space, other states have resisted this threat to *mare liberum* in accordance with their preference for maintaining the high seas freedoms. Any new claims of exclusivity over ocean space or resources have most commonly been viewed as a derogation from the pre-existing freedoms of the high seas and so have been curtailed in accordance with these freedoms.³² For example, when states negotiated the status of the Exclusive Economic Zone (EEZ), it was argued that the freedoms of the high seas within this 200-mile zone were to be qualitatively and quantitatively the same as the high seas freedoms outside the zone.³³ The high seas freedoms coexist with the exclusive rights of the coastal state in this maritime zone, provided that they are not incompatible with the legal regime of the EEZ.³⁴

30. See Sam J. Tangredi, *Globalization and Sea Power: Overview and Context*, in GLOBALIZATION AND MARITIME POWER 1, 7 (Sam J. Tangredi ed., 2002), available at http://www.ndu.edu/inss/books/Books_2002/Globalization_and_Maritime_Power_Dec_02/02_ch01.htm.

31. U.N. Conference on the Law of the Sea, Feb. 24-Apr. 27, 1958, *Official Records Vol. IV: Second Committee*, at 9, U.N. Doc A/CONF.13/40 (comments of U.S.S.R.).

32. For example, as noted above, claims to rights over the continental shelf, to increased breadths of territorial seas and to the living resources in areas adjacent to the coast have always been countered by the rights of other users to the high seas. See CHURCHILL & LOWE, *supra* note 22, at 59, 119, 280.

33. Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, FOREIGN AFF., Spring 1979, at 916. (“[T]hey must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete – and allow for future uses no less inclusive – than traditional high-seas freedoms”).

34. See UNCLOS, *supra* note 21, art. 58(2). In addition, the rights and duties located in Articles 88 to 115 are deemed to apply to the EEZ provided they are not incompatible with Part V. Articles 88

As currently formulated, the freedoms of the high seas have included not only the freedoms of navigation and fishing, but also freedoms of laying submarine cables and pipelines, and overflight.³⁵ There has not been an exhaustive categorization of the high seas freedoms,³⁶ and scientific research and a variety of military activities are typically regarded as other freedoms of the high seas.³⁷ States have generally accepted that the freedoms of the high seas entailed certain responsibilities or implied restrictions.³⁸ "The purpose of such regulation was to safeguard the exercise of the freedom in the interests of the whole international community."³⁹ The International Law Commission set forth this view in its commentary to the draft articles for the 1958 High Seas Convention:

Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.⁴⁰

It is evident here that the common interest has been to favor inclusive interests through the maintenance of the high seas freedoms.

through 115, which are located in Part VII of the Convention dealing with the high seas, address not only navigation and the laying of submarine cables but also include the nationality and status of ships, piracy, slavery, drug trafficking, and unauthorized broadcasting.

35. UNCLOS, *supra* note 21, art. 87(1); Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 10, [hereinafter High Seas Convention]. UNCLOS also refers to the freedoms to construct artificial islands and other installations and of scientific research. UNCLOS, *supra* note 21, art. 87(1).

36. The preferred legal formulation has been to set out an inclusive list of high seas freedoms (signaled by the phrase "*inter alia*"). See UNCLOS, *supra* note 21, art. 87; see also High Seas Convention, *supra* note 35, art. 2.

37. Such a view of marine scientific research was taken during the formulation of the High Seas Convention at the 1958 Conference. Only an implicit reference to scientific research was included in Article 2 of that treaty, which is not an exclusive list of high seas freedoms but allows for other general principles of international law to be incorporated amongst the assorted freedoms of the high seas. The International Law Commission intended such an inclusive approach and noted that the freedom to conduct scientific research would be another freedom. See *Report of the International Law Commission to the General Assembly*, 19 U.N. GAOR Supp. (No. 9) art. 27 cmt. 2, U.N. Doc A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, 278, A/CN.4/SER.A/1956/Add.1. UNCLOS now explicitly refers to the freedom of scientific research. UNCLOS, *supra* note 21, art. 87(1)(f). Moreover, military activities have usually been included among the traditional freedoms of the high seas, even if not explicitly stated. Instead, the freedom of navigation has usually been viewed as encompassing the free movement of warships across the high seas. See D. P. O'CONNELL, VOL. 2 THE INTERNATIONAL LAW OF THE SEA 809 (I. A. Shearer ed., 1984); P. Sreenivasa Rao, *Legal Regulation of Maritime Military Uses*, 13 INDIAN J. INT'L L. 425, 435 (1973).

38. See, e.g., U.N. Conference on the Law of the Sea, *supra* note 31, at 24 (comments of Czechoslovakia); see also Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1237 (1985) (commenting that the freedoms of the high seas are by no means absolute, but have been constrained and qualified in the mode and place of their exercise).

39. U.N. Conference on the Law of the Sea, *supra* note 31, at 15 (comments of U.S.).

40. *Report of the International Law Commission to the General Assembly*, *supra* note 37, art. 27 cmt. 5.

The consequence of *mare liberum* has been the generation of a tension between inclusivity and exclusivity in claims to ocean space and its use. As a general matter, it is adherence to *mare liberum* that has ensured an ongoing viability for the recognition of inclusive interests in the ways that ocean space and use are regulated. As a further broad proposition, exclusive interests have only been accepted to the extent that they do not threaten this ongoing observance of *mare liberum*. These exclusive interests are manifested in the importance attributed to flag state control over vessels on the high seas, which is discussed immediately below, and in the limited exceptions to this authority, as seen in the narrow instances allowing for the right of visit, which are addressed in Part Three.

B. Flag State Jurisdiction on the High Seas

Against this background, it seems an inevitable consequence that a state may only exercise authority over those vessels bearing its flag because to do otherwise would be tantamount to an assertion of jurisdiction or sovereignty over the high seas, which is prohibited under international law.⁴¹ The freedom of navigation provides vessels of any state with the right to traverse the high seas with minimal interference from any other state.⁴² The Permanent Court recognized as much in the *SS Lotus* case: “It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly.”⁴³

A ship is to sail under the flag of one state.⁴⁴ States set the conditions for the grant of nationality to ships and for the right to fly their flag.⁴⁵ In bestowing the right to fly its flag, there must be a genuine link between the state and the ship.⁴⁶ The importance of flag state control over a vessel is underlined by the requirement that the registration of a ship with a particular state may only be changed when the vessel is in port, thereby ensuring that the nationality of the vessel remains constant while the vessel is at sea.⁴⁷

A vessel is then subject to the exclusive jurisdiction of the state to which it is flagged, with any exception limited to those expressly provided for by treaty.⁴⁸

41. UNCLOS, *supra* note 21, art. 89 (“No State may validly purport to subject any part of the high seas to its sovereignty.”).

42. Interference is limited to the rights of visit and hot pursuit. The right of hot pursuit is addressed below. *See infra* note 56 and accompanying text.

43. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7).

44. UNCLOS, *supra* note 21, art. 92(1).

45. *Id.*, art. 91(1).

46. *Id.* This rule has been disregarded to some extent given the prolific use of so-called “flags of convenience” whereby ship owners seek the right to fly the flag of a state that does not necessarily enforce either international standards as to the seaworthiness of the vessel, or fishing or environmental requirements as stringently as another state, and that is not as expensive as another state. It is perhaps the mutual commercial interest that purports to provide the “genuine link” in such cases.

47. *Id.*, art. 92(1); Kaye, *supra* note 15, at 210.

48. UNCLOS, *supra* note 21, art. 91(1). *See infra* Parts III and IV. Joyner emphatically denies that there is any existing right under customary international law to permit the interdiction of foreign flagged vessels on the high seas. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT’L L. 507, 536-37

Exclusivity of jurisdiction extends to the exercise of both prescriptive and enforcement jurisdiction. "Under the *mare liberum* principle, the interdiction of a flag vessel of a foreign state is generally considered to be the prerogative of the flag state in question, not of third-party states patrolling the high seas."⁴⁹

While this right of flag state control over vessels on the high seas is recognized as generally applicable to all types of ships, warships and ships owned or operated by a state and used only on government non-commercial service are afforded additional protection against the application of any possible exception. The latter vessels are entitled to complete immunity from the jurisdiction of any state besides the flag state when on the high seas.⁵⁰ As a result, third-state rights against foreign warships on the high seas are virtually non-existent. Instead, an attempt to exercise law enforcement jurisdiction against a foreign warship could be tantamount to a threat or use of force against a sovereign instrumentality of a foreign state.⁵¹

The reasons behind this entrenched rule of control over flagged vessels and non-interference with those vessels on the high seas were clearly stated in *Le Louis*.⁵² In *Le Louis*, the High Court of Admiralty referred to the "perfect equality and entire independence of all distinct states" and their "equal right to the uninterrupted use of the un-appropriated parts of the ocean for their navigation".⁵³ A vessel that flies the flag of a particular state is then assimilated to the territory of that state; "what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."⁵⁴ Today, exclusive flag state jurisdiction remains "of critical importance to securing the interests of the global economy and the world's major navies, and epitomizes international law where adherence is firm and universal in its political basis."⁵⁵ The common interest in the law of the sea has thus traditionally been a balance of inclusive interests in the freedoms of the high seas and exclusive interests held by flag states in exercising control over their vessels as they navigate the Earth's waters.

III. LIMITED EXCEPTIONS: CERTAIN SOCIAL CAUSES PREVAIL

The adherence to the traditional paradigm of freedom of the high seas and exclusive flag state control means that the right of any state to exercise jurisdiction over a vessel not flagged to it will only be permissible where there has been express agreement between the states in question. One of the key exceptions in this regard is the right of visit,⁵⁶ which is codified in Article 110 of the UN

(2005).

49. Thomas D. Lehrman, Note, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 229 (2004).

50. UNCLOS, *supra* note 21, art. 95-6.

51. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 815 (1984).

52. *Le Louis*, *supra* note 25, at 1475.

53. *Id.*

54. *S.S. Lotus*, *supra* note 43, at 25.

55. Garvey, *supra* note 24, at 132.

56. The other key exception is the long-established right of hot pursuit. See D. P. O'CONNELL,

Convention on the Law of the Sea (UNCLOS).⁵⁷ The right of visit granted under UNCLOS is expressly for the enforcement of the designated prescriptions included in that treaty with respect to vessels that are not accorded immunity.⁵⁸

Article 110 of UNCLOS sets out four instances where warships may exercise a right of visit against a foreign-flagged vessel: piracy, slavery, unlawful broadcasting, and where suspicions as to the nationality of the vessel arise.⁵⁹ These exceptions to flag state authority and the freedom of the high seas have resulted from “globally-shared needs and troubles, especially in modern times.”⁶⁰

Even within these exceptions, there are limitations that apply in relation to the specific acts, as well as in relation to the exercise of the right of visit generally. As a general matter, the procedure to be followed under Article 110 is that a ship may be sent under the command of an officer to the suspected ship in order to check its documents.⁶¹ If suspicion remains, the suspected ship may then be boarded for further examination.⁶² This examination must be carried out “with all possible consideration.”⁶³ In the event that the suspicions prove unfounded and that no act was committed that justified such suspicions, the ship visited is entitled to compensation “for any loss or damage that may have been sustained.”⁶⁴ The specific grounds warranting this procedure, and the ongoing protections afforded to maintain the traditional paradigm, are discussed in this Part.

supra note 37, at 1078-79 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea); *see also* Robert C. Reuland, *The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 VA. J. INT'L L. 557 (1993). The right of hot pursuit is premised on the idea that a coastal state may pursue a foreign vessel when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state (including violations of laws and regulations of the EEZ and the continental shelf). UNCLOS, *supra* note 21, art. 111(1-2). Hot pursuit must be commenced when the foreign vessel is within the internal waters, archipelagic waters, territorial sea or contiguous zone of the pursuing state, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. UNCLOS, *supra* note 21, art. 111(1). “The right of hot pursuit – an exception to the freedom of the high seas – is at the same time a right of the littoral State established for the effective protection of areas under its sovereignty or jurisdiction.” NICHOLAS M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 39 (1969).

57. UNCLOS, *supra* note 21, art. 110.

58. *Id.*

59. *Id.*, art. 110(1). There are also limited instances where a state may prescribe and enforce certain measures against foreign vessels in the EEZ and on the high seas in order to protect and preserve the marine environment. *Id.*, art. 221. Or for the management and conservation of fisheries. *Id.*, art. 73; *see also* I. A. Shearer, *Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels*, 35 INT'L & COMP. L.Q. 320, 333-41 (1986).

60. H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 373.

61. UNCLOS, *supra* note 21, art.110(2).

62. *Id.*

63. *Id.*

64. *Id.* art. 110(3).

