A Developing Norm Under International Law: A Case Study of the Proliferation Security

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May 16, 2012
A DEVELOPING NORM UNDER INTERNATIONAL LAW: A CASE STUDY OF THE PROLIFERATION SECURITY INITIATIVE

Sunan J. Rustam

Submitted to the faculty of Indiana University Maurer School of Law in partial fulfillment of the requirements for the degree Doctor of Juridical Science May 2012
Dedication Page

For Mamih and Apa
This Is Your Pencil

For Lia, Hana and Najwa
The Universe Is Your Sajadah

For the Rustams and Nasutions/Mrs. Binarti
May It Be
Acknowledgment

"Whoever is inimical to one whom I befriend, is at war with Me. When a servant of Mine approaches Me through the medium of that which I like best, out of what I have declared obligatory for him, and continues to advance towards Me through optional prayers (Nawafil), then I begin to love him. When I make him My beloved, I become his ears to hear, and his eyes to see and his hands to grasp, and his feet to walk. When he asks Me, I grant him and when he seeks My protection I protect him." (Bukhari) (Hadith Qudsi), Thank you Lord.

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List of Abbreviations


ASEAN: Association of Southeast Asian Nations

BWC: Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583


I.C.J.: International Court of Justice

IUU: Illegal, Unreported, and Unregulated


NWFZT: Nuclear Weapon Free Zone Treaty

P.C.I.J.: Permanent Court of International Justice

PSI: Proliferation Security Initiative

SBA: Ship-boarding agreement


U.N.: United Nations


UNGA: United Nations General Assembly

UNSC: United Nations Security Council

UNTOC: Convention against Transnational Organized Crime (Nov. 15, 2000), 40 I.L.M. 353

U.S.: United States of America

WMD: Weapons of mass destruction
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International Instruments


Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583.


Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.


8049.


Southeast Asian Nuclear Weapon Free Zone Treaty (Dec. 15, 1995), 35 I.L.M. 635.


Bilateral Agreements


Agreement between the Government of United States of America and the Government


Countries’ Legislation


Cases


Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. (Nov. 20), p. 266.


Customs Regime between Germany and Austria Case, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, p. 47, para 35 (Sept. 5).


North Sea Continental Shelf (Germany v. Denmark/Netherland), Judgment, 1969 I.C.J. (Feb. 20), p. 3.


S.S. Lotus Case (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No.10, at 28 (Sept. 7).

Chapter 1

Overview of the Proliferation Security Initiatives (PSI)

Since U.S. President George W. Bush declared it in Krakow, Poland on May 31, 2003, the Proliferation Security Initiative (PSI) concept has consistently remained the same. Beginning with eleven like-minded states, this U.S.-led initiative has grown into a collective initiative comprised of ninety-eight states worldwide. The original members that committed to the PSI were the United States, Australia, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain, the United Kingdom, Japan, and Singapore. The initiative, which stems from the 2002 U.S. National Strategy to Combat WMD Proliferation, is a response to curb the growing challenges posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials.

The PSI is an international arrangement composed of states with a common objective to stop the illicit trafficking of weapons of mass destruction (WMD) by non-state or state actors. The international arrangement follows principles conveyed in the PSI statement of interdiction agreed to by the PSI participants. In practice, the PSI unilaterally interdicts, in the context of this dissertation, any ship suspected of carrying not only elements but also technology related to WMD. In so doing, those following the PSI may use force if deemed necessary. In fact, some of the past PSI interdiction

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activities have involved the use of force in acquiring control over foreign ships. PSI maritime interdiction covers areas from territorial seas to the high seas.

The PSI statement of interdiction principles serves as the blueprint for PSI activities and identifies concrete steps to facilitate effective interdiction of WMD. Under President Obama, the U.S. government has affirmed and strengthened the PSI, evidenced by Obama’s speech in Prague in April 2009, as well as by such U.S. policy documents as the White House’s National Security Strategy and the Pentagon’s last Quadrennial Defense Review. International measures and the campaign to invite states to join the PSI have been intensive, if not extensive. Among the recent international measures that were deemed to be in favor of the PSI, are the conclusion of the 2010 Ship-Boarding Agreement between the governments of the United States and Saint Vincent and the Grenadines, and the entry into force in 2010 of the 2005 SUA Protocol, which criminalizes transfer of WMD. Bilateral requests for other countries to join the PSI are also taking place, the latest during a bilateral meeting between U.S. Secretary of State Clinton and Indonesian Foreign Minister Natalegawa during the 2011 Asia Pacific Economic Cooperation (APEC) meetings. The U.S. government also invites states to participate in PSI meetings to provide their views and correct any misunderstanding of the PSI.

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The international measures and campaigns for the PSI have drawn opinions from international law commentators, among others. At first, the international community was skeptical. Debates escalated. Proponent states argued that PSI complemented existing regimes of international law, primarily combating terrorism and the proliferation of WMD recognized by international law. Opponent states mainly countered that PSI threatened the long-standing balance of coastal state interests and the international community that had been painstakingly agreed upon and incorporated in 1982 United Nations Convention on the Law of the Sea (UNCLOS). Opponent states believed that PSI interdiction hampered the application of freedom of navigation that allowed ships to traverse freely in the world. The international community then took the debate to the United Nations Security Council (UNSC).

In 2004, one year after PSI was introduced, the UNSC issued Resolution 1540, which treats illicit trafficking of WMD as a threat to international peace and security. It called states to stop such threats but failed to indicate PSI interdiction as a means of enforcement. The opponent states viewed UNSC Resolution 1540 as a confirmation of their stance, while proponent states considered the resolution a stepping stone because it treated trafficking of WMD as a threat to international peace and security. For the proponent states, the lack of reference to PSI in Resolution 1540 did not necessarily mean the PSI was illegal under international law, and they continued to conduct interdiction, particularly within their ring of networks.

Despite its failure in the UNSC forum, PSI proponents continue efforts to call on states to join the arrangement, from inviting them as observers to concluding with ship-boarding agreements. The efforts are not without results. As of late 2011, ninety-
eight countries worldwide had publicly declared their commitments to support PSI, in addition to ship-boarding agreements by major flag-state countries. Currently, PSI has access to more than 75% of ships in 50% of the maritime zones in the world. The access continues to grow as indicated, among others, by entry into force of 2005 Protocol to Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol) criminalizing the transfer of WMD in 2010.

A general analysis indicates that the views on the PSI tend to be similar, ranging from its identification elements to description documents to expectation in enforcements. For example, Guilfoyle identifies the PSI as a political commitment to secure shipments of WMD both under national and international jurisdiction, while Shulman describes the PSI as a novel and highly innovative initiative to justify the use of force by blurring the lines between war and peace. Similarly, Byers argues that the PSI is primarily about enforcing rights under national and international law, that is, flag states' consent to grant each other stop and search power. Furthermore, Allen views the PSI as a pragmatic and adaptive program to counter the growing threats of terrorism and WMD proliferation.

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In more detail, Joyner and Parkhouse opine that the PSI is an initiative to interdict nuclear materials illegally trafficked among states or non-state actors, and Bergin describes the PSI as a partnership effort of states that uses a range of legal, diplomatic, economic, and other tools to interdict threatening shipments of WMD. Moreover, Kaye expects the PSI to be a preventive strategy that represents a practical solution to a threat of WMD terrorism, while Winner suggests that the PSI is a coalition of the willing, with voluntary commitment and participation, and Holmes and Winner typify it as a loose consortium of nation-states that share concerns about halting WMD shipments. Finally, Logan describes the PSI as a collective response to the threat of international terrorism, and Doolin asserts that the PSI serves the common interest of states in support of WMD counter-proliferation.

It is interesting to note, however, that for an initiative that has gained vast international support in a relatively short period, the PSI says little in terms of description. In fact, the only official description of the PSI available to the public is...

SECURITY AND COMBATING TERRORISM 55, 62 (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006) [hereinafter Wolff].
the statement of interdiction\textsuperscript{19} published on the U.S. State Department's website, which describes the PSI as a mere initiative of consenting states. The PSI is neither an organization nor a treaty, for that matter. Furthermore, it is voluntary in nature, and consenting states can always opt out at any time. Despite its flexibility, however, some experts argue that international measures to codify the PSI as solid international law are underway, from bilateral agreements to draft protocols of treaties to the United Nations forum.\textsuperscript{20}

With its growing networks, the impact of PSI is also expanding. PSI interdiction has resulted in numerous interdiction incidents. The interdicted states, despite their protests, have settled amicably, indicating the effectiveness of PSI implementation. Commercially, PSI interdiction has pushed owners of sea transportation services to reconsider PSI effects in their practices, especially risk of being stopped in the case of non-compliance. Similarly, in international law, PSI interdiction has had consequences concerning whether practices of maritime interdiction to stop illicit trafficking of WMD have developed into a norm, conducted and accepted by states around the world.

This dissertation seeks to investigate such consequences, that is, the status of PSI maritime interdiction as a norm under international law. It aims to determine which PSI element that is acceptable to the international community under


international law: the documents (the PSI statement of interdiction, ship-boarding agreements, declaration in support of PSI) or the practice (the PSI maritime interdiction, conclusion of similar international conventions) or a combination of the former and the latter. In doing so, this dissertation will analyze PSI documents under selected regimes of international law, compare PSI maritime interdiction with other maritime interdiction recognized under international law, and frame the PSI elements under the sources of international law as enshrined in Article 38 of the International Court of Justice (I.C.J.) Statute, all of which are reflected in the following chapters.

**Aims and Scope**

This dissertation will show that PSI maritime interdiction has transformed into a norm under international law, particularly for the PSI-participating states. It argues that PSI as an international arrangement has legal characteristics that give rise to international rights and obligations. For PSI-participating states, the characteristics set forth guidelines for enforcing their shared commitments. Among other items, it prescribes rules on the limited use of force, the requirement of flag-state consent, and an avenue for compensation for conducting maritime interdiction to stop illicit trafficking of WMD. All of these rules are consistent with prevailing rules of international law, enshrined primarily in UNCLOS.

This dissertation limits its scope only PSI measures at sea, i.e. maritime interdiction. The reason behind the limitation of the scope is to set boundary and provide detailed discussion on PSI maritime interdiction. In addition, the fact that transportation of goods worldwide is carried out primarily at sea contributes to the
limitation of the scope. Furthermore, statistically the numbers of PSI measures conducted at sea is higher compared to that in air and land.

Analysis in this dissertation will cover a review of regimes of international law, particularly international law of the sea affected by PSI. Specific regimes of international law discussed are sovereignty, freedom of navigation, combating terrorism, the proliferation of WMD, and use of force. The dissertation argues that PSI does not contradict the aforementioned specific regimes of international law.

Similarly, under comparative analysis, this dissertation contends that PSI maritime interdiction shares common characteristics with other maritime interdictions recognized by international law, such as piracy, fisheries, drug trafficking, and human trafficking. The analysis will compare the PSI statement of interdiction with UN CLOS and other international conventions that govern maritime interdiction.

With regard to the status of PSI under international law, the dissertation will focus on framing the PSI within sources of international law governed by Article 38 of the I.C.J. Statute. Attention will be given to first and second sources of international law, which are international treaty law and customary international law. The dissertation holds that PSI as an international arrangement creates legal obligations for its participating states and to a certain extent non-participating states.

This dissertation research was conducted using a qualitative approach by first focusing on primary sources of law, especially UN CLOS. The use of other international instruments is selective on a case-by-case basis. The dissertation also applies an I.C.J. framework of sources of international law. It will frequently make direct quotations from relevant I.C.J. cases, UN CLOS, and other selected international
instruments. In addition, the dissertation will refer to secondary sources only if primary sources are not sufficient.

**Overview of Chapters**

This dissertation consists of six chapters. Two chapters provide the introduction and conclusion while the remaining four chapters serve as substantive chapters. The first chapter introduces the topic of the dissertation: PSI. It discusses the background of PSI, argumentation in support of PSI, and limitations of analysis. The second chapter includes an overview of PSI, with analysis of the PSI statement of interdiction principles, ship-boarding agreements, and PSI membership. In addition, it includes analysis of PSI programs and activities and selected countries’ views on PSI.

In the third chapter, the dissertation argues that PSI is consistent with international law. Discussions of relevant regimes of international law cover sovereignty, freedom of navigation, combating terrorism, the proliferation of WMD, and the use of force. It posits that the PSI motive complements existing regimes addressing terrorism and WMD that are recognized under international law. It further contends that PSI methods do not contradict freedom of navigation and that its limited use of force is permissible under international law.

The fourth chapter includes discussion that is organized in a comparative scheme. It compares PSI maritime interdiction with maritime interdiction recognized under international law. For classification purposes, the comparison divides the latter into UNCLOS-based maritime interdiction and maritime interdiction based on other international instruments.
The fifth chapter investigates the status of PSI under international law. It holds that PSI as an international arrangement creates legal obligations for its participating states. The public declaration of commitment to PSI is a legal characteristic that gives rise to international obligations. PSI also meets treaty and custom international law requirements as indicated by a framework of sources of international law. As a unilateral act, PSI constitutes state practice and *opinio juris* is reflected in the declaration supporting PSI. Finally, the sixth chapter includes the conclusion and summary.
Chapter 2

Analysis of the Proliferation Security Initiative (PSI)

The PSI is developing into a norm in international law. The following analysis will discuss the PSI documents, namely the PSI statement of interdiction, declaration in support of the PSI, and ship-boarding agreements. In addition, this chapter will also discuss selected countries’ views representing proponents and opponents of the PSI.

Statement of Interdiction

For purposes of this analysis, the PSI statement of interdiction is treated as an international legal instrument that all of its participants are committed to follow. It has legal character in the sense that it creates a legal obligation that all participants are expected to meet when they join the initiative.\(^{21}\) The PSI statement of interdiction also meets the treaty qualifications of the 1969 Vienna Law of Treaties;\(^{22}\) that is, it is entered into by states in written format and governed by international law. PSI participants are states that make public declarations of commitment; the PSI statement of interdiction is in written format; and the PSI is claimed to be consistent with national legal authorities and international law. Thus, because the PSI shares primary elements of a treaty, its interpretation should follow the customary rule of interpretation recognized under international law as encapsulated in Article 31 of the 1969 Vienna Law of Treaties, that is, a subjective, literal, and theological approach showing no preference or hierarchal manner. In other words, the interpretation covers the three approaches holistically. *Subjective* refers to the intention of the parties, *literal*\(^{21}\) See Chapter 3, “PSI and International Law,” *infra*, for discussion of the legal character of the PSI statement of interdiction.

refers to the ordinary meaning of the words, and *theological* refers to analysis of the object and purpose of an instrument in question.23

**Chapeau.** Participants in the PSI have voluntarily agreed to four principles: undertaking effective measures, adopting streamlined procedures, strengthening national legal authorities, and taking specific actions.24 The chapeau serves as a general condition:

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, 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 U.N. Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to [the following principles].25

By theological interpretation, the chapeau is relatively clear. Similar to other international legal instruments, the chapeau acts as a preamble to the PSI statement of interdiction. It generally describes the object and purpose of the PSI. The object is to impede and stop shipments of WMD, delivery systems, and related materials from state and non-state actors of proliferation concern, while the purpose is to fight proliferation of WMD, which participants consider a threat to international peace and security. While making no specific reference to any international legal instruments, the chapeau does recognize the role of international law in the PSI.