A. Piracy

The menace of piracy towards maritime commerce has been documented since the days of ancient Greece and the Roman Empire.⁶⁵ An exception to flag state authority came to be recognized in respect of piracy because of the great importance to the European powers of securing their trade routes and transport lines to overseas colonies.⁶⁶ “The purpose of [the] laws against piracy is to suppress unlawful acts of violence on the high seas and to protect commerce ‘... in the interest of the freedom of the seas [; therefore,] international customary law authorises any subject of international law to extend its jurisdiction to such outlaws.’”⁶⁷

Universal jurisdiction exists over pirates, who are viewed as *hostis humani generis*.⁶⁸ “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”⁶⁹ This universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy.⁷⁰ As the enemies of all humankind and thereby a threat to all states, no state could be held responsible for the acts of pirates and universal jurisdiction was considered appropriate.⁷¹ However, at the point that the acts were not threatening “to all states or the act was done under the authority of a state, universal jurisdiction...” would no longer be available.⁷²

Early definitions of piracy had sought to establish a broad basis for warranting the exercise of universal jurisdiction.⁷³ Oppenheim, for example, defined piracy as “every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.”⁷⁴ After surveying a range of commentators and codification efforts on piracy, Halberstam concluded that “[t]he customary law of piracy can be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction.”⁷⁵ Under UNCLOS, piracy consists of:

any illegal acts of violence or detention, or any act of depredation,
committed for private ends by the crew or the passengers of a private

65. Jesus, *supra* note 60, at 364.

66. CHURCHILL & LOWE, *supra* note 22, at 209.

67. Anna van Zwanenberg, *Interference with Ships on the High Seas*, 10 INT'L & COMP. L.Q. 785, 805 (1961).

68. Enemies of all humankind.

69. UNCLOS, *supra* note 21, art. 105.

70. See Tina Garmon, Comment, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 260 (2002).

71. Halberstam, *supra* note 4, at 288.

72. *Id.*

73. *Id.* at 273-76.

74. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 609 (H. Lauterpacht ed., David McKay Company Inc. 8th ed. 1955).

75. Halberstam, *supra* note 4, at 287-88.

ship or a private aircraft, and directed... against another ship... , or against persons or property on board [that other ship on the high seas].⁷⁶

Certain features of the UNCLOS definition have served to exclude some terrorist attacks from this ground to exercise the right of visit.⁷⁷ In particular, the requirement in the definition of piracy that two ships are involved precludes the characterization of hijacking (where passengers gain control of one ship) as piracy.⁷⁸ Also, that the act is for private ends or private gain has also narrowed the range of acts that may be classed as piracy.⁷⁹ For example, the hijacking of the *Santa Maria*, a Portuguese merchant vessel, in 1961 by passengers in the name of the Independent Junta of Liberation, which had been defeated in the Portuguese Presidential elections of 1958, was not considered to be for private ends.⁸⁰ While clearly inadequate to respond to acts of maritime terrorism, the narrow definition of piracy has provided an acceptable basis for states to exercise the right of visit against foreign vessels on the high seas.⁸¹

B. Slave Trade

Article 110 of UNCLOS recognizes that warships may visit and board a foreign vessel on the high seas when it is reasonably suspected that the foreign vessel "is engaged in the slave trade."⁸² However, unlike foreign vessels and persons engaged in piracy, the visiting vessel does not have the right to seize the vessel or arrest and prosecute those on board. A distinction is drawn in this regard between the right to board and the right to seize the vessel and arrest the crew.⁸³ Both acts of enforcement jurisdiction are anticipated with respect to piracy, but not in relation to the slave trade. Instead, Article 99 of UNCLOS only requires states to suppress the slave trade in relation to their own vessels.⁸⁴ This regime reflects the 1817 decision of *Le Louis* where it was held that British warships had no right to visit and search vessels of other states for the purposes of suppressing the slave

76. UNCLOS, *supra* note 21, art. 101(a)(i).

77. See generally Halberstam, *supra* note 4; Garmon, *supra* note 70.

78. CHURCHILL & LOWE, *supra* note 22, at 210.

79. See Garmon, *supra* note 70 at 265; Halberstam, *supra* note 4, at 282.

80. van Zwanenberg, *supra* note 67, at 803-17; Halberstam, *supra* note 4, at 286-87.

81. It was due to the narrow definition of piracy included in UNCLOS, and now accepted as customary international law, that the 1988 Convention was required. The acts of those responsible for the hijacking of the *Achille Lauro* and the murder of Mr. Klinghoffer could not be characterized as piracy. See Garmon, *supra* note 70, at 262; Halberstam, *supra* note 4, at 276. However, as discussed above, the 1988 Convention did not create a procedure for states to exercise jurisdiction over alleged offenders. See *supra* notes 4-5 and accompanying text.

82. UNCLOS, *supra* note 21, art. 110(1)(b).

83. As explained by Guilfoyle:

An interdiction has two potential steps. The first stage is stopping, boarding and searching the vessel for evidence of the prohibited conduct... Where boarding reveals evidence of such conduct, the arrest of persons on board and/or seizure of the vessel or its cargo may follow... The boarding and seizure stages of interdiction involve different exercises of enforcement jurisdiction.

Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT & SEC. L. 1, 4 (2007).

84. UNCLOS, *supra* note 21, art. 99.

trade.⁸⁵ Even though prohibitions on the slave trade have long been entrenched in international law,⁸⁶ the enforcement of the prohibition, consistent with the traditional paradigm, is conferred solely on the flag state.

C. *Unauthorized Broadcasting Activities*

The right of visit has also been permitted in relation to the transmission of radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations.⁸⁷ The problem of unauthorized broadcasting grew at the end of the 1950s and into the 1960s, particularly in the Baltic, Irish and North Seas.⁸⁸ Coastal states were opposed to the operation of these radio stations due to interference with pre-existing stations, threats to commercial broadcasting interests, including the "broadcast [of] material (most of which consists of records of 'pop' music) without the appropriate royalty payments being made to copyright... holders," and tax avoidance.⁸⁹ Despite these concerns, there was resistance among the affected states at the time to utilize " 'strong-arm action' " that would run "counter to the traditional British concept of the freedom of the seas."⁹⁰ The affected states within the Council of Europe instead proceeded to adopt a treaty that established jurisdictional rules in connection with the establishment, operation and facilitation of unlawful offshore broadcasting stations,⁹¹ rather than extending the reach of their criminal jurisdiction into the high seas.⁹² This treaty then formed the basis of a proposal while negotiating UNCLOS, which resulted in the adoption of Article 109.⁹³

Under Article 109 of UNCLOS, the vessels entitled to exercise the right of visit must have jurisdiction over the unauthorized broadcasting based on the offending vessel or installation being of the same flag or registry, the nationality of the offenders, or the vessel or installation is flagged to the state where the transmissions can be received or where authorized radio communication is suffering interference.⁹⁴ States are accorded both legislative and enforcement jurisdiction in this regard.⁹⁵ If a military vessel does not have jurisdiction on these

85. *Le Louis*, *supra* note 25, at 1464.

86. *See, e.g.*, Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

87. UNCLOS, *supra* note 21, art. 109.

88. *See* N. March Hunnings, *Pirate Broadcasting in European Waters*, 14 INT'L & COMP. L.Q. 410, 410 (1965) (referring to eleven such stations that had come into operation between 1958 and 1965).

89. *Id.* at 413.

90. J C Woodliffe, *The Demise of Unauthorised Broadcasting from Ships in International Waters?*, 1 INT'L J. ESTUARINE & COASTAL L. 402, 403 (1986) (citing to debates in the United Kingdom House of Commons and House of Lords, respectively).

91. European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, *opened for signature* Jan. 20, 1965, Europ. T.S. No. 53.

92. Woodliffe, *supra* note 90, at 403.

93. *Id.* at 405-06.

94. UNCLOS, *supra* note 21, art. 109(3).

95. CHURCHILL & LOWE, *supra* note 22, at 212.

grounds, it may not conduct a boarding or seize the suspected vessel or installation, or arrest and prosecute those on board. The importance of the freedom of the high seas demanded that one of these acknowledged bases of jurisdiction exist in order to subject a foreign vessel to the right of visit.

D. Questions as to Nationality of the Vessel

When a “ship is, in reality, of the same nationality [of a] warship,” even “though flying a foreign flag or refusing to show its flag,” the warship is entitled to board the ship to verify its suspicions as to nationality.⁹⁶ This right to visit a vessel to verify its flag was initially justified as part of states’ efforts to detect piracy.⁹⁷ It has recently offered a lawful basis for the boarding of a vessel, the *M/V So San*, that departed North Korea and was headed to Yemen. Concerns about the nationality of the *M/V So San* provided the justification for the Spanish Navy to board the Cambodian vessel wherein fifteen Scud missiles were discovered on board.⁹⁸ Although the boarding was lawful in this context, there was no prohibition on the delivery of the weapons to Yemen and the vessel was released in order to complete its journey.⁹⁹ Without the query as to nationality, the boarding would have been viewed as an illegal interference with high seas freedoms.

The right of visit of a stateless vessel had not been recognized under the 1958 High Seas Convention.¹⁰⁰ As a result, there was some debate as to whether the right of visit could be asserted against such a vessel. For example, a United States Court of Appeals reached the decision in *United States v. Marino-Garcia* that:

international law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation’s affairs. We further conclude that there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel’s status as stateless.¹⁰¹

96. UNCLOS, *supra* note 21, art. 110(1).

97. To this end, Oppenheim wrote:

It is a universally recognized customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag.

OPPENHEIM, *supra* note 74, at 604.

98. J. Ashley Roach, *Initiatives to Enhance Maritime Security at Sea*, 28 MARINE POL’Y 41, 53-54 (2004).

99. See Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS (American Society of International Law, Wash. D.C.) Dec. 12, 2002, <http://www.asil.org/insights/insigh94.htm>.

100. Article 22 of the High Seas Convention only referred to vessels that were the same nationality of the warship but flying another flag or refusing to show its flag. High Seas Convention, *supra* note 35, art. 22.

101. *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982), *cited in* William C.

On the other hand, Churchill and Lowe have argued that “there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them.”¹⁰² They considered that such a nexus may be established based on the nationalities of the crew or other persons on board the vessel.¹⁰³ The question has now been resolved in favor of recognizing the right of visit under Article 110 of UNCLOS, although some question still remains as to whether a stateless vessel may be seized and those on board arrested.¹⁰⁴ Presumably the very status of the vessel as stateless posed no threat to exclusive flag state control in this situation. If the suspicions regarding the nationality of a vessel prove unfounded then, as mentioned above,¹⁰⁵ the vessel may be entitled to compensation for any damage sustained.¹⁰⁶

E. Conclusion

The designated instances under Article 110 of UNCLOS warranting the right of visit by a warship on the high seas against a foreign-flagged vessel are few in number, and are not uniform in establishing prescriptive and/or enforcement jurisdiction over these vessels. Both for the right of visit in respect of unlawful broadcasting and of the slave trade, the warship must have an established basis of jurisdiction to justify the arrest of the vessel. The right of visit to check nationality or in relation to stateless vessels then reinforces the importance of flag states maintaining their control over their own vessels. It is only in relation to piracy that universal jurisdiction exists so that all warships have the right to visit, search and arrest a vessel not flying its own flag. The common interest has been that these particular social issues have warranted some incursions into absolute flag state authority; there is an inclusive interest in suppressing the slave trade, and arresting pirates and so exclusive claims to assert jurisdiction over non-flag vessels in these limited circumstances have been accepted. The fact that these exceptions are narrowly construed reflects that the preference of states still accords with the overarching construct of *mare liberum*.

IV. INCREASING EXCEPTIONS: “POWERS CONFERRED BY TREATY”

Although Article 110 of UNCLOS only lists four specific instances where the right of visit may be exercised,¹⁰⁷ that convention further recognizes that additional grounds for conducting the right of visit may be established by treaty.¹⁰⁸ Article 6

Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POL'Y 218, 228 (1989).

102. CHURCHILL & LOWE, *supra* note 22, at 214.

103. *See id.*; *see also* Jeffrey D. Stieb, *Survey of United States Jurisdiction over High Seas Narcotics Trafficking*, 19 GA. J. INT'L & COMP. L. 119, 131-32 (1989) (arguing that the Court in *Marino-Garcia* erred and that it should have had regard to the nationality of the individual defendants).

104. *See* Guilfoyle, *supra* note 83.

105. *See supra* notes 56 – 64 and accompanying text (referring to the general requirements for boarding during the exercise of the right to visit).

106. UNCLOS, *supra* note 21, art. 110(3) (provided that the ship boarded has not committed any act justifying the suspicions in the first instance).

107. As noted above, Article 110 deals with the right to visit on the high seas, but states are accorded enforcement jurisdiction for other specified purposes under UNCLOS in relation to their powers over the EEZ. *See supra* note 59 and accompanying text.