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24 PSI statement of interdiction, *supra* note 19.
25 *Id.*
According to the subjective and literal approaches, however, the chapeau is not without question. Subjective interpretation, for example, questions whether PSI drafters intended the PSI as a follow-up measure to an international law regime, indicating the PSI is not a stand-alone initiative, or whether PSI application must accord with international law, suggesting it is an independent strategy. Each of these questions has different legal perspectives; the former suggests that PSI interdiction will always be consistent with international law because international law mandates it while the latter indicates that PSI interdiction, as an independent strategy, may be consistent with international law. Ramifications of these legal perspectives are also different. For example, the former requires fewer efforts in justifying its consistency with international law compared to the latter, which needs to balance PSI-collective concerns with prevailing international law. It is not clear whether the drafters of the PSI statement of interdiction intended such dual interpretations, but a valid concern is that the PSI should be consistent with international law. The PSI drafters, however, were aware of the notion that consistency with international law plays a significant role in gaining international community support.

Concerning the literal interpretation, several issues require clarification, among them whether PSI interdiction applies to all shipments of WMD irrespective of their original purpose, or whether the PSI follows the U.N. definition of WMD as conveyed in many U.N. conventions. Which one is the decisive element: the purpose or the perpetrator? What if there was a shipment of WMD that came from state or non-state actors of proliferation concern under a peaceful purpose? Another question is whether the PSI solely determines the lists of states and non-state actors of proliferation
concern or whether other lists from international organizations such as the U.N. are included. One may argue that this question could be answered by referring to the intention of the PSI drafters concerning whether the PSI, as discussed above, is mandated by international law. If the PSI drafters intended it as a mandate of international law, then the list is limited to that of the U.N. or any other list that is recognized by the international community. Otherwise, the list may refer to non-U.N. lists, thus making it prone to abuse and arguably causing a higher degree of resistance from the international community.

The last sentence of the chapeau referring to the threat to international peace and security makes an interesting point. In this sentence, PSI participants consider proliferation of WMD to be a threat to international peace and security. The chapeau neither references nor elaborates on what constitutes a threat to international peace and security. Even if the spread of WMD among state or non-state actors of proliferation concern was the intended meaning of the drafters of the PSI statement of interdiction, it still lacks internationally recognized mechanisms to address such concerns. The international law—or the international community for that matter—recognizes only the U.N. Security Council as having such power and authority. 26 This point is interesting because until 2003 no international legal instruments, but PSI made such specific reference to proliferation of WMD. In the U.N. level, no reference occurred until 2004, when the UNSC passed its Resolution 1540.

The last sentence of the chapeau is also the most powerful sentence in terms of both political and seemingly legal consequences. It establishes a common ground for

all PSI participants and its binding character, due to the similarity with the phrase “threat to international peace and security” used by the UNSC. Less than a year after its conception, the last sentence of the chapeau was incorporated into the most powerful instrument recognized by international law, the United Nations Security Council Resolution. Under UNSC Resolution 1540, dated April 28, 2004, acting under Chapter VII of the United Nations Charter, the UNSC treats proliferation of nuclear, chemical, and biological weapons as well as their means of delivery as a threat to international peace and security.\textsuperscript{27} Resolution 1540, however, does not refer to the PSI as a means to address such threats.

**First principle.** The first principle of the PSI primarily highlights two parts: effective measures, conveyed in the first sentence, and a brief explanation of the phrase “states and non-state actors of proliferation concern” in the second:

Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. “States or non-state actors of proliferation concern” generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.\textsuperscript{28}

In the first part, PSI participants may interdict WMD shipments unilaterally or in concert with other states or non-PSI participants. Such action suggests the need for effective coordination among not only PSI participants but also non-participants. It is not clear, however, how far roles of non-PSI participants should extend in a PSI

\textsuperscript{28} PSI statement of interdiction, supra note 19.
interdiction, from merely intelligence exchanges to highly coordinated use of force. It could also suggest that a state may participate on a case-by-case basis in PSI interdiction without being a member of the PSI. If this is the case, then liability will be an issue should a PSI interdiction result in an unexpected outcome.

The second part of the first principle is brief elaboration of “states and non-state actors of proliferation concern.” Literal interpretation indicates that the PSI is referring to any perpetrator conducting acts of proliferation (among others, developing or acquiring and transferring WMD) as a state or non-state actor of proliferation concern. The rhetorical approach aside, teleological interpretation begs a question of a situation in which the state or non-state actors concerned intend the WMD for peaceful purposes. Currently, international law does not prohibit a state from developing a WMD, its purpose notwithstanding. Furthermore, it would be very difficult to establish an objective and non-politically motivated list of such states and entities, let alone publish such a list to the public.

Another issue that is apparently intertwined is the definition of weapons of mass destruction in the description of acts of proliferation. The first definition refers only to chemical, biological, and nuclear weapons while the second uses the phrase WMD. One can argue that the first definition falls under the second definition; hence, the assumption is that chemical, biological, and nuclear weapons are WMD. Nevertheless, the fact that the PSI statement of interdiction is not clear in defining WMD or in making any reference to an external definition of weapons of mass destruction suggests a wider scope of definition applying not only to weapons per se.

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but also to elements thereof. In the field, this condition makes it more difficult for PSI participants to establish what constitutes a WMD, whether a large shipment of fertilizer falls under the definition of weapon of mass destruction or whether plutonium intended for nuclear reactors could also constitute a WMD.

**Second principle.** Three tasks are mentioned in the second principle: adopt streamlined procedures, dedicate appropriate resources and efforts, and maximize coordination:

Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.\(^{30}\)

The focus of this second principle is primarily on internal and administrative matters among PSI participants, with the last two tasks indicating a wider scope of action in support of interdiction operations. A literal interpretation, however, suggests that the second principle applies only to PSI participants. In other words, non-participant states supporting the PSI cannot take part within the scope of the second principle.

Subjective and literal methods of interpretation indicate that the PSI operates primarily on exchange of intelligence information prior to any action of interdiction. One may assume that the drafters of the PSI statement of interdiction are fully aware of the significant role intelligence information plays in the success of PSI interdiction. Time and coordination are key elements in streamlined procedures and rapid exchange during this pre-interdiction phase. This situation suggests an element of burden-sharing among PSI participants, which may require further cooperation ranging from

\(^{30}\) PSI statement of interdiction, *supra* note 19.
classification of intelligence information to the mechanism of exchange for such information. Concerning sources of information, it can be assumed that states of non-PSI participants may also provide intelligence information to PSI participants, although doing so could present a technical challenge because the PSI claims it has neither secretariat nor official contacts to whom information can be sent.

**Third principle.** Of all the principles set out in the PSI, the third principle is the most complex because it requires not only national but also international efforts:

Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.\(^{31}\)

At the national level, the phrase “review and strengthen” suggests that PSI participants should coordinate not only their laws but also their enforcement efforts to support the objectives of the PSI. One of the ways to coordinate a national law with international commitment is by adopting the latter into the former; an extreme example in the case of the PSI would be to define the act of shipping WMDs as a crime under a state’s law. If the PSI drafters considered national law harmonization with the PSI, then one may assume that the PSI has an effect similar to that of an international agreement or a treaty. In this context, the PSI creates a belief that proliferation of WMD is a criminal act and that states have obligations to combat such a crime. The coordination of national law with the PSI is also crucial because it sets a legal basis for local enforcement agencies to act accordingly and to support the PSI at the international level.

\(^{31}\) *Id.*
Similarly, at the international level, it would be difficult for PSI participants to work to strengthen the PSI if their national laws and policies do not support or regard the PSI to begin with. Usually, national laws and policies reflect national interests and then are translated into official state positions in the international arena. In the context of the PSI, its participants are committed to supporting it at the international level, suggesting a reflection of their national laws and policies. Among the apparent support of the PSI at the international level is the conclusion of UNSC Resolution 1540, which treats proliferation of WMD as a threat to international peace and security, and the negotiation of the 2005 SUA Protocol, which was an attempt to criminalize the transfer of WMD at the international level. Another example supporting the PSI at the international level is the conclusion of bilateral ship-boarding agreements among such PSI participants as the United States and Panama.

**Fourth principle.** The content of the fourth principle ignites debates and controversies with regard to its allowing such actions as the use of force with or without consent of a relevant state:

Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels.
by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified. 32

Although the object and purpose of this particular principle is parallel to the previous principles—to take action within the boundaries of national and international law—contextual interpretation reveals a different objective. Several commitments set out in this principle tend to undermine or ignore other states’ jurisdictions governed by the UNCLOS. 33

The commitments range from not transporting or assisting alleged cargoes to providing flag states’ consent and seizing alleged cargoes to other actions within their ports, as set out in paragraphs a, b, c, e, and f. Locations of these commitments, which may take place in ships of a coastal state, ports, airfields, and other facilities, make

32 Id.
them fall under the exclusive jurisdiction of a coastal state recognized by international law. Paragraph d, however, allows actions that may contradict provisions of the UNCLOS, including freedom of navigation (innocent, transit, and archipelagic sea-lane passages) and use of force. For example, the first section of paragraph d lacks the element of consent of a relevant state prior to taking any appropriate action. Such consent is fundamental because the UNCLOS is very specific when it comes to the consent of a flag state.\textsuperscript{34} Unless there is consent from the flag state or a valid assumption that a passage is prejudicial, the freedom of navigation regime guarantees passage of a foreign vessel through state territorial or archipelagic waters.

Moreover, in the second section of paragraph d, an indication of contradiction is apparent in the phrase of “entering or leaving,” which is open to multiple interpretations because it can be loosely defined as areas beyond a territorial sea without specific designation. In other words, at the extreme, PSI participating states may unilaterally board and search with force foreign vessels on the high seas en route to one state’s jurisdictional waters. It is not clear whether the drafters of this particular paragraph intended to limit the UNCLOS or to maintain a certain degree of consistency as shown in the preceding and following paragraphs, notably a, b, c, e, and f. Similar to the first section, the second section tends to ignore the element of consent of a relevant flag state. As long as a foreign ship is en route or leaving a PSI participant’s jurisdictional waters, that particular ship is subject to PSI interdiction irrespective of its actual location.

Another issue that the PSI drafters apparently took for granted in the fourth principle or, for that matter, in the entirety of the PSI statement of interdiction, is a

\[\text{\textsuperscript{34} Id. art. 92.}\]
ship's registration. Based on subjective interpretation, the drafters of the PSI intended to have all ships capable of carrying WMD subject to PSI interdiction. In doing so, PSI access is exercised by means of PSI participants and ship-boarding agreements, with major states having many ships registered in the world. One may argue that this unilateral flag-state method of gaining access is quite effective in ensuring PSI accessibility of all ships as compared to multilateral measures like the U.N. forum. Nevertheless, it does not address the rather long-standing issue of flag states, the genuine link.35

The genuine link can be problematic to PSI interdiction because it can undermine flag states’ methods of gaining access. An example of the genuine-link issue is the bareboat chartering practiced by all states in the world.36 Bareboat chartering allows a state flag other than the flag of the ships’ owner or registration to be used. In bareboat chartering, three interests are involved: the charter, the flag state, and the state of cargo origin. When a party charters a boat under the bareboat scheme, that particular party may use its own flag during the time of the charter. This practice does not violate the one-nationality rule37 because the charterer bears all responsibility when flying its own flag. Hypothetically, the charterer may avoid PSI-interdiction access by flying a flag from a state not listed as one of PSI proliferation concern.

37 UNCLOS, supra note 33, art. 92.
Membership of the PSI

In the span of eight years, the number of PSI participants has grown from the original eleven to ninety-eight states. It continues to increase because the number does not include states that support but do not fully endorse the PSI or states that neither oppose nor agree to the PSI. As of 2011, the number of states participating in the PSI, the newest addition being Saint Vincent and the Grenadines, has increased to almost half of states in the world.38 Of these PSI participants, thirty-two are in Asia, five in Africa, forty-two in Europe, six in Oceania, and thirteen in the Americas. Of these, eighty-four have maritime areas, and eleven have concluded ship-boarding agreements with the United States.

Figure 1. World map of states endorsing the PSI (red).

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Total UN Members: 193 (2011)

*Fig. 2. Geographic percentages of U.N. member states endorsing the PSI.*
Table 1

**States Endorsing the PSI by Continent (N = 98)**

<table>
<thead>
<tr>
<th>Africa (5)</th>
<th>Americas (13)</th>
<th>Asia (32)</th>
<th>Oceania (6)</th>
<th>Europe (42)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angola+</td>
<td>Antigua and Barbuda+</td>
<td>Afghanistan</td>
<td>Australia+</td>
<td>Albania+</td>
</tr>
<tr>
<td>Djibouti+</td>
<td>Argentina+</td>
<td>Armenia</td>
<td>Fiji+</td>
<td>Andorra</td>
</tr>
<tr>
<td>Liberia+</td>
<td>Bahamas++</td>
<td>Azerbaijan+</td>
<td>Marshall</td>
<td>Austria</td>
</tr>
<tr>
<td>Libya+</td>
<td>Bosnia++</td>
<td>Bahrain+</td>
<td>Islands++</td>
<td>Belarus</td>
</tr>
<tr>
<td>Tunisia+</td>
<td>Brunei</td>
<td>Darussalam+</td>
<td>Samoa+</td>
<td>Bulgaria+</td>
</tr>
<tr>
<td>Chile+</td>
<td>Colombia+</td>
<td>Cambodia+</td>
<td>Vanuatu+</td>
<td>Croatia+</td>
</tr>
<tr>
<td>Colombia+</td>
<td>El Salvador+</td>
<td>Cyprus++</td>
<td>Czech Republic</td>
<td>Denmark</td>
</tr>
<tr>
<td>Honduras+</td>
<td>Georgia+</td>
<td>Iraq+</td>
<td>Estonia+</td>
<td>Finland</td>
</tr>
<tr>
<td>Panama+</td>
<td>Japan+</td>
<td>Jordan+</td>
<td>France+</td>
<td>Germany</td>
</tr>
<tr>
<td>Paraguay</td>
<td>Kazakhstan+</td>
<td>Korea+</td>
<td>Greece+</td>
<td>Germany</td>
</tr>
<tr>
<td>Saint Vincent and</td>
<td>Kyrgyzstan+</td>
<td>Holy See</td>
<td>Hungary</td>
<td>Greece</td>
</tr>
<tr>
<td>the Grenadines++</td>
<td>Kuwait+</td>
<td>Iceland+</td>
<td>Latvia+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td>United States+</td>
<td>Mongolia*</td>
<td>Ireland+</td>
<td>Luxembourg</td>
<td>Lithuania+</td>
</tr>
<tr>
<td></td>
<td>Morocco+</td>
<td>Italy+</td>
<td>Macedonia</td>
<td>Luxembourg</td>
</tr>
<tr>
<td></td>
<td>Oman+</td>
<td>Latvia+</td>
<td>Montenegro+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Papua New</td>
<td>Malta++</td>
<td>Netherlands+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Guinea+</td>
<td>Moldova</td>
<td>Norway+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Philippines+</td>
<td>Montenegro+</td>
<td>Portugal+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Qatar+</td>
<td>Macedonia</td>
<td>Russia+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Saudi Arabia+</td>
<td>Montenegro+</td>
<td>San Marino</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Singapore+</td>
<td>Montenegro+</td>
<td>Serbia</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Sri Lanka+</td>
<td>Netherlands+</td>
<td>Slovakia</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Tajikistan</td>
<td>Norway+</td>
<td>Slovenia+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Turkey+</td>
<td>Poland+</td>
<td>Spain+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Turkmenistan+</td>
<td>Portugal+</td>
<td>Sweden+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>United Arab Emirates+</td>
<td>Romania+</td>
<td>Switzerland</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Uzbekistan</td>
<td>Russia+</td>
<td>Ukraine+</td>
<td>Liechtenstein</td>
</tr>
<tr>
<td></td>
<td>Yemen+</td>
<td>United Kingdom+</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note:* Countries concluding ship-boarding agreements with the United States; + Countries having maritime areas.

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The effectiveness of the PSI as a maritime operation depends primarily on the sea zones it covers and the ships it can interdict. Both sea zones and ships denote sovereignty issues that require other states’ participation for the PSI to work. Failing to consider sea zones and ships will not only place the PSI in a difficult practical situation but will also introduce legal complexities. Through its participants, the PSI interdiction currently covers areas of nearly 75% of the world’s seas. In total, endorsements of the PSI by both declarations and ship-boarding agreements have provided PSI participants with access to roughly 75% of all commercial shipping vessels in the world (about 37,000 of 50,000 totals).40

Endorsements of the PSI occur in the form of declarations and ship-boarding agreements, as mentioned earlier. A declaration on the PSI normally highlights not only expressed political willingness but also commitment to support the PSI in its implementation. An example of a declaration supporting the PSI is that of Colombia:

By adhering to the Proliferation Security Initiative (PSI) Colombia expresses its willingness to work jointly with members of PSI to prevent and stop the transport of weapons of mass destruction, their delivery systems and related materials. Colombia will devote resources and efforts to interdiction operations and capabilities within the framework of the Initiative, in accordance with its national law and national capabilities, and without prejudice of the efforts and resources that Colombia should allocate to the maintenance of public order and defense of the institutions against the actions of the illegal armed groups.41

Similar commitments can also be found in ship-boarding agreements that support the PSI, as shown in the preamble to the 2010 ship-boarding agreement between Saint Vincent and the Grenadines and the United States:

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Convinced that trafficking in WMD, their delivery systems, and related items by States and non-state actors of proliferation concern must be stopped;

Committed to cooperation to stop the flow by sea of WMD, their delivery systems and related materials. 42

These forms of endorsement differ generally in the details of PSI procedures and implementation but not in terms of commitment to support the PSI. In fact, given the similar theme in the PSI, one may reasonably assume that most of the procedures and implementation detailed in ship-boarding agreements are general practices in the PSI.

With regard to the legal effects of the two forms, this writer is of the opinion that, under international law, declarations have legal effects comparable to those of ship-boarding agreements. This view is derived from several international cases, primarily before the International Court of Justice (I.C.J.), which held that declarations may give rise to international obligations. 43 For example, in the Nuclear Test Case, the I.C.J. highlighted two requirements for a declaration to have legal effects: it must be bound to accept obligations and be publicly declared. Colombia’s declaration to endorse the PSI meets these requirements; it not only acknowledges transport of WMD, delivery systems, and related materials as threats to international peace and security, but it also accepts obligations, as described in the PSI. In addition, Colombia has publicly announced such declaration.

Ship-Boarding Agreements

In the framework of the PSI, thus far, the United States has concluded eleven ship-boarding agreements with states worldwide (see Appendix A). Some of these

42 SBA St. Vincent and the Grenadines, supra note 6, pmbl.
states are major open-registry or flag-of-convenience countries, namely Antigua and Barbuda, the Bahamas, Belize, Cyprus, Liberia, Malta, the Marshall Islands, Panama, and Saint Vincent and the Grenadines. These states are located in the Americas, Asia, Europe, and Oceania. As noted previously, the PSI applies two methods in its practices: access to sea zones and access to ships. The ship-boarding agreement provides the means for the latter. On the basis of these ship-boarding agreements alone, the PSI has full access to over 45% commercial ships worldwide, in addition to the maritime area of each of these states.

Except for the agreement with Panama, the U.S. ship-boarding agreements are generally divided into twenty sections: a preamble; definitions; object and purpose; cases of suspect vessels; operations in international waters; operations in the territory of a third state; jurisdiction over detained vessels; exchange of information and notifications of results of actions of the security forces; conduct of security forces officials; safeguards; use of forces; exchange of knowledge of laws and policies of other party; points of contact; disposition of seized property; claims; disputes and consultations; rights, privileges and legal positions; cooperation and specialized assistance; entry into force and duration; and rights for third states. For the purpose of discussion, these twenty sections are classified into three major groups: the preamble, object, and purpose; mechanisms of operation (before, during, and after); and miscellaneous provisions.

In the standard preamble, the ship-boarding agreements refer to nine international instruments, in addition to any relevant bilateral agreements between the United States and the other party. These nine international instruments are the 1992 United Nations Security Council Presidential Statement; the 2004 United Nations Security Council Resolution 1540; the 1993 Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (Paris); the 1968 Treaty on Nonproliferation of Nuclear Weapons (Washington, DC, London, and Moscow); the 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Washington, DC, London, and Moscow); the 2002 International Ship and Port Facility Security Code and its Updates (International Maritime Organizations); the 2003 PSI Statement of Interdiction; the 2005 Protocol of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; and the 1982 United Nations Convention on the Law of the Sea. It is interesting to note that of all the international instruments recognized in the ship-boarding agreements, only the 1982 UNCLOS has not yet been ratified by the United States.\(^{45}\)

The object and purpose of the ship-boarding agreements is relatively simple: to cooperate in preventing illicit transportation by vessels of items of proliferation concern to or from states or non-state actors of proliferation concern.\(^{46}\) In doing so, the


\(^{46}\) For example, see SBA St. Vincent and the Grenadines, *supra* note 6, at arts. 1 & 2;
parties, with reference to their national laws, recognizes principles of international law on sovereign equality and territorial integrity. In principle, the cooperation governs the general mechanism for conducting PSI operations at sea, ranging primarily from exchange of information to conduct of officials during operation to rights of third states. This cooperation also provides access to almost all commercial or private vessels of both parties. Exception to the access is only for vessels under bareboat-charter arrangements as previously discussed.

The PSI mechanism of operation in the ship-boarding agreements can be subdivided into before, during, and after interdiction phases that occur in international waters, defined as all parts of the sea except archipelagic waters, territorial seas, and internal waters of a state. This mechanism of operation may also occur in the territorial sea of a consenting third state. For the pre-interdiction phase, exchange of information concerning detection and location of suspect vessels is crucial, in addition to exchanging knowledge about laws and policies of the parties and designated points of contact. In this pre-interdiction phase, the process of obtaining


47 SBA St. Vincent and the Grenadines, supra note 6, at arts. 2(2) & 2(3).
48 Id. art. 1(8).
49 Id. art. 3(2).
50 Id. art. 1(9).
51 Id. art. 5.
52 Id. arts. 4 & 7.
53 Id. art. 11.
54 Id. art. 12.
permission for interdiction takes place.\textsuperscript{55} After such permission is received either by response (written or oral)\textsuperscript{56} or assumption (two to four hour lapse of time without response),\textsuperscript{57} the interdiction may take place.

During the interdiction phase, limitations are set, among other things, on use of force,\textsuperscript{58} conduct of officials,\textsuperscript{59} and safeguards.\textsuperscript{60} The post-interdiction phase covers issues such as jurisdiction over detained vessels,\textsuperscript{61} claims for incidents that may have occurred during interdiction,\textsuperscript{62} and disposition of seized property.\textsuperscript{63} In this post-interdiction phase, parties are also committed to exchanging information on results of the interdiction.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{55} Id. art. 4.
\item \textsuperscript{56} Id. art. 4(2).
\item \textsuperscript{57} Id. arts. 4(3) & 4(c).
\item \textsuperscript{58} Id. art. 10.
\item \textsuperscript{59} Id. art. 8.
\item \textsuperscript{60} Id. art. 9.
\item \textsuperscript{61} Id. art. 6.
\item \textsuperscript{62} Id. art. 14.
\item \textsuperscript{63} Id. art. 13.
\item \textsuperscript{64} Id. art. 7(2).
\end{itemize}
Table 2

**Mechanisms of Operation under the Ship-Boarding Agreements**

<table>
<thead>
<tr>
<th>No.</th>
<th>Action</th>
<th>Interdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Before</td>
</tr>
<tr>
<td>1</td>
<td>Request to board suspect vessels</td>
<td>x</td>
</tr>
<tr>
<td>2</td>
<td>Respond to request</td>
<td>x</td>
</tr>
<tr>
<td>3</td>
<td>Boarding in the event of non-reply</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Rights to visit</td>
<td>x</td>
</tr>
<tr>
<td>5</td>
<td>Notification to master</td>
<td>x</td>
</tr>
<tr>
<td>6</td>
<td>Exchange of operational information</td>
<td>x</td>
</tr>
<tr>
<td>7</td>
<td>Notification of results</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Status of reports</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Conduct of security force officials</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Safeguards</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Use of force</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Exchange of knowledge of laws and policies of other party</td>
<td>x</td>
</tr>
<tr>
<td>13</td>
<td>Points of contact</td>
<td>x</td>
</tr>
<tr>
<td>14</td>
<td>Disposition of seized property</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Claims</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Evaluation of implementation</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Cooperation and specialized assistance</td>
<td></td>
</tr>
</tbody>
</table>

In the miscellaneous provisions, several articles should be noted. First is the right of the third state, in which the non-U.S. party of the ship-boarding agreement is given discretion to allow interdiction exercise of the former's suspect ships. Such discretion comes with a condition that the third state will comply with all provisions related to interdiction rights set forth in the ship-boarding agreement that the non-U.S.
party has committed to or *mutatis mutandis*.\textsuperscript{65} This article indicates that not only other PSI participants but also non-PSI states may conduct interdiction of non-U.S. suspect ships under the ship-boarding agreement. The second article to note is the duration of the ship-boarding agreement. Although both parties agree to evaluate its implementation,\textsuperscript{66} the ship-boarding agreement offers no clarification as to the duration of the agreement; thus, it can be terminated only upon written notification.\textsuperscript{67}

**Program and Activity of the PSI**

In general, the PSI program and activities can be classified into two major types: the Operational Experts Group Meeting, which is the lead forum, and field exercises, including maritime interdiction, field scenarios, port interdiction, combined interdiction (sea, land, and air), gaming, and shipping-container workshops. The twenty-one member states of the Operational Experts Group Meeting, which coordinates PSI activities, are Argentina, Australia, Canada, Denmark, France, the Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Singapore, Germany, Greece, Italy, Japan, South Korea, Spain, Turkey, the United Kingdom, and the United States. Since 2003, the PSI has conducted forty-eight field exercises and convened twenty-three Operational Experts Group Meetings. Although there is no fixed schedule for meetings and exercises, the frequency of PSI activities range from five to thirteen annually. In terms of results, PSI participants claimed to have conducted eleven interdictions in 2005 and two dozen other efforts to prevent transfers of equipment and WMD materials from 2005-2006, in addition to assisting with more

\textsuperscript{65} *Id.* art. 19.
\textsuperscript{66} *Id.* art. 15(2).
\textsuperscript{67} *Id.* art. 18(3).
than thirty shipment interdictions in 2006.\(^6\) Besides the PSI core activities, other
initiatives related to the PSI include the Megaport Initiative, the Container Security
Initiative, the Secure Freight Initiative, the Customs Trade Partnership against
Terrorism, the Global Initiative to Combat Terrorism, and Cooperative Threat
Reduction.\(^6\) Due to the nature of PSI secret operations, it is difficult for the public to
learn of the PSI’s results, let alone obtain any information on the activities.

At present, no international tribunal has tried a PSI-related case or interdiction.
PSI-interdiction cases, if any, are settled through diplomatic channels. Nevertheless,
PSI participants have claimed that they have conducted numerous PSI-related
interdictions worldwide since its inception in 2003. Among the claimed cases of PSI
interdictions are *BBC China* in October 2003,\(^7\) coolers cargo in February 2005,
crchromium-nickel steel plates cargo in November 2006, ballistic missile components
cargo in February 2007, sodium perchlorate cargo in April 2007, and ballistic missiles
cargo in June 2007.\(^7\) In general, the outcome of these interdiction efforts is that the

rpts/RL34327_20080204.pdf.

\(^6\) Phillip A. Foley, Paper presented at the Proliferation Security Initiative in the Framework of
Maritime Security Symposium: PSI: U.S. Perspective (Dec 12, 2007) (on file with the
Directorate General of Law and International Treaties Library, Indonesian Ministry of Foreign
Affairs); see also Christopher Shiraldi, *U.S. National Security Implications of the U.N.
Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National
the Strait of Malacca and the Regional Maritime Security Initiative: Responses to the U.S.
Proposal, in GLOBAL LEGAL CHALLENGES: COMMAND OF THE COMMONS, STRATEGIC
COMMUNICATIONS AND NATURAL DISASTERS* 97, 98 (Michael D. Carsten ed., 2007).

\(^7\) Concerning a German flag freighter bound to Libya, cooperation among U.S., U.K.,
German, and Italian governments stopped the *BBC China* in the Suez Canal, found centrifuge
parts, and confiscated them. After unloading the centrifuge parts, the *BBC China* was released
to continue its course to Libya.

\(^7\) Coolers cargo, Feb. 2005 (a ship bound to Iran from Europe with coolers cargo for heavy-
water reactor program; the European government denied the export license after being notified
by the U.S.); chromium-nickel steel plates cargo, Nov. 2006 (a ship bound to Iran from Asia
cargoes were never shipped to their original destinations. The measures in these cases ranged from interdiction *per se* to detour to other actions that inhibited the cargoes from reaching their intended destinations. The seized cargoes are usually returned to the original supplier state.

With regard to location, PSI maritime operations cover sea zones governed in the UNCLOS, that is, territorial seas, contiguous zones, exclusive economic zones, continental shelves, and the high seas, in addition to straits used for international navigation and archipelagic waters. The rule of thumb in these zone divisions is that territorial seas and the high seas are two opposite poles in terms of sovereignty and jurisdiction, the former being exclusive while the latter is inclusive. For straits used for international navigation, the rules are subject to the sea zones delimiting such straits while archipelagic waters follow territorial sea regimes. Within these sea zones, there are exceptions that allow other states sovereignty and jurisdiction. These exceptions include innocent, transit, and archipelagic sea-lane passages.