108. Article 110 commences with “[e]xcept where acts of interference derive from powers

of the 1958 High Seas Convention similarly permitted states to consent to interference with their vessels only “in exceptional cases expressly provided for in international treaties.”¹⁰⁹ States are entitled to enter into formal agreements to limit their sovereignty in relation to their authority over vessels flagged to them on the high seas. Consent may be accorded in an ad hoc manner, which has been regarded as consistent with the freedoms of the high seas. As a United States court has noted in relation to the boarding and seizure of the *Persistence* on the high seas:

The practice of obtaining prior consent of the foreign flag state is apparently a fairly common one... and we see nothing to suggest that it is improper. The policy behind Article 6 [of the 1958 High Seas Convention] is that of ensuring freedom of access to the high seas by preventing arbitrary interference with vessels of one state by those of another... Permitting the flag state to authorize boarding by a foreign vessel in no way interferes with this policy; indeed, it can only further the recognition in Article 6 of the flag state’s ability to exercise authority over its vessels.¹¹⁰

The right of states to formulate specific agreements to permit the boarding and possible seizure of vessels has been accorded in response to efforts to suppress certain criminal acts. An early example was when the United States entered into a treaty with the United Kingdom in its efforts to prevent the importation of liquor into its territory during the Prohibition era.¹¹¹ More recently, states have established boarding procedures in cooperative efforts to deal with unlawful fishing,¹¹² migrant smuggling,¹¹³ and the illicit trafficking in narcotic drugs and

conferred by treaty . . .” UNCLOS, *supra* note 21, art. 110(1).

109. Article 6(1) reads: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.” High Seas Convention, *supra* note 35, art. 6(1).

110. *United States v. Green*, 671 F.2d 46, 51 (1982) (footnotes omitted).

111. Convention Between the United Kingdom and the United States of America Respecting the Regulation of the Liquor Traffic, U.S.-U.K., Jan. 23, 1924, 22 U.K.T.S. 1924, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1924/18.html>; see also John Siddle, *Anglo-American Co Operation in the Suppression of Drug Smuggling*, 31 INT’L & COMP. L.Q. 726 (1982).

112. See, e.g., Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 21(1), Dec. 4, 1995, 34 I.L.M. 1542, U.N. GAOR, 6th Sess., U.N. Doc. A/CONF.164/37, available at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm [hereinafter “Fish Stocks Agreement”]. Flag States are obliged to undertake a range of actions to ensure that their national vessels comply with regional conservation and management measures, and, if a member of a regional organization, have certain rights of inspection over other members, as well as non-members where those non-members are party to the Fish Stocks Agreement. *Id.*, arts. 21-22. The novelty of an “inspecting State” regime has been commented on as follows:

This is one of the most interesting and controversial provisions in the [Fish Stocks Agreement]. It creates a new regime, moving away from the principle of exclusive flag state jurisdiction over vessels on the high seas, by introducing a

psychotropic substances.¹¹⁴ The latter is examined in more detail in this Part, both by way of example of how states have crafted additional bases for the right of visit and because of the influence these boarding provisions provided in the formulation of the ship-boarding procedure adopted in the 2005 Protocol.

UNCLOS requires states parties to cooperate in their efforts to suppress the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas.¹¹⁵ There is no specific right granted to warships in UNCLOS to visit, board and seize a vessel if there is a reasonable suspicion that a vessel is engaged in this illicit trade.¹¹⁶ Instead, all that is anticipated is that the flag state may request the assistance of other states,¹¹⁷ rather than another state initiating action or undertaking more precise measures with a flag state that possibly has vessels involved in drug trafficking on the high seas.¹¹⁸

The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances¹¹⁹ built on the general requirement under UNCLOS to cooperate in the suppression of illicit drug trafficking on the high seas by allowing the interception of a ship suspected of illicit trafficking by a state other than the flag state.¹²⁰ Suggestions that there should be consideration of arrangements for law enforcement authorities to board vessels flying foreign flags were initially considered “inappropriate” and best left to bilateral and regional arrangements.¹²¹ The Vienna Convention did not ultimately provide a general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking. Instead, Article 17 sets up a procedure whereby a state party may request permission to board a vessel of another state party when the ship is outside the

new legal concept in the law of the sea, namely, ‘the inspecting State’.

Peter Orebeck, Ketill Sigurjonsson & Ted L. McDorman, *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement* 13 INT'L J. MARINE & COASTAL L. 119, 131 (1998).

113. See Protocol to the UN Convention against Transnational Organized Crime, Dec. 12, 2000, U.N. GAOR 55th Sess., UN Doc. A/RES/55/25, Annex III (2001) (not in force) available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf. See also IMO Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea, IMO Circular, MSC/Circ.896, Mar. 4, 1999, Annex.

114. UNCLOS, *supra*, note 21, art. 108.

115. *Id.* art. 108(1).

116. The existence of a customary international law right was denied by Italy’s highest court in 1992. See Erik Franckx, *Pacta Tertius and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, 8 Tul. J. Int'l & Comp. L. 49, 68 (2000).

117. UNCLOS, *supra* note 21, art. 108(2).

118. William C. Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 15 MAR. POL'Y 183, 185 (1991) [hereinafter Gilmore, 1988 UN Convention].

119. Vienna Convention for the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, UN Doc. E/CONF.82/15, 28 I.L.M. 497 (1989), entered into force Nov. 11, 1990 [hereinafter Vienna Convention].

120. Prescriptive jurisdiction is established under Article 4 of the Vienna Convention. *Id.* art. 4.

121. See Gilmore, 1988 UN Convention, *supra* note 120, at 185 (referring to the response of the relevant expert group involved in drafting the Vienna Convention to a Canadian proposal).

territorial sea of any state.¹²² Authorization may be afforded on an ad hoc basis, or by means of separate agreements or arrangements otherwise reached between the states parties.¹²³

Certain protections are also accorded to the flag state within the Vienna Convention, in recognition of its preeminent position on the high seas. A flag state is permitted to subject its authorization to conditions to be mutually agreed between it and the requesting party.¹²⁴ Moreover, Article 17 does not set any precise timeframe for the authorization by the flag state, but simply requires a party to “respond expeditiously to a request from another party” regarding the nationality of a vessel and authority to board.¹²⁵

In response to illicit drug trafficking into its territory, the United States has pursued a range of legal strategies, both within its domestic law,¹²⁶ and in cooperation with other states.¹²⁷ The United States and the United Kingdom entered into a bilateral agreement in 1981 to permit the interdiction of British-flag vessels in designated areas of the Caribbean, Gulf of Mexico, and Atlantic Ocean when those vessels were suspected of trafficking in drugs.¹²⁸ Reciprocal rights are not accorded to the United Kingdom in relation to any United States vessel. “Its provisions are designed solely to facilitate the effective enforcement of US law subject to a number of safeguards for the UK.”¹²⁹ At the time of its adoption, the Exchange of Notes was described as a “significant departure from the customary rule that on the high seas jurisdiction follows the flag.”¹³⁰ The United Kingdom further emphasized that the agreement was not to be regarded as a precedent for the conclusion of any further agreement affecting British vessels on the high seas.¹³¹

Through this treaty, consent to the visit, search and seizure of the vessel is given in advance and so no further authorization is needed at the point that a vessel wishes to conduct a boarding.¹³² A boarding by the United States Coast Guard

122. Vienna Convention, *supra* note 119.

123. *Id.* 17(9).

124. *Id.* 17(6).

125. *Id.* art. 17(7).

126. *See* Siddle, *supra* note 111, at 730-32.

127. One example is a “shiprider” agreement between the United States and Trinidad and Tobago where law enforcement officers of one state right on law enforcement vessels of the other. *See* CHURCHILL & LOWE, *supra* note 22, at 220, and n. 43.

128. Great Britain and Northern Ireland: Narcotic Drugs: Interdiction of Vessels, Exchange of Notes concluded Nov. 13, 1981, 33 U.S.T. 4224; 1981 U.S.T. LEXIS 91 [hereinafter Exchange of Notes].

129. William C. Gilmore, *Narcotics interdiction at sea: UK-US cooperation*, 13 MAR. POL’Y 218, 222 (1989) [hereinafter Gilmore, *UK-US cooperation*].

130. Siddle, *supra* note 111, at 726. *See also* Gilmore, *UK-US cooperation*, *supra* note 129, at 226 (referring to a statement of the then Attorney General of the United Kingdom that the agreement was “quite a compromise of important principles”).

131. *See* Siddle, *supra* note 111, at 739 (referring to statements made in the UK Parliament, and in the letter accompanying the agreement). *See also* Gilmore, *UK-US cooperation*, *supra* note 129, at 226.

132. The Exchange of Notes provides that the United Kingdom “will not object to the boarding by the authorities of the United States” Exchange of Notes, *supra* note 128, art. 1.

would only be justified if there was a reasonable belief that the vessel had on board a cargo of drugs for importation into the United States.¹³³ Upon boarding, the United States Coast Guard was required to take necessary steps to establish the place of registration of the vessel, and if these steps suggested that a drug trafficking offense under United States law was being committed, could proceed to search the vessel and then seize it and take it to a United States port.¹³⁴ In this situation, the United Kingdom did reserve its right to object to the continued exercise of United States jurisdiction and could thereby forestall forfeiture proceedings.¹³⁵ Furthermore, the United Kingdom reserved the right to object to the exercise of jurisdiction over any of its nationals who may have been arrested at the time of the seizure of the vessel, and in which case the United States would be required to release those nationals.¹³⁶

Another separate agreement that contemplates ship boarding in relation to drug trafficking is the 1995 Council of Europe Agreement on Illicit Traffic by Sea.¹³⁷ The European Agreement has been described as "intimately connected" with the Vienna Convention, and any proposals during negotiations that were contrary to the letter or spirit of the Vienna Convention were not acceptable.¹³⁸ Article 6 of the European Agreement retained the need for flag state authorization prior to the boarding of a ship by another state party.¹³⁹ Proposals relating to the treaty itself affording consent to a boarding by states parties, or that tacit consent could be established when a flag state failed to respond to a request were rejected.¹⁴⁰ The European Agreement does, however, permit either the state conducting the boarding or the flag state then to prosecute any offenders, with the flag state being accorded preference in such a situation of concurrent jurisdiction.¹⁴¹

With each of these agreements, the efforts to establish ship-boarding procedures have been faced with the entrenched construct of the freedom of the high seas and the paramountcy of flag state control over its vessels on the high

133. *Id.* art. 1.

134. *Id.* art. 2-3.

135. *Id.* art. 4.

136. *Id.* art 5. The situation of other nationals may not be affected by this provision, but the United Kingdom has noted that all persons should be accorded equal treatment and did not deny that the prosecution of nationals of other states would be of primary concern to their state of nationality. Siddle, *supra* note 111, at 743 (referring to the United Kingdom note accompanying the agreement).

137. Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Jan. 31, 1995, E.T.S. 156 [hereinafter European Agreement].

138. William C. Gilmore, *Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement*, 20 MAR. POL'Y 3, 4 (1996) [hereinafter Gilmore, *Europe Agreement*]. The link between the agreements is reinforced by the fact that only states party to the Vienna Convention could also become parties to the European Agreement. See European Agreement, *supra* note 137, art 27(1).

139. See European Agreement, *supra* note 137, art 6.

140. Gilmore, *Europe Agreement*, *supra* note 138, at 7. Gilmore does note that some of the negotiating parties were willing to permit a more liberal approach to boarding than was enshrined in Article 6 and so predicted the possibility of further bilateral agreements. *Id.*

141. European Agreement, *supra* note 137, arts 3, 10, and 14.

seas. The derogations from the traditional paradigm to deal with the illicit trade in drugs have involved precise strictures as to when the right of visit may occur, and what safeguards are to be afforded to the foreign-flagged vessel in these instances. What might have been considered a common interest in reducing unlawful trafficking in narcotic drugs and psychotropic substances, was superseded by what was perceived as a greater common interest in adhering to the principle of *mare liberum*.

V. PRESSURE ON THE PARADIGM: SECURITY INTERESTS AND THE RIGHT OF VISIT

The traditional paradigm whereby the high seas are open to all users and states may only exercise authority over foreign vessels in limited circumstances renders threats to maritime security more acute. These threats include terrorists using a small boat as a weapon against a larger ship; terrorists seizing a vessel and destroying it to wreak havoc at ports or in straits; vessels being used to ship terrorists and their weapons and supplies to destinations around the globe.¹⁴² Even beyond the efforts of these non-state actors, some states could be involved in shipping conventional arms or weapons of mass destruction for use by terrorists.¹⁴³

The right of visit during times of armed conflict is more extensive under the laws of naval warfare compared to the limited grounds recognized in Article 110 of UNCLOS. As a general matter, enemy and neutral merchant vessels are exempted from attack during a time of armed conflict.¹⁴⁴ However, the laws of naval warfare permit a warship to exercise the right of visit and search of a merchant vessel flying a neutral flag if it is suspected that the vessel in fact belongs to the enemy, or if the vessel is outside neutral waters and subject to capture.¹⁴⁵ The right to search and visit neutral merchant vessels is premised on the need to prevent the possible passage of military contraband to the enemy.¹⁴⁶ Given that interference with neutral shipping may constitute a use of force, the extent of interference allowed depends on the defensive necessity of the belligerent.¹⁴⁷ A belligerent commander may also subject enemy merchant ships to visit and search, which may result in the seizure of the vessel as prize, and possibly its destruction.¹⁴⁸

142. "It has been reported that al Qaeda owns or controls about 15 cargo ships that could be used as floating bombs against cruise ships and other high interest vessels, or to smuggle explosives, chemical or biological weapons, such as a radioactive dirty bomb into a US port, or to transport al Qaeda members into a third country." Roach, *supra* note 98, at 42.