**Selected Countries Views on the PSI**

Country views of the PSI can be divided into two groups: proponents, PSI-participating countries, and opponents, non-participating countries. This dissertation examines only two countries, one representing each group, Australia for the proponent and Indonesia for the opponent. The primary reasons for their selection are that the

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with steel plates for a missile program; interdicted, steel plates confiscated and returned to original supplier country in Asia); ballistic missile components cargo, Feb. 2007 (a ship bound to Syria from the U.S. with ballistic missile components cargo; inspected, cargo seized and returned to the U.S.); sodium perchlorate cargo, Apr. 2007 (a ship bound to Iran from Asia with sodium perchlorate cargo used for rocket propellants; interdicted and detoured to an Asian port); ballistic missile cargo, June 2007 (a Syrian plane bound to North Korea with suspected cargo related to ballistic missiles; denied over flight rights) as described in Wade Boese, *Interdiction Initiative Successes Assessed*, ARMS CONTROL TODAY, July/August 2008, available at http://www.armscontrol.org/act/2008_07-08/Interdiction.
PSI receives much criticism from Asia, in particular Southeast Asia, and Asia is one of the world’s major maritime routes. With some of the world’s busiest ports, airports, and trans-shipment centers, Asia has a higher probability of being used to transfer WMD worldwide. Indonesia is the largest archipelagic country in the world, the first country in the world that declared its archipelagic status, and one of the key countries proposing the prevailing archipelagic concept under the UNCLOS. Australia is one of the United States’ strongest allies, supporting the PSI while being located close to Asia between the Indian Ocean and the South Pacific Ocean.

**Participating country: Australia.** First, the Australian Government believes that the proliferation of WMD is a serious threat to international peace and security. Therefore, it is strongly interested in and committed to non-proliferation and disarmament, in particular the PSI. Nevertheless, the Australian government holds that the PSI is not a substitute for maintaining and strengthening the existing multilateral WMD regimes. Neither is the PSI a replacement for having an export control mechanism. Rather, the Australian government views the PSI as part of its security framework to deny proliferating WMD and related technology, given the current world situation with North Korea conducting nuclear tests in 2006 and Iran maintaining its persistent refusal to cooperate with the IAEA. In addition, the


73 Knez, supra note 72.

74 Id.
Australian government argues that it has an international legal obligation derived from UNSC Resolution 1540 to prevent the proliferation of WMD.\textsuperscript{75}

The Australian government further asserts that the PSI effectively complements and reinforces existing multilateral structures or laws, in this case combating proliferation of WMD and terrorism.\textsuperscript{76} In terms of its membership, the PSI does not discriminate against any country because it is not an exclusive club. In fact, the strength of the PSI lies in its diversity and inclusiveness. In reality, according to the Australian government, most of the work of the PSI is not about dramatic interdictions at sea. Rather, it is the everyday work of good intelligence, export controls, and law enforcement efforts.\textsuperscript{77} In other words, most PSI work takes place in port.

The PSI is a cooperative activity intended to address transnational issues. When issues extend beyond the boundaries of any one country and that particular country alone cannot manage or resolve such issues, then cooperation may provide a solution. In this case, the PSI functions as a cooperative activity similar to Southeast Asia's cooperation in addressing disaster relief and tackling transnational crime such as drug trafficking and illegal fishing. With the increasing attempts to spread WMD, countries should look for ways to enhance their ability to counter the threat of such proliferation. The PSI is a way to counter that threat.

The Australian government views the PSI as a new type of strategic thinking and flexibility, which Australia had already embraced through its own counter-
terrorism and counter-proliferation efforts.\textsuperscript{78} The PSI is practical, flexible, and non-bureaucratic because it is not a formal organization. Under the PSI, countries can exercise and test their defense and law enforcements procedures, share information, and perform actual maritime and air interdictions. In terms of methods, the Australian government has in place a procedure that includes conditions and requirements for providing consent in the event of a PSI request. Hence, consent from the Australian government is not automatic but decided on a case-by-case basis. In other words, the Australian government maintains its national sovereignty with regard to PSI requests.\textsuperscript{79}

**Non-participating country: Indonesia.** Indonesia is party to the UNCLOS, all U.N. conventions on terrorism, CWC, BTWC, and NPT, as well as the ASEAN Free Weapons Zone Treaty; so it prohibits the proliferation of WMD. The Indonesian government’s concern about the PSI lies primarily with the notion that the PSI will limit its sovereignty or sovereign rights by undermining relevant rules of international law affecting internal waters, archipelagic waters, territorial seas, straits used for international navigation, exclusive economic zones, and high seas.\textsuperscript{80} Furthermore, the fact that Indonesia is in a strategic location between two major oceans and connects two major continents makes it difficult to comply with the PSI measures. With

\textsuperscript{78} Id.
\textsuperscript{79} Id.
hundreds of vessels of all flags passing through Indonesian waters from Africa, Europe, the Middle East, and Southeast Asia, the task of conducting PSI interdiction may seem impossible. The Indonesian government also holds that PSI measures, from responding to interdiction requests to exchanging confidential information to conducting an interdiction with possible use of force, are more likely to obstruct international navigation than support it.81

From the political viewpoint, Indonesia has reservations about the PSI, especially concerning the process of drafting the PSI, the dual use of materials for weapons of mass destruction, and the use of weapons of mass destruction for terrorism.82 First, the process of formulating the PSI was selective, unilateral in nature, and not multilaterally negotiated. The goal of the PSI is pre-emptive and originally targeted only the “proliferators” of the “Axis of Evil” states. Indication of this selectiveness and lack of multilateral negotiation was apparent during the UNSC meeting in 2004 adopting UNSC Resolution 1540. Despite the fact that the Security Council adopted Resolution 1540, it failed to include a reference to interdiction, despite the PSI wording, because it was strongly rejected by China and some non-aligned countries. Furthermore, several countries remain skeptical about the implementation of UNSC Resolution 1540, simply because the UNSC adopted the resolution without a transparent, inclusive, and multilaterally negotiated process.

The Indonesian government argues that the dual use of WMD and associated technology in civilian and military application makes interdictions difficult to implement. Thus, doing so would only hamper legitimate commerce and shipping

81 Rachmadianto, supra note 80.
82 Id.
activities in the already-busy routes in Indonesian waters. The difficulty in identifying the exact use for the alleged materials of WMD will inevitably lead to political decisions concerning countries sending or receiving the cargo. For example, although India, Pakistan, and Israel are “nuclear weapon-capable states” and not parties to the NPT, PSI-participating countries do not consider them to be “states of proliferation concern.” Hence, these countries are apparently exempt from PSI interdictions. Yet if the cargo belongs to or ships to one of the “Axis of Evil” countries or the so-called “rogue” states, it would probably be targeted for PSI interdiction.

With regard to combating terrorism through WMD, the Indonesian government holds the view that the current regimes have already addressed that issue. The existing multilateral instruments addressing WMD already provide for cooperation and mandate states to take national measures in terms of legislation, export control, border control, and information and intelligence sharing. Many states that are party to the multilateral instruments addressing WMD, including Indonesia, have enacted relevant laws and regulations that criminalize terrorists acquiring WMD and related materials. Hence, one can argue that the PSI and its unilateral motive may undermine the existing WMD regimes.

A recent development in Indonesia’s position on the PSI is reflected in the results of a bilateral meeting between U.S. Secretary of State Clinton and Indonesian Minister of Foreign Affairs Natalegawa, which took place before the APEC Summit 2011 in Honolulu, November 11, 2011. In his response to requests from Secretary Clinton for Indonesia to join the PSI, Minister Natalegawa stated that Indonesia is

83 Id.
84 Id.
85 Information on file with the author.
currently in the process of studying it. Further, Minister Natalegawa asserted that Indonesia recognizes the motive of the PSI, that is, stopping the illicit trafficking of WMD, but holds a different view of the means for attaining that end. Indonesia is carefully observing consistency where the PSI is concerned, in particular in its implementation, and comparing the PSI to prevailing international legal instruments, including the UNCLOS. In his last remarks in the discussions on the PSI, Minister Natalegawa expressed Indonesia’s expectation that the means or implementation of the PSI should accord with the prevailing international law and should not cause a bottleneck in achieving mutual objectives related to reducing or eliminating proliferation of WMD.
Chapter 3

The PSI and International Law

International law scholars hold different views about the PSI. Those who favor it argue primarily that the PSI complements relevant regimes of international law, from combating terrorism to countering proliferation of WMD.86 Its complementary character is apparent in the motive shared by international instruments, including UNSC Resolution 154087 and the NPT.88 The argument continues that, given the vast number of participating countries, the PSI serves as an international network that works in identifying threats to international peace and security and in taking concrete action to suppress those threats. In so doing, the PSI respects national and international law, complying with rules such as flag-state consent, interdiction, and use of force.

On the other hand, scholars questioning the PSI opine that its application will affect international navigation worldwide, thereby possibly undermining the regime of freedom of navigation recognized by international law.89 With few exceptions, the UNCLOS guarantees freedom of navigation to virtually all ships from all countries in the world, from territorial seas with innocent, transit, and archipelagic passages to the high seas. There is a fine line between the act of transporting and crime, and the UNCLOS exists to protect the balance between the former and the latter. The PSI, in pursuing the latter, tends to weaken the former. Interdiction as one of the PSI’s

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87 UNSC Resolution 1540, supra note 27.
primary manifestations will, among other hindrances, prolong navigation times and add unnecessary burden to international navigation, even if the PSI conducts interdiction in a random manner. In addition, the notion that the PSI allows use of force in its interdiction may harm international peace and security.

Nevertheless, these two contending views have something in common: that the PSI touches international law, primarily the regimes of sovereignty, freedom of navigation, terrorism, WMD, and use of force. For example, the PSI motive, which is stopping the illicit transfer of WMD by state and non-state actors of proliferation concern, affects regimes combating terrorism and proliferation of WMD because it adds a new method to address the concerns of the regimes. The PSI motive attempts to accommodate these two regimes by conducting, among other unilateral acts, maritime interdiction. As a result, this ability to conduct unilateral maritime interdiction has triggered discussion that PSI methods may have the potential to undermine sovereignty, freedom of navigation, and use of force regimes. The PSI maritime interdiction of foreign ships in foreign maritime zones raises issues of jurisdiction, passages, and self-defense, among others.

In brief, the sovereignty issues covering maritime zones include territorial seas, contiguous zones, archipelagic waters, straights used for international navigation, exclusive economic zones, continental shelves, and the high seas, with the question being whether PSI interdiction in these zones violates existing international law. Discussions on the freedom of navigation regime focus on ships: whether the PSI violates ships mobility guaranteed by the freedom of navigation. Analysis of the PSI concerning regimes for combating terrorism and proliferation of WMD addresses
whether the PSI complements these two regimes. Finally, concerning the use of force, the question is whether the PSI’s limited application of use of force is permissible under international law. In a wider scope, PSI application may touch other regimes of international law, such as state responsibility, piracy, and liabilities. Given the minimal impact of the PSI on these other regimes, however, these topics are reserved for future research and discussion.

**Sovereignty**

Relevant to the PSI, the regime of sovereignty focuses on two parts: maritime zones and ships. Under the UN CLOS, a state has different sovereignty for each maritime zone, from being exclusive, as in territorial seas, to being inclusive, as in the high seas. In contrast to maritime zones, sovereignty of a state over a ship is generally exclusive. Enforcement of sovereignty in both maritime zones and ships is subject to a regime of international law known as jurisdiction.\(^\text{90}\) The UN CLOS division of maritime zones indicates that, although a state may have sovereignty, its sovereignty does not necessarily mean that it has automatic jurisdiction of the area. This is the case with the PSI, which allows enforcement of one state’s jurisdiction in another state’s area of sovereignty.

Hypothetically, there are several scenarios in which the PSI can be exercised in maritime zones and against ships. First, the PSI can interdict a foreign ship in a foreign maritime zone. In this first scenario, the PSI requires two consents, those of the coastal state and the flag state. Second, the PSI can conduct interdiction of a foreign ship but in a PSI-participating maritime zone. In this particular scenario, the PSI needs the

\(^{90}\) See IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 106 (2008) [hereinafter BROWNIE].
consent only of the flag state. Finally, the PSI can perform interdiction of a ship from a PSI-participating country but in a foreign maritime zone. Similar to the second scenario, the third scenario requires only a single consent, but of a different type, that of the coastal state.

In light of these scenarios, the maritime zone discussion focuses on coastal-state consent while the ship discussion analyzes flag-state consent. In addition, however, for the purpose of classification, another scenario is posited in which the PSI covers all the elements. In this scenario, the PSI conducts interdiction of a ship from a PSI-participating country in a PSI-participating maritime zone. This scenario, taking into account that the PSI carries out its interdiction within the PSI network, requires neither coastal nor flag state consents. In a sense, this last scenario is similar to an exercise of sovereignty of a state over its territory, so it needs no further analysis.

**Maritime Zones**

Before the PSI locus analysis, this section includes a brief discussion of sea zones under the UN CLOS and possible areas of law that are open to multiple interpretations. Within these possible areas, the PSI may find justification for its interdictions. The discussion begins with analysis of maritime zones with exclusive sovereignty: territorial seas and archipelagic waters. Then, the discussion focuses on maritime zones with sovereign rights: contiguous zones, exclusive economic zones, and continental shelves.

To begin with, the UN CLOS divides the territorial sea regime into thirty articles in three major parts: legal status, legal status, limits, and rules on ships passing the

\[91\text{UNCLOS, supra note 33, art. 2.}\]

\[92\text{Id. arts. 3-16.}\]
The legal status affirms that a territorial sea, which starts from the end of a land’s territory to an adjacent belt of sea, falls under the sovereignty of the coastal state. Such sovereignty, nevertheless, comes with an exception of innocent passage for a foreign ship.

The UNCLOS permits a foreign ship to navigate through a coastal state’s territorial sea as long as such navigation follows the requirements set forth in the UNCLOS. Among the noted requirements are continuous and expeditious modes and innocent purposes not prejudicial to the peace, good order, or security of the coastal state. Furthermore, the legal status and rules for ships passing in a territorial sea are subject to a caveat that requires consistency not only with the UNCLOS but also with other rules of international law. In other words, other rules of international law may be applicable within a territorial sea. The UNCLOS does not, however, clarify further the applicability of other rules of international law in territorial seas.

As comprehensive as the UNCLOS may appear, the provisions addressing territorial seas raise issues, one of which is a caveat. In the UNCLOS, although the preamble indicates UNCLOS primacy over rules and principles of general international law, such indication does not address, among other issues, which types of general international law are referenced. Under Article 38 of the I.C.J. Statute, the primary sources of international law are international convention, customary international law, and general principles of law. Teleological interpretations of the

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93 Id. arts. 17-31.
94 Id. art. 3.
96 UNCLOS, supra note 33, arts. 2(2) & 19.
preamble suggest that these primary sources of law may apply for matters not
governed in the UNCLOS. Following that line of interpretation, at the extreme and in
favor of the PSI, one may argue that, because the international community recognizes
combating terrorism as an international law norm, measures by coastal states to
prevent terrorism may take place in a territorial sea, thereby justifying PSI
interdiction.

If the PSI is applicable in a territorial sea, of which a coastal state has
exclusive sovereignty, then one may also argue that the PSI is legitimate in other
maritime zones where a coastal state has fewer sovereign rights. UNCLOS governance
of maritime zones starts with territorial seas having the most exclusive sovereignty
and gradually ends with the high seas, which are open to all states. This gradual effect
is apparent in contiguous zones, where the UNCLOS indicates only coastal sovereign
rights, exclusive economic zones with respect to their living resources, and the
continental shelf with its resources shared by other countries. The gradual effect is
also visible in other maritime zones, namely straits used for international navigation
and archipelagic waters.

The UNCLOS defines a strait used for international navigation as a strait that
connects high seas and an exclusive economic zone or vice versa. Under this
definition, a strait used for international navigation can be a coastal state territorial sea,
exclusive economic zone, or contiguous zone. If part of a strait used for international
navigation is a territorial sea, then the right of other states to navigate through it falls
under the zone of a territorial sea, which is innocent passage. For maritime zones other

98 UNCLOS, supra note 33, art. 37.
than territorial seas, transit passage applies.99 The rights and duties of states in these zones with straits used for international navigation are subject to the UNCLOS and other rules of international law.100 Thus, PSI interdiction might be applicable in a strait used for international navigation.

With regard to archipelagic waters, the gist of this regime is to eliminate possible sea pockets that may jeopardize the political, geographical, and economic integrity of an archipelagic state.101 An archipelagic state has exclusive sovereignty over its archipelagic waters. Different from those of a territorial sea, the right and duties of an archipelagic state are subject solely to the UNCLOS, with an exception of innocent passage, which is subject to other rules of international law.102 In addition to the rights of other states in archipelagic waters, the UNCLOS recognizes archipelagic sea-lanes passage with similar provisions to transit passage.103 To this end, the applicability of PSI interdiction in archipelagic waters is comparable to that for a territorial sea, that is, under the exclusive jurisdiction of a coastal state.

PSI participants argue that the PSI may enforce jurisdiction via interdiction in any maritime zone as long as relevant consents have been obtained. They argue that, for maritime zones with exclusive sovereignty such as archipelagic waters, territorial seas, and internal waters, the PSI requires not only coastal state and but also flag state consent. They further argue that the PSI requires only flag state consent to conduct interdiction in maritime zones with sovereign rights and open-to-all characters, such as contiguous zones, exclusive economic zones (including straits used for international

99 Id. arts. 37 & 45.
100 Id. art. 34.
101 Id. art. 46.
102 Id. arts. 49 & 52.
103 Id. art. 54.
navigation connecting two exclusive economic zones and straits used for international navigation connecting exclusive economic zones), the continental shelf, and the high seas. The interdiction, nevertheless, should respect coastal state sovereign rights within the maritime zones and practices of international navigation.

The PSI defines maritime zones into zones with sovereign rights and zones open-to-all states or referred to as international waters. The definition covers contiguous zones, exclusive economic zones, the continental shelf, the high seas, and straits used for international navigation. Of all the zones in which the PSI may enforce interdiction, the high seas and straits used for international navigation are less controversial than contiguous zones, exclusive economic zones, and continental shelves, largely because the UNCLOS recognizes the sovereign rights of coastal states in these zones. The high seas, on the other hand, are open to all states; hence, no claim of sovereignty can be made, nor can sovereign rights be reserved. As for straits used for international navigation, the regimes are subject to the zones bordering such straits, either the high seas or an exclusive economic zone.

With regard to the PSI and the maritime zones with sovereign rights, the discussion is focused on two major questions: whether PSI interdiction is applicable within these zones and whether PSI interdiction will hamper the exercise of coastal states’ sovereign rights. The fact that the UNCLOS provides a state with limited sovereignty within these maritime zones does not mean that other states may enforce their jurisdiction therein. Neither does it mean, however, that no jurisdiction is enforceable in the said maritime zones. Because the UNCLOS does not specifically govern enforcement of another state’s jurisdiction within a state’s contiguous zone,

104 PSI statement of interdiction, supra note !9.
exclusive economic zone, and continental shelf, the focus of this dissertation is on attempting to identify which rules are applicable. Teleological interpretation, pursuant to the UNCLOS preamble, will be applied for matters not regulated by the rules and principles of general international law.¹⁰⁵

Concerning exclusive economic zones and a continental shelf, in addition to the UNCLOS preamble, each has its own clarifications. In exclusive economic zones, the rights and duties of other states may be governed by other pertinent rules of international law as long as such rights and duties are compatible with the UNCLOS.¹⁰⁶ Concerning a continental shelf, the UNCLOS does not clarify whether other rules of international law can govern the rights of a coastal state;¹⁰⁷ however, in exercising such rights, coastal states must respect other states’ rights that are subject to other rules of international law.¹⁰⁸ In a nutshell, the PSI in a contiguous zone, an exclusive economic zone, and a continental shelf will be governed by general international law, in particular rules that are compatible with the UNCLOS.

To identify which general international law applies to PSI interdiction in a state’s contiguous zone, exclusive economic zone, and continental shelf, references are once again made to sources of the international law framework, as noted in Article 38 of the I.C.J. Statute, namely international agreement, customary international law, and general principles of international law. Based on this reference, one can validly submit that the general international law applicable to PSI interdiction within the maritime zones is international agreements, that is, PSI commitments and ship-boarding

¹⁰⁵ UNCLOS, supra note 33, pmbl., para. 8.
¹⁰⁶ Id. art. 58, paras. 2 & 3.
¹⁰⁷ Id. art. 77.
¹⁰⁸ Id. art. 78; see also art. 87 (concerning rights of other states, e.g., freedom of navigation subject to other rules of international law).
agreements. Because PSI participants have their own consent arrangements, interdiction within PSI participants’ contiguous zones, exclusive economic zones, and continental shelves is permissible under international law. Yet although PSI interdiction finds legal justification through international agreements among its participants, such is certainly not the case for states not participating in the PSI.

In the maritime zones of non-participating states, it could be difficult to identify a comprehensive legal justification, let alone enforce PSI-based interdiction. Aside from the absence of PSI-interdiction regimes in international law, the UNCLOS recognizes greater rights and responsibilities of coastal states within their contiguous zones, exclusive economic zones, and continental shelves compared to those of other states. This recognition provides the coastal states with priority in taking necessary actions within their maritime zones, although such actions are limited. As difficult as it may seem, however, in practice PSI interdiction in non-participating states’ maritime zones is generally conducted via bilateral arrangements on a case-by-case basis. Considerations of this practice are arguably political rather than legal in nature. Given the character of PSI interdiction, such practices remain confidential and are rarely announced to the public.

Taking into account that the UNCLOS gives coastal states preference in their maritime zones, one may propose a valid interpretation that the exercise of coastal states’ sovereign rights must prevail over other states’ interests. This interpretation would suggest a condition that if application of other states’ interests does not hinder

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109 See, e.g., id. art. 58(3).
the exercise of a coastal state’s sovereign rights, then such application may be deemed as not in violation of the UNCLOS. As long as such application meets the condition, other states may exercise their interests in a coastal state’s contiguous zone, exclusive economic zone, and continental shelf. Following this line of interpretation, PSI interdiction may be justified provided that it does not impede the exercise of a coastal state’s sovereign rights.

**Ships**

Unlike regimes on maritime zones on which the UNCLOS is silent other than for activities prescribed as coastal states’ sovereign rights, the general rule of international law is clear concerning ships as territorial extensions of a state. Unless there is an intervening situation, exclusive jurisdiction over a ship lies with its flag state, irrespective of the ship’s location. Thus, because a ship is an extended territory of its flag state, the flag state’s consent plays a crucial role when another state exercises jurisdiction over its ship. Under the PSI arrangement, interdiction is permissible among ships of PSI participants, including those states having ship-boarding agreements. Controversy arises when PSI participants conduct interdiction of ships of non-participating states without their prior consent. This scenario, however, is not likely to occur.

To date, PSI interdiction has followed mandated flag-state consent, even among PSI participants. In other words, flag-state consent is not automatic as a result of being a PSI participant. The only arrangement that is close to automatic consent is assumed consent. In terms of assumed consent, a PSI participant may conduct

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111 *See, e.g.*, UNCLOS, *supra* note 33, art. 110.
112 *Id.* arts. 91, 92, & 94.
interdiction of a ship of another PSI participant if the latter does not respond to a consent request from the former in a specified time frame. In ship-boarding agreements, the specified time frame ranges from two to four hours, with the end of this period initiating the assumed consent arrangements. Afterwards, the PSI participant conducting assumed-consent interdiction would provide its full report to the flag state.

Besides flag-state consent, theoretically other states have interests in a ship, for example, cargo origin, destination, and owner. A state may be the origin-owner, the destination-owner, or even simply the owner of the cargo in a ship. Under normal conditions, the flag state has exclusive jurisdiction over these cargo interests. The condition changes, however, when a flag state approves a PSI-interdiction request. Under ship-boarding agreements, the party conducting the PSI interdiction may exercise its jurisdiction over the seized cargo. The flag state no longer has jurisdiction of the cargo. In other words, the interdicting state may transfer, sell, or dispose of the cargo. Nevertheless, in most successful PSI-interdiction incidents made known to the public, the PSI returns the suspected cargo to its country of origin and not its country of destination.

In theory, the party that will suffer the most losses in the event of seized cargo is the destination-owner because that party may have paid for the cargo either in part or in full. Consequently, a seized cargo incident will add more burdens to the flag state and users of commercial ships, particularly if the interdicting state decides not to return the seized cargo. As a result, in the context of the PSI, users of commercial ships will demand higher assurance from the flag states in the event of PSI-based
interdiction. Failure to provide appropriate assurance in the case of a PSI interdiction may significantly hamper commercial navigations worldwide.

A recent international development, however, may alter the view that a PSI interdiction will impede international commercial navigations. As of July 28, 2010, the 2005 SUA Protocols\textsuperscript{113} entered into force after Nauru deposited its instrument of ratification with the IMO on April 29, 2010. Based on this protocol, state parties must treat the illicit transfer of WMD or carrying WMD as an offense or a crime.\textsuperscript{114} Thus, member states to the protocol are under legal obligation to suppress this particular crime. As for commercial users, the fact that the illicit transfer of WMD constitutes a crime will leave them no choice but to comply and treat the PSI as a measure recognized by law.

**Freedom of Navigation**

Of all the issues related to freedom of navigation, exercising it in territorial seas and archipelagic waters remains debatable, if not sensitive, because two conflicting interests are at play—the interests of the coastal or bordering states and those of international navigation of the flag state. The coastal or bordering state holds the view that international navigation will undermine its sovereignty while the international community contends that freedom of navigation must be preserved due to its economic significance. In reconciling the two interests, the international community has set a balance under the UNCLOS. There are requirements for each type of passage, and failing to meet them will result in coastal or bordering state jurisdiction. The balance serves as a bridge between these two foreign interests.

\textsuperscript{113} 2005 SUA Protocol, \textit{supra} note 7.
\textsuperscript{114} \textit{id.} art. 5, para. 5(1)(b).
Customary international law recognizes freedom of navigation,\textsuperscript{115} which is codified by the UNCLOS in three major forms: innocent passage,

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (b) any exercise or practice with weapons of any kind;
   (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
   (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
   (e) the launching, landing or taking on board of any aircraft;
   (f) the launching, landing or taking on board of any military device;
   (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
   (h) any act of willful and serious pollution contrary to this Convention;
   (i) any fishing activities;
   (j) the carrying out of research or survey activities;
   (k) any act claimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
   (l) any other activity not having a direct bearing on passage.\textsuperscript{116}

Transit passage,

1. Ships and aircraft, while exercising the right of transit passage, shall:
   (a) proceed without delay through or over the strait;
   (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of State bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
   (d) comply with other relevant provisions of this Part.\textsuperscript{117}

Freedom of the high seas,

\textsuperscript{115} Nicaragua, \textit{supra} note 43, at 93, para. 174.
\textsuperscript{116} UNCLOS, \textit{supra} note 33, art. 19.
\textsuperscript{117} \textit{Id.} art. 39.
1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for their rights under this Convention with respect to activities in the Area. \(^{118}\)

The rules indicate that a foreign ship, irrespective of its cargo, may traverse a territorial sea or archipelagic waters under innocent passage, straits used for international navigation via transit passage, and other zones with the freedom of the high seas. These freedoms come with requirements that a ship must abide by. The requirements vary according to the maritime zones. For instance, innocent passage carries more conditions compared to transit passage because it passes a zone in which a coastal or archipelagic state has exclusive sovereignty. Similarly, freedom of the high seas has the least requirements compared to innocent passage because the high seas are open to all states and no state may claim the sovereignty thereof, unless otherwise governed. As for freedom of navigation in a contiguous zone, exclusive economic zone, and continental shelf, they are all subject to the limited sovereign rights of the coastal state.

For innocent, transit, and archipelagic sea-lane passages, the primary issue with the PSI lies in the definition of *freedom of navigation*. The UNCLOS does not

\(^{118}\) *Id.* art. 87.
include the PSI *per se* as a motive that could serve as a basis for interdiction. One may argue that the application of the PSI will cause imbalance by creating impediments to international navigation. One may further argue by drawing an analogy between impediments caused by the PSI and that of laying mines in ports that infringe on international navigation, as decided by I.C.J. in the Nicaragua Case:

On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph I (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones, which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State that enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships. One may counter, however, that given the international concern and potentials of terrorism and abuse of WMD, PSI interdiction may be an effective measure to address such concerns. Moreover, in practice, PSI interdiction is limited by certain criteria and does not have the effect of literally blocking international navigation as does laying mines in ports. In addition, the PSI requires both coastal- and flag-state

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119 Arguably, UNCLOS, *supra* note 33, art. 23 ("Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substance shall, when exercising the right of innocence passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements") may come close to including the PSI motive based on cargo specification. Furthermore, some states' practices demand prior notification of ships falling under this particular article; see CHURCHILL & LOWE, *supra* note 36, at 92.


121 See BROWNLIE, *supra* note 90, at 746 (discussing forcible measures to occlude sources of terrorism).
consents in conducting interdiction in zones where innocent, transit, and archipelagic sea-lane passages are exercised. The requirement of these consents may well waive freedom of navigation because both the coastal or bordering state and the flag state have considered PSI interdiction in terms of their internal interests. In this sense, there are no longer contending or conflicting interests. Similarly, for freedom of the high seas in zones other than a territorial sea or archipelagic waters, provided that relevant consent has been obtained, PSI interdiction does not violate or contradict the freedom of the high seas. The relevant consents also waive coastal state primacy over other states in exercising sovereign rights such as exploration and exploitation of mineral resources.

**Terrorism and Weapons of Mass Destruction**

At the outset, it is submitted that the PSI motive is not a stand-alone motive. Based on documents referring both to the PSI statement of interdiction and ship-boarding agreements, the PSI motive is derived from existing regimes of international law, in particular that of combating terrorism and proliferation of WMD. In other words, without the aforementioned existing regimes of international law, the PSI motive cannot exist. Moreover, to a certain extent, the PSI also connects combating terrorism and non-proliferation of WMD regimes. The connection between the PSI motive and these regimes is apparent by observing the contents of its international instruments.