143. *Id.*

144. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES* 102-03 (2004).

145. UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 365-66 (2004); DINSTEIN, *supra* note 144, at 217. An exception exists when the merchant vessel is bound for a neutral port and is under convoy of accompanying neutral warships. *MANUAL OF THE LAW OF ARMED CONFLICT*, at 366. *See also* DINSTEIN, *supra* note 144, at 104.

146. HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 302 (1992).

147. *Id.*, at 304.

148. LESLIE C. GREEN, *CONTEMPORARY LAW OF ARMED CONFLICT* 163 (1993); DINSTEIN, *supra* note 144, at 215-16.

Although van Dyke takes the view that “the relationship between the law of the sea and the laws of armed conflict has always been fuzzy”,¹⁴⁹ it seems that the so-called “war on terror” does not trigger this body of law.¹⁵⁰ A “right of stop and inspect”, which is distinguished from the right of visit, is used to refer to actions taken to enforce United Nations sanctions as part of maritime interception operations.¹⁵¹ The Security Council has authorized such interdictions under Chapter VII of the UN Charter in relation to the 1991 Gulf War and the action in Afghanistan in 2001,¹⁵² as well as in connection with the 1991-1993 war in Yugoslavia, the 1993-94 conflict in Haiti, and the 1997 civil war in Sierra Leone.¹⁵³

Reference to the right of self-defense has also been reasserted as a legal justification for the boarding of foreign vessels on the high seas.¹⁵⁴ After

149. Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL'Y 107, 121 (2005). It has been suggested that UNCLOS now replaces many of the rights and responsibilities drawn from the laws of naval warfare and that those laws are generally no longer valid due to the prohibition on the use of force in the UN Charter. See A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 111, 130-133 (Horace B. Robertson ed., 1991). Alternatively, Astley and Schmitt consider that the law of the sea is mostly consistent with the laws of war, particularly those rules relating to neutrality. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 AIR FORCE L. REV. 119, 138 (1997) (“the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict”). Finally, it has been argued that UNCLOS was envisaged as a treaty for times of peace and is thus not applicable at all during armed conflict. Elmar Rauch, *Military Uses of the Oceans* [1984] 28 JAHRBUCH FÜR INTERNATIONALES RECHT 229, 233 (1985) (“To be sure, the new Convention constitutes part of the law of peace and is not intended to regulate the law of naval warfare.”).

150. In any discussion of the legality of the PSI, for example, the right of visit on the high seas has been addressed under the terms of UNCLOS and not by reference to law of naval warfare. See, e.g., Logan, *supra* note 15; See, e.g., Kaye, *supra* note 15. Cf Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction*, 29 MELB. U. L. REV. 733 (2005) (discussing the PSI in the context of belligerent rights).

151. Astley & Schmitt, *supra* note 149, at 146 (referring to a right to approach and visit as a law enforcement activity).

152. MARK J. VALENCIA, *THE PROLIFERATION SECURITY INITIATIVE: MAKING WAVES IN ASIA* (ADELPHI PAPERS) 34 (2005) (referring to Maritime Interdiction Operation under resolutions relating to Iraq, and the Leadership Interdiction Operation and NATO's Operation Active Endeavour targeting the Taliban and al Qaeda operatives). See also Garmon, *supra* note 70, at 273-74 (referring to interdictions in the search for members of al Qaeda).

153. Jon M. Van Dyke, *Perspective: Balancing Navigational Freedom with Environmental and Security Concerns*, 2003 COLO. J. INT'L ENVTL. L. & POL'Y 19, 25 (2003) (hereinafter Van Dyke, *Perspective*). Resolution 1540, which was adopted in 2002, requires states to prohibit and criminalize the transfer of weapons of mass destruction and delivery states to non-state actors, but does not specifically permit interdiction for these purposes. S.C. Res. 1540, ¶ 2, U.N. Doc. S/RES/1540 (Apr. 27, 2004).

154. Churchill and Lowe point to earlier examples of interference with shipping based on claims to self-defence, but indicate that the response to France's interdictions during the Algerian emergency of 1956-62, and the practice of the United Kingdom in not interfering with French shipments of arms to Argentina during the 1982 Falklands/Malvinas conflict may have represented a shift against this justification for the boarding of foreign vessels on the high seas. CHURCHILL & LOWE, *supra* note 22, at 216-17.

September 11, 2001, the United States began boarding vessels in the Indian Ocean, the Red Sea and the Strait of Hormuz looking for Osama bin Laden and al Qaeda associates.¹⁵⁵ Although consent from masters was generally sought for these inspections, the United States notified the maritime industry that it would compel boarding if the vessel was suspected of transporting terrorist suspects.¹⁵⁶ The specific legal basis for this action was never explicitly articulated, but President Bush generally referred to acts of self-defense in response to the attacks by al Qaeda.¹⁵⁷ United States officials also initially characterized the PSI by reference to the right of self-defense.¹⁵⁸ This position has been soundly criticized by commentators,¹⁵⁹ however, and has not been part of more recent rhetoric on the PSI.

In view of the limitations imposed by the traditional construct of the law of the sea, as well as ambiguities associated with the laws of armed conflict as applicable to current security concerns about terrorist attacks and the proliferation of weapons of mass destruction, states have instituted efforts on the basis of multilateral cooperation, through bilateral agreement, and even unilateral actions, in order to enhance their efforts in ensuring their maritime security. Those examined immediately below are the PSI, the bilateral ship-boarding agreements pursued by the United States, and Australia's establishment of a Maritime Identification System.

A. Proliferation Security Initiative

The PSI was initially conceived as a "collection of interdiction partnerships",¹⁶⁰ among eleven core members, subsequently expanding to fifteen core members,¹⁶¹ as well as receiving the support of another sixty states.¹⁶² In agreeing on a non-binding Statement of Interdiction Principles, the participants committed themselves to establishing "a more coordinated and effective basis through which to impede and stop shipments of [weapons of mass destruction], delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council."¹⁶³

155. Van Dyke, *Perspective*, *supra* note 153, at 25.

156. *Id.* at 25.

157. *Id.*

158. As US Undersecretary of State, John Bolton has referred to the PSI as part of the general right of self-defense allowing for the interdiction of North Korean vessels. *See Garvey*, *supra* note 24, at 134.

159. *See, e.g., Garvey, id.* at 134-36.

160. *Id.* at 129. *See also Logan, supra* note 15, at 255 (referring to the PSI as a "loose alliance").

161. These core members are Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Russia, the UK and the US. In August 2005, the core group was dismantled, particularly because it was not needed once the basic principles of interdiction were established. VALENCIA, *supra* note 152, at 29.

162. *See* UNITED STATES DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE FREQUENTLY ASKED QUESTIONS (FAQS) (May 26, 2005), <http://www.state.gov/t/isn/rls/fs/46839.htm>.

163. Statement of Interdiction Principles, *supra* note 16.

The intention of the PSI is not to create legally binding commitments,¹⁶⁴ but as an alternative, the Statement of Interdiction Principles calls on states to “take specific actions in support of interdiction... to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks.”¹⁶⁵ From a policy perspective, the PSI is described as “a multilateral intelligence-sharing project incorporating cooperative actions and coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction.”¹⁶⁶

As the Statement of Interdiction Principles intends participants to take action “to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks,”¹⁶⁷ the PSI is immediately constrained by the traditional requirements of exclusive flag state control and the freedom of the high seas. In recognition of the greater authority that states have over their ports, internal waters and territorial seas, the participant states are committed to taking appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern in these maritime areas.¹⁶⁸ These actions may involve stopping and/or searching vessels in internal waters, territorial seas or contiguous zones (where states have declared the latter), or enforcing conditions on vessels that enter or leave ports, internal waters or territorial seas that require the boarding, searching and seizure of cargos of proliferation concern.¹⁶⁹ While states have sovereignty over territorial seas, there is no authority to disrupt the passage of vessels through those waters unless the passage is prejudicial to the peace, good order or security of the coastal state; in other words, if it is not innocent passage.¹⁷⁰ Commentators have raised doubts that the mere passage of weapons of mass destruction through the territorial seas is a violation of the right of innocent passage.¹⁷¹ Garvey, for example, argues that the

164. Ted L. McDorman, *From the Desk of the Editor-in-Chief: An Information Note on the Proliferation Security Initiative (PSI)*, 36 OCEAN DEV. & INT'L L. 381, 382 (2005). The level of participation required has been vividly described by Joseph:

One can liken PSI and its day-to-day execution to that of a deputized posse: the United States and a group of other like-minded states, using existing legal powers, have organized to hunt down illicit shipments of dangerous weapons.

On any particular day, some members of that posse may choose not to ride out.

Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY, June 2004, at 8. See also Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, 28 WASH. Q. 129, 130 (2005).

165. Statement of Interdiction Principles, *supra* note 16, at Principle 4.

166. Joseph, *supra* note 164, at 6.

167. Statement of Interdiction Principles, *supra* note 16, at Principle 4.

168. *Id.* at Principle 4(d).

169. *Id.*

170. UNCLOS, *supra* note 21, at art. 19(1) (“Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”)

171. Andrew Prosser & Herbert Scoville, Jr., *The Proliferation Security Initiative in Perspective*, 3 (June 16, 2004), <http://www.cdi.org/pdfs/psi.pdf>. See also Logan, *supra* note 15, at 259 (2005) (“it is not the mere transport of WMD that threatens a state’s sovereignty, but the use of these weapons against it”); Joyner, *supra* note 48, at 542 (“with few exceptions there is very little hard or formal international law not only on the question of transfers of nuclear, chemical, and biological materials,

right of innocent passage “is not offended by a shipment of [weapons of mass destruction] material that does not constitute a threat to the coastal state, which of course would describe the typical situation, in that the threat presented by [weapons of mass destruction] material is determined by the intended use at the point of destination, not transit.”¹⁷²

Participant states are committed to taking action to board and search any vessel flying their own flag when those vessels are either in their territorial seas or internal waters, or when those vessels are outside the territorial waters of another state.¹⁷³ Even where vessels are flagged to the participant states, then these states commit to giving serious consideration as to whether other states should be permitted to board and search those vessels in pursuit of the PSI objectives.¹⁷⁴ The ongoing deference to the flag state’s control affirms that the PSI is not intended to create a new right of visit on the high seas. The problem therefore faced is that it remains unlikely that vessels flagged to states of concern will agree to their ships being boarded on the high seas. North Korea, for example, has strenuously objected to the PSI, demanding that the Bush administration explicitly renounce any intent to confront North Korea economically or militarily.¹⁷⁵ North Korea has also asserted that any interdiction of its vessels, or a blockade, would be viewed as an act of war, and thereby abrogates the Armistice Agreement that ended the Korean War.¹⁷⁶ As Lehrman correctly notes, “principles of international maritime law may frustrate the implementation of the PSI in particular contexts and situations.”¹⁷⁷

B. Bilateral Ship-Boarding Agreements

Adhering more closely to the traditional paradigm, the United States has sought to enter into ship-boarding agreements with states holding the largest shipping registries, and hence the greatest number of flag vessels, in order to establish authority to board vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. In pursuit of this policy, the United States has signed ship-boarding agreements with Belize, Croatia, Cyprus, Liberia, Marshall Islands and Panama.¹⁷⁸ According to

agents, and compounds and the associated myriad dual-use items and technologies that could be used to turn those materials into weaponized devices, but even more fundamentally on the question of the possession of such technologies.”).

172. Garvey, *supra* note 24, at 131. Equally, it has been observed that UNCLOS does not foreclose such an interpretation. See Lehrman, *supra* note 49, at 232. See also Kaye, *supra* note 15, at 214 (“Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed.”).

173. Statement of Interdiction Principles, *supra* note 16, at Principle 4(b).

174. *Id.*, Principle 4(c).

175. Mark J. Valencia, *Unsettling Asia for Security's Sake*, FAR E. ECON. REV., Mar. 1, 2005, at 55, 56.

176. *Id.* at 56. See also VALENCIA, *supra* note 152, at 61.