The primary international instrument is UNSC Resolution 1540, which shows the highest degree of connection to the PSI due to its status and content. The status of
UNSC Resolution 1540 is binding on all U.N. member states through Article 25\textsuperscript{122} of the U.N. Charter. Acting under Chapter VII of the Charter, the UNSC unanimously adopted Resolution 1540 in its 4956th meeting on April 28, 2004. The Resolution has sixteen preamble paragraphs (PP) and twelve operative paragraphs (OP) covering matters of proliferation of nuclear, chemical, and biological weapons as well as their means of delivery. The particular importance of this Resolution is the UNSC decision to treat proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery, as a threat to international peace and security.\textsuperscript{123} It also considers the illicit trafficking of WMD as a threat to international peace and security:

Gravely concerned by the threat of illicit trafficking in nuclear, chemical and biological weapons and their means of delivery, and related materials, which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security.\textsuperscript{124}

In the PP sections, paragraphs are divided into three major categories, namely, addressing the roles of the UNSC, matters regarding proliferation of nuclear, chemical, and biological weapons as well as their means of delivery, and reminders of states' obligation related to these matters. In the OP sections, the UNSC calls states to implement the Resolution appropriately both at national and international levels.

The PSI statement of interdiction and UNSC Resolution 1540 share similar issues, primarily (1) considering proliferation of WMD and their means of delivery as a threat to international peace and security;\textsuperscript{125} (2) taking appropriate and effective

\textsuperscript{122} "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter, supra note 26.


\textsuperscript{124} UNSC Resolution 1540, supra note 27, pmbl, para. 9.

\textsuperscript{125} Id.; see also UNSC Resolution 1540, supra note 27, pmbl., para. 1.
actions to combat the illicit trafficking of WMD;\textsuperscript{126} (3) enhancing coordination at all levels to prevent the illicit trafficking of WMD;\textsuperscript{127} (4) adopting and enforcing national laws to prohibit the illicit trafficking of WMD;\textsuperscript{128} and (5) indicating that all measures should be consistent with national and international law.\textsuperscript{129} Some issues, however, are governed only in the PSI; for example, the type of proliferators are limited by the UNSC Resolution only to non-state actors as maintained under UNSC Resolution 1267 (1999), while the PSI includes non-state actors and states of proliferation concern. In terms of objectives, the PSI and UNSC Resolution 1540 both attempt to address concerns of regimes of terrorism and WMD.

Although the UNSC Resolution 1540 was passed in 2004, one year after the adoption of the PSI, both refer to the UNSC Presidential Statement of 1992, highlighting all U.N. member states’ general obligations concerning WMD:

The members of the Council underline the need for all Member States to fulfill their obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction; to avoid excessive and destabilizing accumulations and transfer of arms; and to resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability.\textsuperscript{130}

Similarly, this particular UNSC Presidential Statement is also referred to in all ship-boarding agreements concluded by the United States with major flag-state countries

\textsuperscript{126} PSI statement of interdiction, supra note 19, first principle; see also UNSC Resolution 1540, supra note 27, pmbl., para. 4.
\textsuperscript{127} PSI statement of interdiction, supra note 19, chapeau; see also UNSC Resolution 1540, supra note 27, pmbl., para. 10.
\textsuperscript{128} PSI statement of interdiction, supra note 19, third principle; see also UNSC Resolution 1540, supra note 27, operating para. 2.
\textsuperscript{129} PSI statement of interdiction, supra note 19, chapeau and fourth principle; see also UNSC Resolution 1540, supra note 27, operating para. 10.
\textsuperscript{130} UNSC Resolution 1540, supra note 27.
before the issuance of UNSC Resolution 1540. After such issuance, accordingly, UNSC Resolution 1540 is included in a preamble paragraph in virtually all shipboarding agreements concluded by the United States with major flag-state countries.

The UNSC Resolution 1540 includes UNSC Resolutions 1267 and 1373 (2001) in its preamble paragraphs. UNSC Resolution 1373 serves as a link between terrorists and WMD and UNSC Resolution 1267 maintains the U.N. list of terrorists or terrorist groups. Within the UNSC system, Resolution 1267 is the door to the UNSC’s involvement in terrorism, based on its referral documents. Prior to UNSC Resolution 1267, the issue of terrorism remained at the UNGA level, which can be traced back to its resolutions on measures to eliminate international terrorism, primarily Resolution Numbers 49/60 (1994) and 46/51 (1991). The first declaration about terrorism in the U.N. system was the UNGA Resolution 3034, concluded in its 2114th plenary meeting on December 18, 1972:

...measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.

Based on the above documents, it is conclusive that the PSI has its roots in 1972, or even as far back as 1934, when the international community first discussed the issue of terrorism.

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132 See, e.g., SBA St. Vincent and the Grenadines, supra note 6.
Other international instruments compatible with the PSI motive are those of international conventions concerning terrorism and the proliferation of WMD. To date, fourteen international instruments on combating terrorism and four amendments thereof have been adopted: the Tokyo Convention,\(^\text{133}\) the Hague Convention,\(^\text{134}\) the Sabotage Convention,\(^\text{135}\) the Convention on Protected Persons,\(^\text{136}\) the Hostages Convention,\(^\text{137}\) the Convention on Nuclear Material,\(^\text{138}\) the Protocol on Civil Aviation,\(^\text{139}\) the SUA Convention,\(^\text{140}\) the Protocol on Fixed Platforms,\(^\text{141}\) the Convention on Plastic Explosives,\(^\text{142}\) the Convention on Terrorist Bombings,\(^\text{143}\) the Convention on Terrorist Financing,\(^\text{144}\) the Convention on Nuclear Terrorism,\(^\text{145}\) and the Beijing Convention.\(^\text{146}\) The four amendments are the Amendment to the


\(^{137}\) Convention against the Taking of Hostages, Dec. 17, 1979, 1979, 1316 U.N.T.S. 205..


\(^{143}\) International Convention for the Suppression of Terrorist Bombings (Jan. 9, 1998), 37 I.L.M. 249.


Numerous international conventions on proliferation of WMD have been passed, primarily the Protocol on Poisonous and Other Gases, the NPT, the Treaty on Weapons of Mass Destruction on the Ocean Floor, the BWC, and the CWC. In addition, regional conventions on proliferation of weapons of mass destruction exist, for example, the Treaty of Tlatelolco, the ASEAN NWFZT, and the African NWFZT. Although international conventions of these two regimes of international law do not specifically refer to the PSI, nevertheless, they share common concerns with the PSI motive, that is, stopping the illicit trafficking of WMD, in particular by terrorists. For instance, according to the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism,

150 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.
152 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583 [hereinafter BWC].
155 Southeast Asian Nuclear Weapon Free Zone Treaty (Dec. 15, 1995), 35 I.L.M. 635 [hereinafter ASEAN NWFZT].
Recalling the Declaration on Measures to Eliminate International Terrorism annexed to General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States. 157

Furthermore, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation highlights, among other issues, the danger of terrorism to maritime safety:

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings. 158

Similarly, the NPT prohibits the transfer of WMD, as well as the illicit trafficking thereof:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices. 159

In addition, the 1995 Southeast Asian Nuclear Weapon Free Zone Treaty on disarmament of nuclear weapons indicates:

Determined to take concrete action, which will contribute to the progress towards general and complete disarmament of nuclear weapons, and to the promotion of international peace and security. 160

Finally, the 1980 Convention on Nuclear Material underscores the danger of nuclear material:

157 Convention on Nuclear Terrorism, supra note 145, pmbl., para. 6.
158 SUA Convention, supra note 140, pmbl., para. 3; see also Glen Plant, The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 39 INT'L & COMP. L.Q. 27, 56 (1990) (discussing how the purpose of the convention was to combat terrorism).
159 NPT, supra note 88, art. 1.
160 ASEAN NWFZT, supra note 155, pmbl., para. 2.
Desiring to avert the potential dangers posed by the unlawful taking and use of nuclear material;

Convinced that offences relating to nuclear material are a matter of grave concern and that there is an urgent need to adopt appropriate and effective measures to ensure the prevention, detection and punishment of such offences.\textsuperscript{161}

The above provisions relate to the PSI motive of stopping the illicit trafficking of WMD. Under the provisions of the 1980 Convention on Nuclear Material, it is an offense to take and use nuclear material unlawfully. Thus, the PSI motive attempts to prevent such an offense.

The PSI motive is also a measure to prevent and combat terrorism. As any other measures recognized under international law, the motive of the PSI is to minimize the threats and acts of terrorism. For example, the motive to combat illicit arms trafficking and suppress financing of terrorism was formalized by the international community at the 1999 International Convention for the Suppression of Terrorist Financing:

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds.\textsuperscript{162}

\textsuperscript{161} Convention on Nuclear Material, \textit{supra} note 138, pmbl., paras. 3 & 4 (emphasis added).
\textsuperscript{162} Convention on Terrorist Financing, \textit{supra} note 144, pmbl., para. 6.
The difference between the PSI motive and the financing of terrorism is the type of weapons addressed: the former addresses WMD while the latter is concerned with conventional arms. Given the gravity of destruction that the former may cause compared to the latter, it is difficult not to consider the PSI as a measure to prevent and combat terrorism. In addition, the fact that more than ninety countries worldwide have committed to support the PSI, including major flag-state countries, indicates that the PSI motive is considered a common motive. In other words, the PSI has gained international recognition as a measure to prevent and combat terrorism.

**Use of Force and Anticipatory Self-Defense**

International law is clear in prohibiting states from resorting to threat or force in their international relations. This norm is recognized not only under treaty but also by customary source of law. For instance, the U.N. Charter established such an obligation for its members:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.\(^{163}\)

Under this norm, the threat or use of force is not permissible against any state's political independence or territorial integrity. The phrase “territorial integrity” includes ships, aircraft, or any other property, over which a state can exercise its jurisdiction. Thus, threat or use of force is not permissible against any state ships or aircraft because of the territorial principle. Similarly, the I.C.J., in one of its judgment, reiterates this norm as customary international law,

> Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter “the Declaration on Friendly Relations”) provides

\(^{163}\) U.N. Charter, *supra* note 26, art. 2.
that: "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." (General Assembly resolution 2625 (XXV), 24 October 1970.) The Declaration further provides that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State" (ibid.). These provisions are declaratory of customary international law.\textsuperscript{164}

As with other norms in international law,\textsuperscript{165} the norm of use of force has its exception. The U.N. Charter governs such exceptions, known as the right of self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\textsuperscript{166}

According to the foregoing article, a state may use force in the case of an armed attack. Such use of force may be conducted individually or collectively, each with its respective qualifications. On several occasions, the I.C.J. has reiterated that the circumstances in which the right of self-defense may be resorted to include the occurrence of an armed attack, proportionality, and necessity:

Despite having thus referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to


\textsuperscript{165} For example, the persistent objector rule of customary international law allows a state not to follow customary norms, provided that the state has persistently objected to them.

\textsuperscript{166} U.N. Charter, \textit{supra} note 26, art. 51.
the United States "by the State which regards itself as the victim of an armed attack" (I.C.J. Reports 1986, p. 105, para. 199). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning Military and Paramilitary Activities in and against Nicaragua, it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" (I.C.J. Reports 1986, p. 101, para. 191), since "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack" (ibid., p. 103, para. 195). The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.\footnote{Oil Platfonns (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. (Nov. 6), p. 186, para. 51 (emphasis added).}

These circumstances have acquired the status of customary international law as confirmed by the I.C.J.:

The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law" (I.C.J. Reports 1996 (1), p. 245, para. 41); and in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court referred to a specific rule "whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" as "a rule well established in customary international law" (I.C.J. Reports 1986, p. 94, para. 176).\footnote{Id. para. 76.}

Although international law is clear in prohibiting the use of force, such is not the case in its exception, particularly after the 9/11 attacks.\footnote{For further discussion on exception to or breach of the regime of use of force, see CUSTOMARY INTERNATIONAL LAW 119-144 (Enzo Cannizzaro & Paola Palchetti eds., 2005).}\footnote{For an extensive discussion on use of force after 9/11, see TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE U.N. CHARTER 447-472 (2010).} Terrorism has influenced the international community’s perception of self-defense. At present, this
dissertation submits there are two extensions to the original self-defense doctrine: anticipatory self-defense and pre-emptive self-defense. The difference between the former and the latter lies primarily with the degree of the threat: the former is imminent, and the latter is consequential. The international community, to some extent, recognizes anticipatory self-defense, provided that the threat of attack is immediate and close. On the other hand, where pre-emptive self-defense is concerned, the views in the international community differ significantly. Joyner argues that pre-emptive self-defense is a wider interpretation of the supposedly narrow interpretation of self-defense.171 Furthermore, the practice of pre-emptive self-defense undermines not only the general rule of prohibition of use of force but also the regime of the United Nations, in particular the Security Council, in addressing threats to international peace and security. In practice, anticipatory self-defense includes, most notably, combating terrorism while pre-emptive self-defense covers, among other issues, the proliferation of WMD.

In the present case, the PSI represents both anticipatory and pre-emptive self-defense. One foot stands on combating terrorism while the other is on the measure of non-proliferation of WMD. Based on its intentions, two scenarios are applicable to the PSI. First, if the PSI is intended primarily as a measure to address non-proliferation of WMD, then it falls under pre-emptive self-defense; hence, it will be very difficult to obtain the international community’s acceptance. However, if the PSI is designed to combat terrorism, including the possibility of acquiring WMD, then it not only integrates with the recognized regime of anticipatory self-defense but also

supplements the work of the U.N. in preventing terrorism. Furthermore, the international community’s resistance is greater on the first rather than the second.

Concerning the second scenario, there are two types of use of force: first, that of self-defense recognized by international law and, second, that of the PSI. In the first type, the circumstances include but are not limited to armed attack, proportionality, and necessity elements, while in the second type, not only does the PSI require the first circumstance to be satisfied but it also has its own requirements, particularly in its methods. If one were to analyze the PSI based on the first type, it would fall under collective self-defense measures, in which terrorists carry out armed attacks of the gravest character such as the U.S. 9/11, the U.K. 7/7 or the Spain bombings.

International law, by means of UNSC Resolution 1540, has condemned terrorism and considers it a threat to international peace and security, and the international community has agreed to combat any threat or act thereof. Thus, interdiction is not only necessary but also proportionate to protect a state’s security interests considered essential against further imminent terrorist attacks.

In terms of methods, PSI interdiction must comply with national and international law, which includes the norm of use of force governed in the first type. PSI use of force follows certain additional requirements as indicated in all of its boarding agreements:

1. When carrying out the authorized actions under this Agreement, the use of force shall be avoided except when necessary to ensure the safety of its Security Force Officials and persons on board, or where the Officials are obstructed in the execution of the authorized actions.

2. Any use of force pursuant to this Agreement shall not exceed the minimum degree of force, which is necessary and reasonable in the circumstances.
3. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by Security Force Officials of either Party.\textsuperscript{172}

Accordingly, besides the right of self-defense circumstances recognized by international law, PSI use of force must also consider safety of all persons on board and meet the necessity and reasonableness elements. Hence, one may argue that the PSI requirements in employing use of force are stricter than those derived from the right of self-defense as governed by international law. According to this analysis, one may contend that the PSI not only is in accordance with the prevailing rules of international law, in particular the recognized right of self-defense, but also practices a higher standard by adding its own requirements.