177. Lehrman, *supra* note 49, at 228.

178. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass

the United States, the “combination of states with which we have signed bilateral ship boarding agreements, plus the commitments made by other Proliferation Security Initiative partners under the Statement of Interdiction Principles, translates into more than 60 percent of the global commercial shipping fleet dead weight tonnage now being subject to rapid action consent procedures for boarding, search, and seizure.”¹⁷⁹

A significant aspect of these bilateral treaties is that a flag state has a limited time to respond to a request for authority to board a suspect vessel.¹⁸⁰ The time allowed for a response is two hours for Belize, Liberia and Panama; and four hours for Cyprus and the Marshall Islands.¹⁸¹ If there is no response within that time, the

Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Liber., Feb. 11, 2004, KAV 7065; Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, U.S.-Pan., May 12, 2004, <http://www.state.gov/t/isn/trty/32858.htm>; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Marsh. Is., Aug. 13, 2004, KAV 7064; Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, U.S.-Croat., June 1, 2005, <http://www.state.gov/t/isn/trty/47086.htm>; Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Cyprus, July 25, 2005, <http://www.state.gov/t/isn/trty/50274.htm>; Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Belize, Aug. 4, 2005, <http://www.state.gov/t/isn/trty/50809.htm>. The significance of these agreements has been noted by Joseph: “More than half of the world’s shipping, measures on the basis of gross tonnage, now is registered in six states: Liberia, Panama, the Bahamas, Malta, Cyprus, and the Marshall Islands.” Joseph, *supra* note 164, at 12.

179. Media Note, Office of the Spokesman, The United States and Belize Proliferation Security Initiative Ship Boarding Agreement (Aug. 4, 2005), *available at* <http://www.state.gov/t/pa/prs/ps/2005/50787.htm>

180. See Garvey, *supra* note 24, at 133.

181. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(b); Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, *supra* note 178, at art. XXX; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(b); Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 780, at art. 4, ¶ 3(c); Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of

requesting country is deemed to have conferred such authority (a notable exception to this is the US-Croatia ship-boarding agreement).¹⁸² This system of implied consent has been subject to criticism, as it reflects the unequal bargaining power of the United States vis-à-vis Belize, Liberia, Panama, Cyprus and the Marshall Islands. Garvey notes: “Two hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved.”¹⁸³ At best, this notification period could be described as “window-dressing” for sovereign equality.¹⁸⁴

These ship-boarding agreements are consistent with “shiprider agreements” that the United States has entered into with other states to permit boarding and searching of vessels flagged to those other states in order to curb drug-trafficking.¹⁸⁵ These treaties are “typically bilateral agreements that provide a mechanism, customized to the conditions and capabilities of the parties to the agreement, whereby law enforcement officials of either party may receive preauthorization to board and search flag vessels of the other state for the purpose of curbing the illicit traffic in drugs.”¹⁸⁶ As such, the new bilateral ship-boarding agreements that are specifically directed at countering terrorist threats constitute “powers conferred by treaty” under Article 110 of UNCLOS to permit the right of visit that would not otherwise be countenanced under the freedoms of the high seas. The bilateral agreements permitting a right of visit then provided another model for ship-boarding on which the United States could draw in coordinating the negotiations on the 2005 Protocol. However, as will be discussed below, once the

Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(e)(1).

182. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(d); Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, *supra* note 178, at art. XXX; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(d); Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 4; Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(e)(2).

183. Garvey, *supra* note 24, at 133. Only the treaty with Belize explicitly allows for the possibility of seeking additional time to reply.

184. *Id.*, at 142, n. 66 (2005). Guilfoyle argues, on the other hand, that “this may represent a means for a small State to externalize some of its security or reputation costs.” Guilfoyle, *supra* note 83, at 23.

185. Lehrman, *supra* note 49, at 228, 236.

186. *Id.* at 228, 236-37. See also *supra* Part IV.

United States was placed in a multilateral negotiating context, its ability to trump the traditional paradigm was considerably undermined.

C. Australian Maritime Identification System

In contrast to the multilateral endeavors of the PSI and the bilateral agreements initiated by the United States, the Australian Maritime Identification System (AMIS) was a unilateral declaration intended to enhance the maritime security of Australia.¹⁸⁷ The AMIS was instituted to enable a Joint Command of the Australian Defence Force and the Australian Customs Service to identify vessels intending to enter Australian ports, as well as all vessels entering Australia's Exclusive Economic Zone.¹⁸⁸ These vessels are "to provide comprehensive information such as ship, identity, crew, cargo, location, course, speed and intended port of arrival."¹⁸⁹ The provision of this information is intended to enhance the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities from terrorism.¹⁹⁰ The AMIS extends 1,000 nautical miles from Australia's coast and thereby encompasses ocean areas that would have otherwise been high seas.¹⁹¹

Australia's right to request this information from vessels seeking to enter its ports does not run contrary to the freedom of navigation, but is consistent with its rights under recent changes to the Safety of Life at Sea Convention (SOLAS),¹⁹² and the adoption of the International Ship and Port Facility Security Code (ISPS Code).¹⁹³ In addition to these rights under SOLAS, Australia would still be entitled to seek this identification information from vessels seeking to enter its ports under UNCLOS or customary international law, as merely requesting

187. Australia had announced at the end of 2004 that it would institute a 1,000 nautical mile "Maritime Identification Zone" as part of Australia's efforts to strengthen its offshore maritime security. Press Release, Media Release of the Prime Minister of Austl., John Howard, Strengthening Offshore Maritime Security (Dec. 14, 2004), available at http://www.pm.gov.au/news/media_releases/media_Release1173.html [hereinafter PM Media Release]. After Australia's neighbors voiced concern over the reach of this maritime claim, the policy was reformulated as the AMIS. No official announcement of the change appears to have been made, but government officials began referring to a "system" rather than a "zone". The 1,000 nautical mile reach does not appear to have been changed. See DEPARTMENT OF TRANSPORT AND REGIONAL SERVICES BACKGROUND BRIEFING PAPER, STRENGTHENING AUSTRALIA'S OFFSHORE MARITIME SECURITY (2005), available at http://www.infrastructure.gov.au/transport/security/maritime/pdf/Strengthening_offshore.pdf [hereinafter DOTARS Briefing Paper]; Deputy Secretary Andrew Metcalfe, *Advancing the Coordination of National Security in Australia* (Feb. 21, 2005), available at http://www.pmc.gov.au/speeches/metcalfe/coordination_national_security_2005-02-21.cfm.

188. PM Media Release, *supra* note 187.

189. *Id.*

190. *Id.*

191. *Id.*

192. SOLAS, *supra* note 6.

193. See IMO adopts comprehensive maritime security measures, Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 9-13 Dec 2002, available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689. The ISPS Code is mandatory for all states parties to SOLAS. Australia has implemented the ISPS Code through the Maritime Security Act, adopted on 1 July 2004.

information would not constitute an unreasonable infringement on the freedom of navigation.¹⁹⁴

Beyond simply requesting information, the Australian Prime Minister announced that the Australian Defense Force would “take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities.”¹⁹⁵ However, any efforts at interdiction to enforce the information requirement on the high seas would be unlawful.¹⁹⁶ There is no exception to flag state authority on the high seas that would permit the right of visit to enforce a coastal state requirement to provide information in pursuit of that state’s maritime security policies. Even under SOLAS, if a master of a vessel fails to comply with a request for information, the only consequence is that the vessel may not be allowed to enter the port of that particular state.¹⁹⁷ For enforcement under the ISPS Code, the emphasis is for port states to expel the ship from port, refuse entry to port or curtail the operations of the ship (such as delaying the vessel in port while further security measures are undertaken).¹⁹⁸ The developments under SOLAS in relation to maritime security do not provide any new treaty basis to exercise the right of visit.

Any attempt by Australia to secure identification information from all vessels, except day recreational vessels, that enter its EEZ would also likely constitute an unlawful assertion of both prescriptive and enforcement jurisdiction.¹⁹⁹ Australia does not have any special entitlement by virtue of its position as a coastal state to require vessels to provide security-related information.²⁰⁰ As a coastal state, Australia has sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil”,²⁰¹ as well as “with regard to other activities for the economic exploitation and exploration of the zone.”²⁰² Jurisdiction is then accorded to Australia for the establishment and use of artificial islands, installations and structures, marine scientific research, and

194. Natalie Klein, *Legal Implications of Australia’s Maritime Identification System*, 55 INT’L. & COMP. L.Q. 337, 343-45 (2006).

195. PM Media Release, *supra* note 187.

196. *See Klein, supra* note 194, at 345-50.

197. IMO, *Guidance to Masters, Companies and Duly Authorized Officers on the Requirements Relating to the Submission of Security-Related Information Prior to the Entry of a Ship into Port*, MSC/Circ.1130, Dec. 14, 2004, annex, para. 4, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10885/1130.pdf, .

198. *See Id.*

199. *See Klein, supra* note 194, at 352-57.

200. This situation will change when a new Regulation on Long Range Identification and Tracking, which is included in Chapter V of the SOLAS Treaty comes into force at the end of 2008. This Regulation permits coastal states to request information as to a ship’s identity, location and date and time of the position when those vessels are 1,000 nautical miles from the coast. *See IMO, Long range identification and tracking (LRIT)*, available at http://194.196.162.45/Safety/mainframe.asp?topic_id=905.

201. UNCLOS, *supra* note 21, art. 56(1)(a).

202. *Id.* Art. 56(1)(c) also acknowledges that other provisions in UNCLOS may accord further rights to the coastal state in the EEZ.

the protection and preservation of the marine environment.²⁰³ Notably, the coastal-state rights are for the promotion and protection of exclusive economic interests, rather than security interests. It can equally be observed that the enforcement powers accorded to Australia under UNCLOS are carefully defined so as to minimize the likelihood of coastal states interfering unnecessarily with navigation.²⁰⁴

Given that coastal states and third states both have continuing rights to exercise high seas freedoms in the EEZ, Australia may consider that seeking identification information from all vessels entering its zone is consistent with such rights. If there is a clash of interests between the exercise of the freedoms of the high seas, a due regard requirement is also imposed for the EEZ.²⁰⁵ In this respect, the mutual due regard requirement may be infringed by Australia in demanding extensive identification information from all vessels, particularly when those vessels are merely in transit and do not intend to stop in an Australian port.²⁰⁶ “[T]he comprehensive nature of Australia’s information requirements may indicate that it has insufficient regard for the freedom of navigation.”²⁰⁷

Faced with the strictures of the traditional paradigm, the AMIS is better justified if Australia is able to rely on the current security imperatives, which did not exist at the time of the adoption of UNCLOS, requiring that ocean traffic be more carefully monitored as part of a counter-terrorism strategy.²⁰⁸ Australia could then argue that the identification information falls into a category of unattributed rights in the EEZ, as anticipated in Article 59 of the Convention.²⁰⁹ In this situation, when regard may be had to all relevant circumstances and community interests in ensuring maritime security, Australia could well be justified in instituting the AMIS in respect of all vessels in its EEZ.²¹⁰

D. Conclusion

Although the risks posed by and possible harm inflicted from terrorist attacks against maritime interests are apparent and a common interest in addressing these

203. *Id.* at art. 56(1)(b).

204. Horace Robertson, *Navigation in the Exclusive Economic Zone*, 24 VA. J. INT'L L. 865, 902 (1984). See also Klein, *supra* note 194, at 356-57.

205. This requirement is incorporated into article 58, paragraph 3, of UNCLOS, *supra* note 21, whereby “[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State.” Equally, under article 56(2), coastal states are to “have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention”.

206. Klein, *supra* note 194, at 358.

207. *Id.* at 360.

208. *Id.* at 359-60.

209. Article 59, *supra* note 21, reads: “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole.”

210. Klein, *supra* note 194, at 360.

threats clearly exists, states have struggled to take appropriate action due to the preeminence accorded to high seas freedoms and flag state control. It has not been generally accepted that the laws of armed conflict, as well as the right of self-defense, provide additional means to visit and search vessels, unless a particular right has been sanctioned by the United Nations Security Council.

Faced with these inadequacies in the existing legal structure, states have opted for alternative processes that may afford the necessary authority to take the desired steps to support the shared interest in enhancing maritime security. The bilateral ship-boarding agreements initiated by the United States with the major shipping registry states fit within the contours of Article 110, as a right of visit has been granted to the United States as a “power[] conferred by treaty”. These agreements are inherently limited given their bilateral status; only the United States or its bilateral partner has the right of visit, and so no ally of the United States automatically has the same right to do so in an area where a United States warship is not present.²¹¹ A greater multilateral effort has been undertaken through the PSI, but this regime has also been constructed in such a way as to defer to the traditional paradigm and not encroach on inclusive interests. While the PSI could arguably form the basis of a new customary rule of international law, this likelihood is diminished by the deliberate efforts of participant states to cast the PSI as legally non-binding, by the lack of clarity associated with the articulated Principles, and by the deference accorded to the traditional rules. The unilateral effort of Australia in instituting the AMIS as an exclusive claim over ocean space triggered considerable concern among its neighbors and within the region,²¹² and Australia has subsequently provided assurances that it will take no steps that would run contrary to existing rules of international law.²¹³ It thus becomes evident that states desirous of countering security threats have found that their efforts are curtailed by the traditional paradigm, partially because of their own preference not to destabilize this construct but also because of the resistance from other states to permit further derogation.