Another point in support of the PSI is the fact that it employs threat or use of force in a limited fashion. It does not automatically exercise force against every ship allegedly engaging in the illicit transfer of WMD. Instead, the PSI authorizes use of force only if a ship refuses to be interdicted despite relevant consents having been obtained. Once the consent of a flag state has been received, the status of the PSI is similar to that of flag-state law enforcement. It is an exercise of jurisdiction in the state’s territory rather than an attack on a state’s territorial integrity or political independence. Furthermore, the PSI allows claims for damage, harm, loss, injury, or death arising from its interdiction, a condition that is only addressed if the use of force of the first type is deemed to fail to meet the proportionality tests, among others.

\textsuperscript{172} Agreement between the Government of the United States of America and the Government of Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, art. 2, Apr. 26, 2010, KAV 9066 [hereinafter SBA Antigua and Barbuda].
Chapter 4

PSI Interdiction and Other Maritime Interdictions

Concept and Implementation

The concept of maritime interdiction under international law is complex compared to land interdiction because the UNCLOS divides maritime areas into zones with exclusive sovereignty, sovereign rights, and non-sovereign regimes. In land interdiction, there is only one regime, that is, areas of sovereignty. The complexities of maritime regimes are largely reflected in discussions of the 1975 Third U.N. Conference on the Law of the Sea, particularly in the meetings of the 2nd committee overseeing the division of maritime zones.173 Although some commentators argue that the international community successfully concluded their differences in the UNCLOS,174 a set of legal conundrums concerning concept and implementation remain.175 For example, the question of a foreign military exercise in an exclusive economic zone176 has been debated since the UNCLOS was concluded in 1982. More recently, maritime security issues have included terrorism and the 2010 Israel interdiction of a flotilla, in which Turkey indicated its intention to seek the I.C.J.’s decision on the matter.177

176 Nordquist, supra note 174, at 235-95.
Based on a number of issues, the UN CLOS governs more than half of the maritime interdictions recognized under international law, for example, piracy and slave trade. Other maritime interdictions, such as fisheries, drug trafficking, and people smuggling, are further regulated by other international instruments. These instruments are the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,178 the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;179 the 1995 Agreement to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks;180 the 2001 International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing;181 the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;182 and the 2000 United Nations Convention against Transnational Organized Crime.183

In general, as discussed in the previous chapter, PSI interdictions have three elements: (1) common interests, (2) flag-state consent, and (3) use of force. These three key elements will serve as the main tool for comparing PSI interdiction and other maritime interdictions recognized under international law. The common interests element lies with the motive while the remaining two elements deal with methods of interdiction. This author submits that the PSI, both in motive and methods, shares

178 SUA Convention, supra note 140.
181 International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, Mar. 2, 2001 [hereinafter IAP IUU Fishing].
similarities with other maritime interdictions recognized under international law, particularly under the UNCLOS and other international instruments.

**UNCLOS-Based Maritime Interdictions**

In the UNCLOS, interdictions may be conducted in seven types of maritime zones: a territorial sea, a contiguous zone, straits used for international navigation, archipelagic waters, an exclusive economic zone, a continental shelf, and the high seas. Motives for interdictions also vary according to the zones, ranging from threats against sovereignty to immigration to pollution. These zone-based interdictions rely on each application of the right of navigation in the respective zones. For instance, in the territorial sea, maritime interdiction is applicable only if a foreign vessel exercises its innocent passage. Similarly, maritime interdiction can occur in straits used only for international navigation, in which case a foreign vessel would be under transit passage or in the high seas under the freedom of navigation rights. The following sections include a discussion of each zone, its governed interdiction measures, and comparison to PSI interdiction.

**Territorial seas.** Access to a coastal state’s territorial sea by a foreign vessel is viable only through innocent passage application. In other words, maritime interdictions in a territorial sea may take place only when a foreign vessel is exercising innocent passage. The UNCLOS provisions governing innocent passage are more extensive compared to other passages addressing other zones.\(^{184}\) As indicated in the 2nd Committee discussions,\(^{185}\) one may argue that extensive provisions of innocent passage are due to a territorial sea being recognized as an extension of a coastal state’s

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\(^{184}\) UNCLOS, *supra* note 33. See art. 19 for information on innocent passage, art. 4 for transit passage, and art. 87 for freedom of high seas.

territory, with full sovereignty being exercised. As it is, unless otherwise provided, the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.\textsuperscript{186}

Motives for maritime interdiction in a territorial sea are governed generally in Article 19, which defines the character of innocent passage. Maintaining the peace, good order, and security of the coastal state is widely translated into activities ranging from prohibition of use of force to immigration to fishing and environment, as well as an open-ended provision that includes any other activity not related to the passage.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea if engages in any of the following activities:
   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (b) any exercise or practice with weapons of any kind;
   (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
   (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
   (e) the launching, landing or taking on board of any aircraft;
   (f) the launching, landing or taking on board of any military device;
   (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
   (h) any act of willful and serious pollution contrary to this Convention;
   (i) any fishing activities;
   (j) the carrying out research or survey activities;
   (k) any act claimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
   (l) any other activity not having a direct bearing on passage.\textsuperscript{187}

Articles 20 and 22 allow coastal states to adopt laws and regulations primarily in matters of navigation safety and environment. In terms of criminal jurisdiction, a

\textsuperscript{186} UNCLOS, \textit{supra} note 33, art. 25.
\textsuperscript{187} Id. art. 19.
coastal state, however, may only interdict a foreign vessel if two requirements are met: first, a crime has occurred within the coastal state’s territorial sea, and second, such a crime meets one of three alternative conditions: it affects the coastal state’s peace and good order, a request is issued from the shipmaster or its flag state, or there is drug trafficking. The coastal state does not have civil jurisdiction of a foreign vessel traversing its territorial sea. Subject only to navigation safety, the coastal state in its territorial sea has full discretion to determine methods to conduct interdiction, including, but not limited to, use of force if necessary.

Compared to PSI interdiction, innocent passage interdiction differs in motive and methods. In innocent passage interdiction, the motive should have a direct impact on a coastal state’s recognized interests. The PSI interdiction motive, on the other hand, is based on a group of states’ interests that may not have immediate effects on the coastal state, although such interdiction takes place during an innocent passage. Nevertheless, some commentators assert that the PSI motive can fall under the UNCLOS motive of innocent passage interdiction. The PSI motive may be inserted in the UNCLOS frame from domestic law of the coastal state to international agreements. For instance, Beckman posits that, if the PSI-based motive is turned into domestic law and violation of such a law constitutes a crime, the coastal state is justified in conducting PSI interdiction in its territorial sea. Under this hypothesis, the PSI motive is a recognized motive under the UNCLOS and, thus, follows

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188 Id. art. 27.
189 Id. art. 28.
190 Id. art. 27(4).
UNCLOS provisions for innocent-passage interdiction. Another possibility is to make the PSI motive a recognized motive under international law. One way to do so is to criminalize the transport of WMD.¹⁹²

With regard to methods, both PSI and innocent passage interdictions permit the use of force, in addition to the former allowing recognition of other states on its behalf to conduct interdiction. Under this methodology, an innocent-passage interdiction may be a PSI interdiction, provided that, among other things, consent of the coastal state has been obtained. If this is the case, then PSI interdiction under innocent-passage interdiction should follow the UNCLOS provisions for innocent-passage interdiction. Additionally, although including the PSI motive in innocent-passage interdiction remains under discussion, the fact that PSI interdiction considers and respects the UNCLOS as the primary international law of the sea should be sufficient to deem that PSI interdiction should follow the UNCLOS provision on innocent-passage interdiction. Another difference between PSI interdiction and innocent-passage interdiction is that the latter does not require flag-state consent to interdict a foreign vessel.¹⁹³ Nevertheless, given the assumption that a PSI interdiction may take the form of an innocent-passage interdiction, the PSI interdiction may occur without the flag-state consent.

**Contiguous zones.** The UNCLOS governs maritime interdiction in contiguous zones for customs, fiscal, immigration, or sanitary infringements that occur in a territorial sea:

1. In zone contiguous to its territorial sea, described as contiguous zone, the coastal State may exercise the control necessary to:

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¹⁹³ UNCLOS, *supra* note 33, art. 27.
(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.¹⁹⁴

In other words, the contiguous-zone interdiction motive is subject to innocent-passage interdiction motives for customs, fiscal, immigration, and sanitary infringements. The coastal state, however, cannot exercise criminal and civil jurisdictions for an act occurring in a contiguous zone. With regards to method, interdiction in a contiguous zone follows innocent-passage interdiction. Use of force is permissible with consideration of navigation safety.

With contiguous zones being an extension of territorial sea, contiguous-zone interdictions are similar to innocent-passage interdictions, but differ in both motives and methods from PSI interdiction. Nevertheless, unlike innocent-passage interdiction, PSI interdiction cannot be conducted under contiguous-zone interdiction because the UNCLOS specifically limits motives to customs, fiscal, immigration, and sanitary infringements. Although PSI interdiction cannot be conducted under contiguous-zone interdiction, PSI interdiction may take place within the contiguous zone under the regime of hot pursuit.¹⁹⁵ This argument may be relevant in a situation in which the hot pursuit is conducted for a crime that occurred in a territorial sea, when possible motives of such a crime may include that of the PSI.

**Straits used for international navigation.** Interdiction in the strait used for international navigation is based on the maritime zones delimiting such a strait. The UNCLOS recognizes two possible delimitations for straits used for international navigation: a strait connecting high seas/an exclusive economic zone with high

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¹⁹⁴ *Id.* art. 33.
¹⁹⁵ *Id.* art. 111; *see* App. B for text.
seas/another exclusive economic zone and a strait connecting high seas/an exclusive economic zone with a territorial sea. For the first type of strait, the maritime interdiction is subject to the regime of transit passage. For the second, taking into account the element of the territorial sea, it is subject to of the regime of innocent passage. Hence, given the possible delimitations of a strait used for international navigation, a foreign vessel may take two passages, that is, transit or innocent, according to the zones traversed.

For the first type of strait, in addition to navigation safety, environmental protection, customs, fiscal, immigration, and sanitary reasons as mentioned in Article 42, motives for interdiction are limited to that of transit passage:

1. Ships and aircraft, while exercising the right of transit passage, shall:
   (a) proceed without delay through or over the strait;
   (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of State bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
   (d) comply with other relevant provisions of this Part. 196

Motives for the second type of strait are similar to that of innocent passage because provisions thereof apply mutatis mutandis. 197 Although motives for both types of straits differ, they do not affect the methods of interdiction. In other words, methods for transit-passage interdiction are relatively similar to those for innocent passage. It should be noted, however, that the regime of innocent passage for straits used for international navigation is slightly different than the regime of innocent passage for a territorial sea. In the former, suspension is not allowed, while in the latter the coastal

196 Id. art. 39.
197 Id. art. 45.
state may temporarily suspend innocent passage. The effect of this no-suspension provision is that the chance of the coastal state using force to investigate infringements is greater in the strait used for international navigation than it is in the territorial sea, where other means are available, such as temporary suspension based on security issues.

Under the innocent-passage interdiction regime, PSI interdiction may be conducted in the second type of strait. On the other hand, a coastal state or other state under the PSI cannot interdict a foreign vessel traversing under the transit-passage regime due to the limited motives specified. Similar to contiguous-zone interdiction, however, PSI interdiction may take place in the first type of strait under the regime of hot pursuit commenced in a territorial sea. As in any other maritime zones, navigation safety is a key element in conducting hot pursuit or any other recognized activity in the UNCLOS.

**Archipelagic waters.** Maritime interdiction in straits used for international navigation is subject to two types of passages: innocent passage for a territorial sea and archipelagic sea-lane passage for archipelagic waters. Both passage types are mandatory, but archipelagic states can designate lanes for the latter. Failing to prescribe archipelagic sea-lane passage may give rise to the use of lanes for international navigation without the consent of the archipelagic state. In theory, innocent passage in archipelagic waters follows the regime for a territorial sea while the regime of archipelagic sea-lane passage is identical to that for a strait used for

198 ld. arts. 52(1) & 53(2).
199 ld. art. 53(1).
200 ld. art. 53(12).
201 ld. art. 52.
international navigation connecting a high sea or an exclusive economic zone to
another high sea or an exclusive economic zone, hence the regime of transit
passage. 202 Subject to archipelagic sea-lane passage, sovereignty over its archipelagic
waters is exclusive to an archipelagic state:

1. The sovereignty of an archipelagic State extends to the waters enclosed by
the archipelagic baselines drawn in accordance with article 47, described as
archipelagic waters, regardless of their depth or distance from the coast.
2. This sovereignty extends to the air space over the archipelagic waters, as
well as their bed and subsoil, and the resources contained therein. 203

Motives for interdiction in archipelagic states are based on the zones, that is, innocent
passage for a territorial sea and transit passage for archipelagic waters.

Yet, although transit passage provides fewer motives compared to innocent
passage, in practice, transit passage in archipelagic waters is frequently treated as
innocent passage, thus the innocent-passage motive applies. This condition has a valid
reason. Archipelagic states would argue that treating archipelagic sea-lane passage like
a foreign vessel traversing under the transit-passage regime would undermine the very
concept of the archipelagic state, a designation meant to ensure that no enclaves of
islands can jeopardize its territorial and political integrity. For example, a foreign
vessel could conduct intelligence acts during the transit passage and get away easily
because there is no specific provision governing such acts in the UNCLOS.

Furthermore, the sovereignty of archipelagic waters is identical to that of a
territorial sea, 204 except for existing agreements, traditional fishing rights, and existing
submarine cables that must be recognized by the archipelagic state. 205 The

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202 Id. art. 54.
203 Id. art. 49.
204 Id. art. 49.
205 Id. art. 51.
inconsistency is obvious: the UNCLOS treats an archipelagic sea-lane located in archipelagic waters under the transit-passage regime, yet it recognizes an archipelagic state’s exclusive sovereignty in the archipelagic waters. Thus in practice, as stated previously, although a foreign vessel may claim that it is exercising transit passage by traversing through an archipelagic sea lane, the archipelagic state may conduct innocent-passage interdiction based on its exclusive sovereignty over the archipelagic waters.

As with innocent-passage interdiction, an archipelagic state may determine its own methods, including but not limited to use of force and having other states participate, without flag-state consent to interdict foreign vessels in the archipelagic waters. Moreover, the regime of passage in archipelagic waters cannot be suspended; the coastal state may temporarily suspend innocent passage, but the archipelagic sea-lane passage that applies to the transit-passage regime cannot be suspended at all. Given the premise that innocent-passage interdiction may include PSI interdiction, it can be assumed that the coastal state or another state with the consent of the coastal state may conduct PSI interdiction in its archipelagic waters.