VI. THE RIGHT OF VISIT UNDER THE 2005 PROTOCOL

Revising the 1988 Convention presented another avenue to bring rules relating to the freedom of navigation and flag state authority into line with current security concerns.²¹⁴ The 1988 Convention was adopted with every intention of

211. Under the bilateral treaties with Liberia, the Marshall Islands and Panama, the possibility does exist for the United States to seek permission for third states. Any permission of course remains at the discretion of the flag state in this instance. See Natalie Klein, *Legal Limitations on Ensuring Australia's Maritime Security*, 7 MEL. J. INT'L L. 306, 330-32 (2006) (discussing Australia's rights under these bilateral treaties).

212. Klein, *supra* note 194, at 338-39.

213. Michelle Wiese Bockmann, *Maritime Zone Plans Scrapped*, THE AUSTRALIAN, July 11, 2005, available at www.theaustralian.news.com.au/common/story_page/0,5744,15887094%25E2702,00.html (referring to a statement of the Australian Customs Service).

214. “[A]s a matter of general approach to international regulations, a review of the SUA legal regime seems to be a natural course of action in order for states parties to be able to update such regulations in the light of current events on matters of maritime security.” Jesus, *supra* note 60, at 390.

preserving the freedom of the high seas and demonstrating traditional deference to the powers of the flag state over its vessels on the high seas. Article 9 of that treaty explicitly states: "Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of states to exercise investigative or enforcement jurisdiction on board ships not flying their flag."²¹⁵ The inclusion of a new procedure for ship-boarding in the 2005 Protocol reverses this approach, and creates a new treaty power to exercise the right of visit. However, concerns about the impact of a new ship-boarding procedure on the freedom of navigation were apparent during the drafting of the 2005 Protocol. The rhetoric of the negotiations reflected the traditional paradigm of the freedom of the high seas and exclusive flag state control. For example, Mexico submitted:

In the context of reviewing this international treaty and its protocol the key primary right is freedom of navigation, universally accepted under articles 87 and 89 of UNCLOS. ... It is therefore vitally important that in stipulating an exception to the freedom of navigation the SUA Convention and its Protocol leave no room for doubt as to its application and thus no scope for abuse of authority.²¹⁶

A more nuanced approach was proposed by President Jesus, writing extra-judicially:

As with everything in life, a balance of interests should be found between the different states. While jurisdiction to board, search, seize and arrest the ship and offenders should be accepted as another exception to the flag state exclusive jurisdiction on the high seas or in territorial waters in exceptional crime circumstances, such jurisdiction extension would have to be balanced with respect for flag state's rights, by adopting safeguard provisions on compulsory conflict resolution, compensation for damage and loss in case of unwarranted exercise of police jurisdiction, and sharing of information with the flag state as to the police action and its results.²¹⁷

This Part analyses the ship-boarding procedure adopted in the 2005 Protocol, as a means of demonstrating the ongoing sway of the traditional paradigm and consequent detriment caused in obtaining the optimal balance of interests in countering threats to maritime security.

A. Procedure for Boarding Ships under the 2005 Protocol

The 2005 Protocol sets out in Article 8*bis* procedures by which states parties may request that flag states of suspect vessels permit boarding outside the

215. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 9, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention].

216. IMO Legal Committee, 88th Sess. Agenda item 3, *Review of SUA Convention and Protocol: Comments and proposals. Submitted by Mexico*, IMO Doc. LEG 88/3/1 (Mar. 19, 2004). This approach resonates with the much earlier position set forth in *Le Louis*: "Nor is it to be argued that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment." *Le Louis*, *supra* note 25.

217. Jesus, *supra* note 60, at 396.

territorial sea of any state. The three possible avenues by which a boarding may occur pay deference to the preeminence of the position of the flag state in its authority over vessels on the high seas.²¹⁸ The first avenue anticipates consent on an *ad hoc* basis. Second, consent is accorded implicitly if prior authorization is notified to the IMO Secretary-General and no response to a request is forthcoming from the flag state after four hours.²¹⁹ Finally, if prior authorization is notified to the Secretary General then consent is again considered implicit but there is no need to wait four hours for permission to visit the suspect vessel. Considerations in developing these procedures included minimizing the possible inconvenience that may be caused to a suspect vessel during its journey while still limiting the circumstances by which that vessel could escape inspection.²²⁰

1. General Requirements for Ship-Boarding

Before detailing the different avenues for securing consent to board set out in Article 8*bis*, common features of the ship-boarding procedures may be noted. In the first instance, Article 8*bis* is premised on the scenario of a state party wishing to board a vessel that either flies the flag or displays marks of registry of another state party. Consistent with traditional rules of treaty law, the terms of the 2005 Protocol only apply to those states parties to it, and do not create rights vis-à-vis third states.²²¹ The drafting of the 2005 Protocol considered how the nationality of vessels was to be described. A number of delegates supported inclusion of reference to a ship “claiming its nationality”, but the compromise text settled on was “displaying marks or registry”,²²² which provided greater precision than a claim to nationality.

218. In its first articulation, the United States proposed two methods by which a flag state could authorize the boarding of one of its vessels outside of territorial waters: “either advance authorization when the enumerated conditions are met, or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours.” *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 9, para. 12. As the paragraph is finally drafted, the precise sequence of decision making is not completely clear and logical given the alternatives for authorizing boarding. It is submitted that an earlier proposed structure would have been preferable in this regard. See IMO Legal Comm. Working Group on the Review of the SUA Convention and Protocol, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, IMO Doc. LEG/SUA/WG.1/2 (June 30, 2004), para. 13 [hereinafter Review Working Group] (which delineates more clearly the alternatives and appropriate sequence of events).

219. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 9, para 12.

220. *Id.*

221. Vienna Convention on the Law of Treaties, art. 34, U.N. Doc. A/CONF. 39/27, May 23, 1969, 8 I.L.M. 679 (“A treaty does not create either obligations or rights for a third State without its consent.”).

222. IMO Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, IMO Doc. LEG/SUA/WG.1/2/6, n. 32 (July 12, 2004).

A ship-boarding may only occur under the 2005 Protocol in relation to a vessel that is outside the territorial sea of any other state.²²³ There is no suggestion in the 2005 Protocol that the boarding provisions will interfere with a coastal state's exercise of sovereignty over its territorial sea. Further, though, there is no explicit reference to the EEZ or the high seas and hence no overt recognition of how the rights of states may vary within these different maritime areas. This issue had proved polemic during the drafting of the Vienna Convention, with negotiating states settling on reference to vessels exercising the freedom of navigation in order to account for both the EEZ and the high seas.²²⁴ In the 2005 Protocol, the only means by which any distinction is acknowledged is in respect of the safeguards to be in place during the boarding, and the requirement that a state party take due account of the need not to interfere with or affect "the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea."²²⁵ It would appear that boarding must therefore take account of the right of coastal states in exercising sovereign rights and jurisdiction in the EEZ so as not to interfere with those rights.

Given that the 2005 Protocol is a treaty concerned with the prevention and suppression of terrorist acts against the safety of maritime navigation, there is a nexus between the rights to a board a vessel and the offenses set forth in the 1988 Convention and expanded in the 2005 Protocol. In setting out the offenses over which states may establish jurisdiction, Article 3 of the 1988 Convention included violence against or destruction of ships; seizure or exercising control over a ship by force or intimidation; and, communication of false information that endangers the safe navigation of the ship.²²⁶ These offenses have been expanded under the 2005 Protocol to address acts such as the use of a ship in a manner that causes death or serious injury or damage; the use against or on a ship, or the discharge from a ship, of any explosive, radioactive material or biological, chemical or nuclear weapon; the transportation of any explosive or radioactive material knowing that it is to be used in a terrorist attack; and, the transportation of biological, chemical and nuclear weapons.²²⁷

For boarding to be authorized under the 2005 Protocol, a requesting state must have "reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence" as set out in Article 3, *3bis*, *3ter* or *3quater* of the 1988 Convention and 2005 Protocol.²²⁸ In the first draft, one of the conditions to authorize boarding was a reasonable suspicion of being involved in an offense, or a reasonable belief that the vessel was a target of one of those offenses.²²⁹ This standard was subsequently

223. 2005 Protocol, *supra* note 2, art. 8bis, para. 5.

224. Gilmore, 1988 UN Convention, at 188-89, *supra* note 118.

225. 2005 Protocol, *supra* note 2, art. 8bis, para. 10(c)(ii).

226. SUA Convention, art. 3, *supra* note 214.

227. 2005 Protocol, *supra* note 2, art. 4, para. 5 (creating Article *3bis* to the 2005 Convention).

228. *Id.* at art. 8bis, para 5.

229. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States (2002)*, *supra* note 9, Annex 1, p. 7.

tightened to refer to “reasonable grounds to believe” that a vessel “has been or is about to be involved in, or the target of, the commission of an offence.”²³⁰ This change was to align the terminology with the standards set out in UNCLOS, the Vienna Convention and the Migrant Smuggling Protocol.²³¹ However, in subsequent negotiations, preference was again expressed for reference to “reasonable grounds to suspect.”²³²

A final common feature for the avenues to permit ship-boarding in the 2005 Protocol is that any request “should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information.”²³³ Notably, there is no requirement expressly imposed on the state requesting permission to board to provide information explaining why it has reasonable grounds to suspect that a ship or person on board a ship is involved in a proscribed act under the 1988 Convention or 2005 Protocol.²³⁴ However, the right of the flag state to impose conditions on its authorization to board or the general reference to “other relevant information” may be enough to warrant the disclosure of evidence related to the suspected offenses if desired by the flag state.

A request may be issued orally, but must be confirmed in writing as soon as possible. It is incumbent on the flag state to acknowledge receipt of any oral or written request immediately.²³⁵ Although not completely clear on the face of the text, it appears that in making the request, the requesting state also seeks

230. IMO Legal Committee, 86th Sess., *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Docs. LEG 86/5 (Feb. 26, 2003) & LEG 86/5/Corr.1 (Mar. 13, 2003), Annex 1, Article 8bis para. 2, p. 6.

231. Referring to Articles 108(2), 17(20) and (3), and 8(1) and (2) of these instruments, respectively. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 229, Annex 1, note xxiii, pp. 22-23.

232. IMO Legal Committee, 87th Sess., Agenda item 5, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Doc. LEG 87/5/1 (Aug. 8, 2003), Annex 1, p. 8; 88th Sess., Agenda item 3, *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Legal Committee, IMO Doc. LEG 88/3 (Feb. 13, 2004), Annex 1 art. 8bis, para. 2, n. 26; *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 27.

233. 2005 Protocol, *supra* note 2, art. 8bis, para. 2.

234. France had made a proposal to this effect but it was not incorporated into the text. See IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Complements to the “Boarding” section, Submitted by France*, IMO Doc. LEG/SUA/WG.1/2/1 (June 30, 2004), art. 8bis, para. 2. See also *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 44 (a proposal that would have required the requesting party to hand over any evidence to the flag state); IMO Legal Committee, 90th Sess., Agenda item 15, *Report of the Legal Committee on the Work of its Ninetieth Session*, IMO Doc. LEG 90/15 (May 9, 2005), para. 66 (referring to a comparable proposal from India but was rejected, with some delegations stating it was already covered by the text of para. 5).

235. 2005 Protocol, *supra* note 2, art. 8bis, para. 2.

confirmation from the flag state as to the claim of nationality of the suspect vessel.²³⁶

2. Available Procedures for Permitting Ship-Boarding under Article 8bis

As set forth above, in authorizing a ship-boarding for the purposes of the 2005 Protocol, states parties may either consent on an *ad hoc* basis, consent implicitly if prior authorization is notified to the Secretary-General and no response to a request is forthcoming after four hours, or consent implicitly if prior authorization is notified to the Secretary General. This structure underlines that permission to board requires express flag state authorization and that tacit and advance authorizations to board are only optional.²³⁷ The agreement reached in the 2005 Protocol in this regard stand in marked contrast to the consent system created under the United States bilateral ship-boarding agreements.²³⁸

When proceeding on an *ad hoc* basis, the requesting state must first await confirmation of nationality from the flag state before seeking authorization to board and take appropriate measures with respect to the suspect ship.²³⁹ States parties must respond to requests pursuant to Article 8bis as expeditiously as possible.²⁴⁰ Ambiguity as to the precise time constraint appears to have been preferred to a specific timeframe.²⁴¹ For example, a proposal to require a decision “as soon as possible and, wherever practicable, within four hours”, consistent with the Council of Europe’s implementation of the Vienna Convention, was not adopted.²⁴² France, in particular, proposed a regime to be put in place in the event

236. *Id.*, at art. 8bis, para. 5(a) (“it shall request, in accordance with paragraphs 1 and 2, that the first Party shall confirm the claim of nationality”).

237. *Review of SUA Convention and Protocol, Draft Amendments to the SUA Convention and Protocol, Submitted by the United States*, IMO Legal Committee, 89th Sess., Agenda item 4, IMO Doc. LEG 89/4/5 (Sep. 15, 2004), para. 12. *See also Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 51 (supporting China’s proposal that a provision specifically stating the need for express authorization be included in the SUA Protocol).

238. *See supra* Part V.B.

239. *See* 2005 Protocol, *supra* note 2, art. 8bis, para. 5(b).

240. Earlier drafts had referred to the need of states parties to respond expeditiously to a request confirming nationality as well as requests for authorization to take appropriate measures with regard to that ship. *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 2, art. 8bis, para. 3. These separate requirements were subsequently replaced by the one general requirement in paragraph 1 of the article. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation’s proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 9.

241. *See Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 47 (“unless a clear time limit was established, legal uncertainty would arise as to what the requesting Party would be entitled to do in the event an answer was not received”). *See also* IMO, Review Working Group, 2nd Sess., Agenda item 2, *Review of the draft Protocol to the Convention for the suppression of unlawful acts against the safety of maritime navigation. 1988 (1988 SUA Convention) [hereinafter Review of draft Protocol]*, Submitted by the Secretariat, IMO Doc. LEG/SUA/WG.2/2/1 (Dec. 3, 2004), Annex, art. 8bis, para. 3(d), n. 23 (“[O]ne delegation proposed the insertion of a new subparagraph (d) that would set out consequences in the event of a request Party’s failure to respond. This proposal was discussed but not accepted by the LEG 89 Formal Working Group.”).

242. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA*

that no response came from the flag state, involving alerts to shipping in the area or decision among states parties.²⁴³ However, “[s]everal delegations stated that the proposal was not needed, since the requesting State had a right to warn other Parties which could be implemented without any specific authorization being conferred by a provision in the protocol.”²⁴⁴

China considered that the “generic requirement” to respond to a request as expeditiously as possible was sufficient and avoided unreasonable and impracticable difficulties in specifying a time limit.²⁴⁵ In agreement with China’s views, a majority of delegations considered that the imposition of a time limit was unnecessary as states would not ignore their obligations under the 1988 Convention, or that such a limit was “too constraining, impracticable (especially if different time zones were involved) and served no real purpose.”²⁴⁶ It was further feared that giving a warning to states parties if there was no response would permit arbitrary judgment on the part of the requesting state and may well be “intimidating and counterproductive to the aims of the Protocol.”²⁴⁷ Given these views, it is apparent that a lack of response was not intended to be construed as an authorization to board but that deference to flag state authority prevailed.

The flag state is given four options under the 2005 Protocol in deciding on how the boarding should proceed. It may authorize the boarding by the requesting state either on its own or with officials of the flag state, and, in either instance, subject the boarding to any conditions relating to responsibility for and the extent of measures to be taken.²⁴⁸ Alternatively, the flag state may conduct the boarding and search the suspect vessel itself, or decline to authorize a boarding and

Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States, supra note 221, n. 40 (referring to the Council of Europe 1995 Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, which provides: “The flag State shall immediately acknowledge receipt of a request for authorization under Article 6, and shall communicate a decision thereon as soon as possible, and wherever practicable, within four hours of receipt of the request”).

243. See IMO Legal Committee, 89th Sess., Agenda item 4, *Review of SUA Convention and Protocol: On 8bis(3): new paragraph (d), Submitted by France*, IMO Doc. LEG 89/WP.3 (Oct. 25, 2004), art. 8bis, para. 3(d); IMO, Review Working Group, 2nd Sess., Agenda item 2, *Review of Draft Protocol: New Article 8bis3(d), Submitted by France*, IMO Doc. LEG/SUA/WG.2/WP.1/Rev.2 (Feb. 2, 2005).

244. IMO, Review Working Group, 2nd Sess., Agenda item 4, *Draft Report of the Working Group*, IMO Doc. LEG/SUA/WG.2/WP.16/Add.1 (Feb. 4, 2005), para. 59. See also *Report of the Working Group*, Review Working Group, 2nd Sess., Agenda item 4, IMO Docs. LEG/SUA/WG.2/4 (Feb. 9, 2005) & LEG/SUA/WG.2/4/Corr.1 (Feb. 24, 2005), paras. 59-60.

245. IMO Legal Committee, 89th Sess., Agenda item 3, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by China*, IMO Doc. LEG 89/4/3 (Sep. 22, 2004), para. 5. See also 90th Sess., Agenda item 4, *Review of SUA Convention and Protocol: Comments and proposals, Submitted by China*, IMO Doc. LEG 90/4/6 (Mar. 18, 2005), para. 3 (advocating the deletion of France’s proposed text on warning shipping if there is no response).

246. *Report of the Legal Committee on the Work of its Eighty-Ninth Session, supra note 5, para. 48.*

247. *Report of the Legal Committee on the Work of its Ninetieth Session, supra note 234, para. 80.*

248. See 2005 Protocol, *supra note 2, art. 8bis, para. 5(c) and 7.*

search.²⁴⁹ What appears to be lacking in this provision is an obligation on the flag state to take measures against one of its vessels when there are reasonable grounds to suspect the involvement of that vessel in the commission of an offense under the 1988 Convention or 2005 Protocol. This possibility of flag state inaction would appear to be a regrettable gap in the 2005 Protocol's enforcement regime.

For *ad hoc* authorizations and boardings, the requesting state must receive express authorization from the flag state in order to proceed with boarding and other measures in respect of a suspect vessel. This preferred approach is obviously consistent with the traditional adherence to flag state authority in high seas areas.²⁵⁰ In earlier formulations of Article 8*bis*, the United States had proposed that requesting states could imply authorization if a flag state did not respond to the request to board after four hours. The United States considered that a four-hour default rule was "essential to the prompt conduct of the boarding, to minimize delay of the suspect ship, and to the early release of the warship (or other ship clearly marked and identifiable as being on government service and authorized to that effect) to conduct its other missions."²⁵¹ Concerns about authorizing boarding through implicit consent during negotiations resulted in a proposal that states could opt out of such a situation by notifying the Secretary-General that boarding would only be authorized by express consent.²⁵² In this case, implicit consent remained the default rule with the onus placed on states to take steps to exclude such a possibility through notification to the Secretary-General. However, the "opt-out" formula proved unpopular during negotiations, as it was viewed as inconsistent with the right of a flag state to exercise jurisdiction.²⁵³ Ultimately, the need for express consent to be afforded on an *ad hoc* basis prevailed and implied consent after four hours was re-configured as an "opt-in" clause.

This implicit authorization after a four-hour wait therefore constitutes an alternative avenue for states parties. Paragraph (d) of Article 8*bis* permits a boarding to proceed in these circumstances provided the flag state had previously notified the Secretary-General to this effect.²⁵⁴ While this approach is more deferential to flag states, it does not overcome a number of the difficulties described by those opposing any form of implicit authorization. The four-hour time limit was criticized as impracticable due to the problem of time zones and public holidays.²⁵⁵ In particular, the International Chamber of Shipping, the

249. See *id.*, art. 8*bis*, para. 5(c).

250. China insisted on unambiguous language in this regard. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by China, supra* note 244, para. 7.

251. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 231, Annex 1, note xxx, p. 23.

252. See *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 1, art. 8*bis*, para. 3.

253. See IMO Legal Committee, 88th Sess., Agenda item 13, *Report of the Legal Committee on the Work of its Eighty-Eighth Session*, IMO Doc. LEG 88/13 (May 18, 2004), para. 73.

254. See *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 1, art. 8*bis*.

255. See *Report of the Legal Committee on the Work of its Eighty-Eighth Session, supra* note 253,

International Shipping Federation and the International Confederation of Free Trade Unions opposed implicit authorization given concerns about the need for masters of vessels to have sufficient time to consult with ship owners as well as distinguishing between what would be a lawful tacit boarding and piracy or armed robbery at sea.²⁵⁶ However, this last issue should not have proved a major concern given that boardings under the 2005 Protocol are to be conducted by law enforcement or other officials, and such persons and their ships would presumably be clearly marked and identified for these purposes.

A third alternative is that a flag state may notify the Secretary-General that a requesting state is “authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth... has been, is being or is about to be committed.”²⁵⁷ This “opt-in” clause creates a power conferred by treaty to exercise the right of visit, and is comparable in this regard to the United States-United Kingdom Exchange of Notes in relation to drug trafficking.²⁵⁸ Given that it is an “opt-in” provision, though, the emphasis remains on the freedom of choice afforded to flag states as to whether they will relinquish their authority for the purposes of preventing or responding to the offences addressed in the 1988 Convention and 2005 Protocol.

The preeminent power of the flag state is further affirmed by the fact that the notifications relating to either form of implicit authorization may be withdrawn at any time. During negotiations, although several delegations supported a suggestion that the text should reflect that a withdrawal would only become effective after a certain period of time,²⁵⁹ no such time limit was included.²⁶⁰ While withdrawal from a treaty may generally not take effect until a reasonable period of time passes,²⁶¹ it is not certain that the same rule would apply to the “opt in” notification. In any event, the possibility that the withdrawal of notification has immediate effect is not barred in view of the failure of states explicitly to exclude this possibility in the text of the agreement.

para. 73.

256. See IMO Legal Committee, 88th Sess., Agenda item 3, *Review of SUA Convention and Protocol: Comments on draft article 3bis, Submitted by the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU)*, IMO Doc. LEG 88/3/3 (Mar. 19, 2004), para. 4.

257. 2005 Protocol, *supra* note 2, art. 8bis, para. 5(e).

258. See *supra* notes 128–136 and accompanying text (discussing the Exchange of Notes).

259. See IMO, Review Working Group, 1st Sess., Agenda item 3, *Report of the Working Group*, IMO Doc. LEG/SUA/WG.1/3 (July 26, 2004), para. 80.

260. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 224, Annex I, art. 8bis, para. 3(e), n. 41 (noting that no proposed text on the effective date of notification had been received and including a suggestion of an unspecified number of days). See also *Review of SUA Convention and Protocol: On 8bis(3): new paragraph (d), Submitted by France*, *supra* note 222, art. 8bis, para. 3(f) n. 5.

261. Article 56 of the Vienna Convention on the Law of Treaties anticipates a one-year notice period for the withdrawal from treaties. Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 311.

B. Safeguards Required in Undertaking a Boarding

In addition to detailing the manner by which a state may board a foreign vessel, a number of safeguards are incorporated into Article 8*bis* to temper the manner by which the boarding may be conducted and to ensure consistency with international law standards.²⁶² In this regard, paragraph 10 sets forth duties imposed on the requesting state such as the protection of the persons on board, the safety and security of the ship and its cargo, and, not prejudicing the commercial or legal interests of the flag state.²⁶³

The conduct of the boarding must also be consistent with international law requirements relating to the use of force. At the outset of negotiations, it was proposed that any use of force in the course of undertaking a boarding of a suspect vessel was to be consistent with national law standards as well as the minimum reasonably necessary under the circumstances.²⁶⁴ States subsequently objected to national law exclusively governing the boarding of a vessel, so it was amended to refer to boardings consistent with international law.²⁶⁵ Further support was drawn from the formulation on the use of force in boardings included in the Fish Stocks Agreement.²⁶⁶ Article 8*bis* provides that the use of force is to be avoided "except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions."²⁶⁷ Requesting states are further required only to use the minimum degree of force that would be necessary and reasonable in the circumstances.²⁶⁸

If evidence of unlawful conduct in relation to the offenses under the 1988 Convention and 2005 Protocol is discovered as a result of the boarding, the flag

262. These provisions were primarily driven by the International Confederation of Free Trade Unions, which insisted on maintaining protection for seafarers in the SUA Protocol in a comparable manner to those afforded in the ISPS Code and SOLAS Convention, as well as being consistent with the high priority accorded to what was referred to as the human element in the work of the IMO. See *Review of SUA Convention and Protocol: Submitted by the International Confederation of Free Trade Unions (ICFTU)*, IMO Doc. LEG 87/5/2 (Sept. 11, 2003), paras. 4-6.

263. *Id.*, para. 10.

264. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2002), *supra* note 9, Annex 1, p. 8.

265. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 231, Annex 1, note xxxv, pp. 23-24.

266. Article 22(1)(f) of that treaty reads: "The degree of force used shall not exceed that reasonably required in the circumstances" The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 22(1)(f), Dec. 4, 1995, 2167 U.N.T.S. 3. This approach was advocated by the United Nations as part of the discussions in the correspondence group. See IMO Legal Committee, 87th Session, Agenda Item 6, *Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf, Submitted by the International Confederation of Free Trade Unions*, IMO Doc. LEG 87/5/2 (Sept. 11, 2003), para. 12. See also *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 17.

267. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 7.

268. See *id.*, art. 8*bis*, para. 9.

state is to be promptly informed.²⁶⁹ The flag state may also authorize the detention of the ship, cargo and persons on board.²⁷⁰ In these circumstances, the 2005 Protocol specifies that the flag state has the right to exercise jurisdiction, or that the flag state may consent to another state exercising jurisdiction if that state would have jurisdiction by virtue of Article 6 of the 2005 Protocol and 1988 Convention.²⁷¹ This formulation emphasizing the authority of the flag state reflects earlier drafts that explicitly referred to the primary right of the flag state to exercise jurisdiction.²⁷² As such, it would seem that the requesting state that conducts the boarding and uncovers unlawful conduct under the terms of Article 3, 3*bis*, 3*ter* and 3*quater* may not ultimately be authorized to proceed with the prosecution of the alleged offenders if a jurisdictional nexus under Article 6 does not exist.

In the event that a boarding is conducted and the grounds for such measures are unlawful or prove to be unfounded, the burden then falls to the requesting state to compensate for “any damage, harm or loss attributable to [that state] arising from measures taken pursuant to” Article 8*bis*.²⁷³ The possible attribution of liability in these circumstances would tend to indicate that any decision to request authorization to board must in reality exceed the mere existence of a reasonable ground to suspect. However, a state conducting a boarding in this situation will not be liable if the ship boarded has committed an act justifying the suspicion in the first place.²⁷⁴ This limitation is consistent with the requirements set out in Article 110 of UNCLOS.²⁷⁵

269. See *id.*, art. 8*bis*, para. 6.

270. See *id.*

271. It was acknowledged during the course of negotiations that “while as a general rule, the flag State will normally remain in charge of the boarding operation and of the subsequent steps that might follow, including criminal prosecutions, there may be situations in which it would be more sensible to allow the intervening State – or a third State – to exercise its jurisdiction.” *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 56.

272. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 16. See also IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Comments on Annex 1 as circulated by e-mail by the Co-ordinator of the Correspondence Group, Submitted by Brazil*, IMO Doc. LEG/SUA/WG.1/2/2 (June 30, 2004), para. 10; *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 46.

273. Proposals to refer to compensation payable or to joint and several liability were not adopted. See IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Comments on US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by Brazil*, IMO Doc. LEG/SUA/WG.1/2/4 (July 9, 2004), para. 14; IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Suggested amendment to article 8*bis* 8*b* (Safeguards), Submitted by Mexico*, IMO Doc. LEG/SUA/WG.1/2/8 (July 12, 2004).

274. See 2005 Protocol, *supra* note 2, art. 8*bis*, para. 10(b)(i).

275. See UNCLOS, *supra* note 21, art. 110(3).

C. Interrelationship of Boarding Provisions with Other Rules of International Law

During the course of negotiations, the Legal Committee of the IMO:

recognized that the inclusion of boarding provisions constituted a significant departure from the fundamental principles of freedom of navigation on the high seas and exclusive jurisdiction of flag states over their vessels. It was accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognized in that a boarding by another State on the high seas could only take place in exceptional circumstances. Any exception must be precise, unambiguous and internationally accepted.²⁷⁶

There are several provisions within Article 8*bis* that recognize the existence of other regimes for the boarding of ships. For example, a paragraph was subsequently included to reflect the customary law rules enshrined in Article 110 of UNCLOS in relation to the right to board and inspect a vessel if the ship is without nationality or may be assimilated to a ship without nationality.²⁷⁷ The 2005 Protocol is not intended to apply or limit boardings that are based on the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag state to take law enforcement or other action.²⁷⁸ This latter exclusion allows for the possibility that a requesting state may reach agreement with the flag state not to follow the strict contours of Article 8*bis* of the 2005 Protocol but proceed on an alternative basis of consent.

Article 8*bis* is also accorded the character of being a framework for operations between states parties, as paragraph 13 anticipates that states parties "may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article."²⁷⁹ In view of the increased scope of Article 3, and particularly the references to the transporting of nuclear, chemical and biological weapons, it is possible to interpret this provision as providing some allowance for the existence of the PSI. It further enables the United States to maintain its bilateral ship-boarding agreements without modification in view of the more flag-state-oriented provisions of the 2005 Protocol.

D. Conclusion

Article 8*bis* of the 2005 Protocol is an important development in the law of the sea, as it constitutes another power conferred by treaty for warships to exercise the right of visit in respect of foreign vessels on the high seas. The existence of this procedure coupled with the expanded range of offenses addressed by the 2005 Protocol will be a significant addition to counter-terrorism efforts, provided it

276. Report of the Legal Committee on the Work of its Eighty-Eighth Session, *supra* note 252, para. 66.

277. See Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States, *supra* note 217, Annex 1, art. 8*bis*, para. 16, p. 13.

278. See 2005 Protocol, *supra* note 2, art. 8*bis*, para. 11.

279. *Id.*, art. 8*bis*, para. 13.

attracts a large enough cohort of states parties.²⁸⁰ The possibility exists that the United States may provide incentives to states parties to agree to the “opt-in” consent methods so as to strengthen the position of the state wishing to board the foreign vessel.²⁸¹

The limits of the 2005 Protocol, notably in terms of retaining the emphasis of express consent of a flag state for boarding, the risk of lost opportunity due to flag state delay in authorization and the possibility of obstructive conditions in conducting a boarding, may undercut its utility, even if it does gain sufficient adherence among relevant states. These weaknesses exist because of what appears to amount to unquestioning deference being accorded to the traditional paradigm. If the common interest in meeting security needs is not being met, it is worth asking whether the balance of inclusive and exclusive interests is now inadequately conceived and examine to what extent a paradigm shift is necessary.

VII. THE NEED FOR A PARADIGM SHIFT?

The difficulty that exists for states in endeavoring to improve their maritime security arises when those measures may be viewed as encroaching on the principle of *mare liberum*. How is it possible for a state to make a claim supporting an exclusive interest in security when it is being countered by the almost reflexive invocation of inclusive interests in the freedom of the high seas? As Lehrman remarks:

Under the *mare liberum* principle, the interdiction of a flag vessel of a foreign state is generally considered to be the prerogative of the flag state in question, not of third-party states patrolling the high seas. Thus, freedom of the seas is in tension with the perceived need of third-party states to exercise their power over interdiction.²⁸²

There appear to be two perspectives on how it may be possible to resolve this tension. In the first instance, there may be greater acceptance of the idea that terrorist threats require another exception to the traditional paradigm. Another basis to exercise the right of visit will be accorded to warships in dealing with foreign vessels on the high seas, provided that the right is exercised in a manner that is sufficiently respectful of the freedoms of the high seas and flag state control. To this end, the scope of the right of visit for this purpose will be carefully defined and safeguards for the flag state put in place. The 2005 Protocol and the bilateral ship-boarding agreements initiated by the United States fit within this mold

280. As of December 31, 2007, there were only two contracting parties to the 2005 Protocol. See IMO, *Summary of Conventions as at 31 December 2007*, available at http://www.imo.org/Conventions/mainframe.asp?topic_id=247.

281. See International Law Programme Discussion Group at Chatham House, *The Proliferation Security Initiative: Is It Legal? Are We More Secure?* (Feb. 24, 2005), at http://www.chathamhouse.org.uk/publications/papers/download/-/id/278/file/3914_ilp250205.pdf. (reporting on suggestion that the United States may persuade states to “opt-in” in a similar manner to the way that the United States has convinced states parties to the Statute of the International Criminal Court to conclude treaties as per Article 98 of the Court’s Statute so as to exclude the jurisdiction of the Court over US nationals).

282. Lehrman, *supra* note 49, at 229.

(although the latter are slightly less deferential to flag state control than is the former). This approach represents a gradual accretion in the law, consistent with past claims over ocean space that allowed for more instances of exclusive control for specific interests. Such a course is understandable given that the significance of the shipping industry in the global economy requires the maintenance of commercial interests in developing procedures and legal standards to counter the current security threats.²⁸³

It may also be the case that the traditional paradigm is so entrenched in the jurisprudence of the law of the sea and in the minds of the relevant policy-makers that this shift is all that may be expected. Regardless of the shortcomings that may still prevail in defining the contours of this new exception, just as deficiencies may be identified in the definition of piracy and the scope of powers to deal with the slave trade, the outcome produced is the best compromise given other commercial, military, social and scientific interests at stake. It is the common interest in maintaining *mare liberum* and flag state authority that prevails.

Another perspective on resolving the tension between the freedom of the high seas and states seeking greater powers over foreign vessels to promote their perceived security needs involves recognizing that these latter claims are inclusive in nature, rather than exclusive. That is, all states share a mutual interest in preventing and suppressing terrorist acts against international shipping. President Jesus, writing extra-judicially, has confirmed this view:

The possible acceptance of jurisdiction of any state party to police ships suspected of being involved with terrorist acts on the high seas areas of the ocean would be another encroachment on the state's sovereignty or exclusive jurisdiction over ships flying their flag. *However, it would be a legitimate encroachment to the extent that it would be done for a good purpose, benefiting all states.*²⁸⁴

President Jesus makes this point in relation to the negotiations that were being undertaken on the 2005 Protocol and thus arguably approaches the issue from the first perspective. But the point that all states will benefit from the policing of the high seas for the purposes of preventing terrorist attacks is valid for both perspectives; the key question is what consequence should be drawn from this accepted benefit. Is it simply a matter of justifying a new exception, or is it necessary to accept that encroachments on flag state control for the purposes of promoting maritime security are actually concomitant with the freedoms of the high seas in light of the inclusive interest in protecting international shipping from terrorist attack?

The common interest here is in formulating a perspective on *mare liberum* that reduces, even if only slightly, the preeminent position of flag state control

283. For example, the 2003 report of the UN Secretary-General noted that "[a] balance must also be sought between tightening security measures and maintaining the efficient flow of international trade". *Oceans and the Law of the Sea: Report of the Secretary-General*, UN GAOR, 58th Sess., UN Doc. A/RES/58/65 (2003) at 33.

284. Jesus, *supra* note 60, at 395 (emphasis added).

while still recognizing the ongoing viability of maintaining the freedoms of the high seas. Thus the inclusive interests in reserving the high seas as maritime areas available to all users is not jeopardized, rather our paradigm shift comes in acknowledging that inclusive interests require greater regulation and even intervention in flag state control. The weight accorded to the exclusive claims of the flag state needs to be reduced in seeking to balance inclusivity and exclusivity in our common interest equation.

The need to lessen flag state authority for issues related to maritime security is particularly evident given the phenomenon of flags of convenience. The use of flags of convenience involves ship owners changing the nationality or registry of a ship to a different state as necessary, often as a means of avoiding closer regulation and/or for financial imperatives. As Garmon explains:

Unless the flag state is a signatory to a convention directed at combating maritime violence and terrorism, the flag state is not obliged to prosecute such crimes. Moreover, flag states, offering a haven of convenience to vessel owners, do not have a vested interest in imposing stricter standards against accused vessels. To impose stricter standards against vessel owners would encourage vessel owners to seek more convenient registries. Thus, so long as flag states retain sole discretion regarding enforcement against maritime violence and terrorism, little can be done to combat increasing trends.²⁸⁵

The consequence of this paradigm shift, whereby inclusive interests in maritime security require less emphasis on flag state authority, could have been brought to bear during the negotiations of the 2005 Protocol. With less deference accorded to flag state control, states may have been willing to create a basis of consent for ship-boarding by virtue of the treaty (comparable to the United States and United Kingdom's Exchange of Notes to curb drug trafficking). Even if this consent would not be accorded, the "opt-out" form of tacit consent may have been preferable to the "opt-in" consent procedure included in the agreement. Less weight on exclusive flag state control may have further resulted in the removal of a clause permitting the flag state to impose conditions on the boarding, additional to the safeguards already included in the instrument, or may have at least anticipated mutually agreed conditions. Other possible adjustments to the 2005 Protocol if there had been less deference to flag state control would have anticipated enforcement jurisdiction being exercised by the boarding state consequent on the common interest of all states parties in preventing and suppressing these crimes, as well as a reconsideration of the range of safeguards included for flag states specifically.

A paradigm shift does not need to be revolutionary to instigate change. It would be enough for a different understanding of what falls within the common interest of states to influence what weight should be accorded to inclusive interests and to exclusive claims in achieving the optimal balance. Even a small change in

285. Garmon, *supra* note 70, 268–69 (footnotes omitted).

emphasis may have produced a different, and arguably more effective, legal regime for the prevention and suppression of maritime terrorism.