**Exclusive economic zones.** There are two groups of motives for maritime interdiction in exclusive economic zones. The first is that of natural resources management:

1. In the exclusive economic zone, the coastal State has:
   (a) 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 seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
   (i) the establishment and use of artificial islands, installations and structures;
   (ii) marine scientific research;
   (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention. 206

The second group of motives for interdiction and its enforcement in exclusive economic zone are based on Article 110, regarding the right of visit in the high seas, 207 which will be discussed in detail in the following section on the high seas. The inclusion of high seas under freedom of navigation for a motive of interdiction in exclusive economic zones opens access to the interests of other states. That is, in this particular type of zone, maritime interdiction can be conducted by any state, with the exception of those motives stipulated in Article 56 that belong exclusively to coastal states. A coastal state, on the other hand, can exercise both motives set out in Articles 56 and 110. In exercising interdiction in an exclusive economic zone, other states must comply with the laws and regulations of the coastal state. 208

Enforcements for the first group of motives are reflected in Article 73:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

206 Id. art. 56.
207 Id. art. 58(2).
208 Id. art. 58(1).
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Methods of interdiction in an exclusive economic zone may employ the use of force and do not require prior consent of the flag state. The difference between methods of interdiction under Articles 73 and 110 is that the latter requires compensation if the motives prove to be unfounded. Another state’s interdiction in the exclusive economic zone, according to Article 110, does not require a coastal state’s consent, which is necessary for interdiction under Article 73.

Aside from the difference in motives, under both Article 73 and Article 110, interdictions in exclusive economic zones have similar methods to PSI interdiction, particularly methods based on Article 110, including its compensation element. PSI interdiction, however, has stronger requirements, for example, flag-state consent. This requirement is, of course, acceptable considering that the motive of PSI interdiction is not listed in Article 110 motives. In exclusive economic zones, PSI interdiction may be a stand-alone interdiction, requiring no coastal-state consent, provided that prior flag-state consent has been obtained. PSI interdiction as an extension of innocent-passage interdiction may also occur in an exclusive economic zone under the hot-pursuit regime.

**Continental shelves.** Except in the case of a natural prolongation condition, a continental shelf covering the seabed and subsoil areas spans a distance of 200 miles from where a territorial sea is measured.\(^{209}\) Hence, a continental shelf may constitute the areas of a territorial sea, a contiguous zone, an exclusive economic zone, and in

\(^{209}\) *Id.* art. 76(1).
some rare cases, high seas. As such, although the locations of infringements are seabed and subsoil areas, enforcement begins at the surface. To this end, coastal-state motives for interdiction range from the surface to seabed and subsoil areas. Similar to an exclusive economic zone, the motives for interdiction in a continental shelf are limited to exploiting natural resources. The difference is only in the location of the resources:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

Methods of interdiction for infringement of a continental shelf follow those for an exclusive economic zone set out in Article 73, including, but not limited to, use of force, participation of other states, and requiring no flag-state consent. It should be noted, however, that because infringements based on continental shelf motives may take place in high seas, its enforcement might conflict with recognized freedom of navigation in such areas.

To date, no record indicates that the transport of WMD has been conducted by means of a submarine vessel. Furthermore, PSI interdiction cannot be carried out under continental-shelf motives. With regard to the methods, interdiction on a continental shelf has similar elements with the PSI, except for flag-state consent, which is required under PSI interdiction.

210 Id. art. 78.
211 Id. art. 77.
High seas. The UNCLOS recognizes two groups of motives in high-seas interdiction: those of the flag state and common interests. The motives for the first group are based on the laws and regulations of the flag state, including criminal and civil jurisdictions. The general rule of the first group is that only the flag state or another state with prior consent of the flag state can conduct interdiction on the high seas of its vessels. This rule is based on the principle of exclusive jurisdiction of the flag state:

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
   (a) maintain register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
   (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.\(^{212}\)

The second group of motives for interdiction, based on common interests, includes slave trade,\(^{213}\) piracy,\(^{214}\) drug trafficking,\(^{215}\) illegal broadcasting,\(^{216}\) vessel without nationality,\(^{217}\) fisheries,\(^{218}\) and pollution.\(^{219}\) Under the first group of motives, the methods of interdiction are identical to those for innocent-passage interdiction, including use of force, another state’s participation, and no compensation elements. On the other hand, except for drug trafficking, fisheries, and pollution stipulated in

\(^{212}\) Id. art. 94(1).
\(^{213}\) Id. art. 99.
\(^{214}\) Id. art. 100.
\(^{215}\) Id. art. 108.
\(^{216}\) Id. art. 109.
\(^{217}\) Id. art. 92.
\(^{218}\) Id. art. 118.
\(^{219}\) Id. art. 195.
Articles 108, 118, and 195, the methods of interdiction based on the second group of motives are governed in Article 110:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
   (a) the ship is engaged in piracy;
   (b) the ship is engaged in the slave trade;
   (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
   (d) the ship is without nationality; or
   (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

The primary difference between the methods of interdiction in the first and second groups of motives is that the latter mandates compensation should the motives not be proven.

Of all the maritime zones governed by the UN CLOS, the high seas are the only area in which PSI participants can exercise interdiction with less controversy, although an exclusive economic zone and a continental shelf share similar high-seas freedom of navigation. The reason is primarily that flag-state consent is required in PSI interdiction. For the first group of motives, the element of flag-state consent not only opens all access to jurisdiction, in which the PSI motive can be inserted, but also

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allows other states to participate in the interdiction. In general, methods of interdiction in the high seas are similar to PSI interdiction, except for the first group of motives that require no element of compensation if the motives are unfounded.

**Other Instruments Based on Maritime Interdictions**

**Motives.** The UNCLOS governs almost all motives for maritime interdictions. These motives include piracy, fisheries, drug trafficking, and human trafficking. In fact, some of the instruments relevant to maritime interdictions refer to the UNCLOS, among others, the IAP IUU Fishing Agreement, and the 1995 Fish Stocks Agreement. Although the 1988 U.N. Narcotics Convention, the 2000 UNTOC, and the 2002 Protocol to UNCTOC do not specifically refer to the UNCLOS, they make reference to the international law of the sea concerning activities in maritime zones, despite the fact that the UNCLOS governs drug trafficking and human trafficking or slavery in Article 108 and Article 99, respectively. The 1988 SUA also does not

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221 IAP IUU Fishing, supra note 181, pt. 4, para. 10: "States should give full effect to relevant norms of international law, in particular as reflected in the 1982 Convention, in order to prevent, deter and eliminate IUU fishing."
224 U.N. Narcotics Convention, supra note 182, art. 17, para. 1: "The parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with international law of the sea; see also 2002 Protocol to UNTOC, id. art. 7: "State Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea in accordance with the international law of the sea."
refer to the UNCLOS. Its 2005 Protocol\(^{226}\) does, however, despite the fact that the UNCLOS does not include terrorism as a motive for interdiction. Thus, these instruments not only complement the UNCLOS but also recognize its primacy over them. The PSI, in this respect, is similar to the 1988 SUA and its 2005 Protocol in recognizing the primacy of the UNCLOS.\(^{227}\)

In addition to being included in or referring to the UNCLOS, motives in these instruments have another item in common: interest that constitutes international concern. In the 1988 SUA and its 2005 Protocol, terrorist acts and the transport of Biological, Chemical and Nuclear (BCN) weapons and technology constitute threats to international peace and security.\(^{228}\) The 2001 International Plan of Action on Illegal, Unreported, and Unregulated (IUU) Fishing and the 1995 Fish Stocks Agreement, in particular, indicate irresponsible fishing as a serious concern of the international community.\(^{229}\) Drug trafficking, addressed in the 1988 U.N. Narcotics Convention, and the smuggling of migrants, addressed in the 2002 Protocol to the UNTOC Convention, are also international concerns.\(^{230}\) Similarly, the international community considers the PSI motive, the illicit transfer of weapons of mass destruction related to terrorism, an international concern. This concern was encapsulated primarily through


\(^{227}\) See, \textit{e.g.}, SBA Antigua and Barbuda, \textit{supra} note 172, pmbl., para. 11: “Reaffirming the importance of customary international law of the sea as reflected in the 1982 United Nations Convention on the Law of the Sea.”

\(^{228}\) See 2005 SUA Protocol, \textit{supra} note 7, pmbl., para. 2: “Acknowledging that terrorists acts threaten international peace and security”; \textit{see also} acts qualified as offenses as governed in art. 5, para. 5(1)(b). \textit{See} App. C for text.


UNSC Resolution 1540, which indicates the PSI motive is a threat to international peace and security.\textsuperscript{231}

Another similarity among these motives is that states have incorporated them into their national laws. Thus, states have designated IUU fishing, drug trafficking, and human trafficking as crimes. For example, the European Union has regulated drug trafficking through its Council Framework Decision Number 2004/757/JHA;\textsuperscript{232} human trafficking through Directive 2011/36/EC of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (which replaced Council Framework Decision 2002/629/JHA);\textsuperscript{233} and IUU fishing in Council Regulation (EC) No. 1005/2008 and Commission Regulation (EC) No. 1010/2009, among others. In the United States, IUU fishing is regulated in the Fisheries Conservation and Management Act,\textsuperscript{234} among others; drug trafficking is governed under Title 21 of the United States Code (U.S.C.), the Controlled Substance Act;\textsuperscript{235} and human trafficking is addressed in the Victims of Trafficking and Violence Protection Act,\textsuperscript{236} among others.

\textsuperscript{231} UNSC Resolution 1540, \textit{supra} note 27, pmbl., paras. 8 & 9: “Gravely concerned by the threat of terrorism and the risk that non-State actors such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery...; Gravely concerned by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials, which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security.”


Protection Act of 2000, the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, and the Trafficking Victims Protection Reauthorization Act of 2008, among others. Nevertheless, the PSI motive has not yet been codified in this manner. Not all PSI participants have incorporated the illicit transfer of WMD per se as a crime under their national laws. In the United States, the lead state on the PSI, the PSI motive is regulated primarily by Executive Order No. 12938, dated November 14, 1994, while in the European Union, the PSI motive currently remains only in the form of resolutions or opinions, for example, the Communication on Nuclear Non-Proliferation Com/2009/0143.

Although not all PSI-participating states have incorporated the PSI motive and methods into their national laws, a recent international development related to the illicit transfer of WMD has indicated change. As of July 28, 2010, the 2005 SUA Protocol entered into force after the Republic of Nauru deposited its instrument of ratification to the IMO on April 29, 2010. The Republic of Nauru’s ratification is the 12th instrument of ratification submitted to the IMO, and the Protocol entered into force ninety days after the 12th instrument of ratification was deposited. By June 25, 2011, there were twenty contracting states to the 2005 SUA Protocol, up from a total of eighteen signatory states in 2006-2007. What is interesting concerning the status of this particular protocol is that not all major maritime powers included in PSI-

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participating states have submitted their reservations, including the United States, the United Kingdom, Australia, and France. Several major flag-state countries, however, have acceded, accepted, or ratified the 2005 SUA Protocol, including Panama on May 25, 2011; Saint Vincent and the Grenadines on October 3, 2010; and the Marshall Islands on July 28, 2010.

Unlike other methods established as legally binding norms, the PSI method is voluntary in character. PSI participants, including those who have concluded ship-boarding agreements with the United States, still have choices concerning how to respond to a PSI-based request: either accept or deny flag-state consent or third-party participation. Nevertheless, given the recent entry into force of the 2005 SUA Protocol, stopping the illicit transfer of WMD has become an international obligation, at least for the twenty contracting states of the Protocol.

**Methods.** Methods of interdiction in UN CLOS regimes and other international instruments are similar, primarily in recognizing flag-state consent and limited use of force. This similarity is largely due to other international instruments, as noted earlier, either complementing or referring to the UN CLOS. In the 2005 SUA Protocol, the act of boarding a foreign ship requires its flag-state consent:

5. Whenever law enforcement or other authorized officials of a State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of another State Party ("the first party") located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, or is about to be involved in the commission of an offence set forth in article 3, 3 bis, 3ter or 3quater, and the requesting Party desires to board,
(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and
(b) if nationality confirmed, the requesting Party shall ask the first Party (hereinafter referred to as "the flag State") for authorization to board and to take appropriate measures with regard to that ship which may
include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, and

(c) the flag State shall either:
   (i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or
   (ii) conduct the boarding and search with its own law enforcement or other officials; or
   (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or
   (iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.239

Similarly, in the 1988 Narcotics Convention, flag-state consent is required for boarding a foreign ship:

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:
   a) Board the vessel;
   b) Search the vessel;
   c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.240

In the 2002 Protocol on the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention on Transnational Organized Crime, flag-state consent is also mandated:

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and

239 2005 SUA Protocol, supra note 7, art. 8(5).
240 1988 U.N. Narcotics Convention, supra note 182, art. 17(3).
flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:
(a) To board the vessel;
(b) To search the vessel; and
(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.241

On the other hand, the 1995 Fish Stocks Agreement allows for a strong mechanism with respect to maritime interdiction. Unless otherwise provided under subregional or regional organization or arrangement,242 the procedure of interdiction set out under the 1995 Fish Stock Agreement will prevail.243 Both procedures, subregional or regional organization or arrangement and the 1995 Fish Stock Agreement, waive the flag-state consent in the case of interdiction by other state parties:

1. In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.244

5. Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures referred to in paragraph 1, the inspecting State shall, where appropriate, secure evidence and shall promptly notify the flag State of the alleged violation.

241 2002 Protocol to UNTOC, supra note 223, art. 8(2).
242 See App. F for the major fishery management organizations in the world.
243 See 1995 Fish Stocks Agreement, supra note 180, art. 22, for basic procedure for boarding and inspection pursuant to Article 21. See App. G for text.
244 Id. art. 21(1).
6. The flag State shall respond to the notification referred to in paragraph 5 within three working days of its receipt, or such other period as may be prescribed in procedures established in accordance with paragraph 2, and shall either:
(a) fulfill, without delay, its obligations under article 19 to investigate and, if evidence so warrants, take enforcement action with respect to the vessel, in which case it shall promptly inform the inspecting State of the results of the investigation and of any enforcement action taken; or (b) authorize the inspecting State to investigate.\textsuperscript{245}

When compared to the above articles, the PSI method follows most procedures recognized in addressing the illicit transfer of WMD, drug trafficking, and human trafficking concerning boarding a foreign ship, that is, requiring prior flag-state consent. Under certain arrangements, however, international law allows maritime interdiction of a foreign ship without flag-state consent, as indicated in the fisheries interdiction under the 1995 Fish Stock Agreement.\textsuperscript{246} To a certain extent, arrangements may range from appointment of inspectors to special marking of an enforcement ship, which function as waivers of flag-state consent. Without proper arrangements, flag-state consent might still be required. Nevertheless, even with proper arrangements, the flag state may still deny the request for boarding consent. In any event, under international law, flag-state consent remains a fundamental requirement of boarding a foreign ship.

Comparable to the requirement of flag-state consent, the PSI shares the limited nature of use of force in maritime interdiction recognized by other maritime interdictions, such as the application of safeguards provisions, conveyed inter alia in, the 1995 Fish Stocks Agreement,

(f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are

\textsuperscript{245} Id. art. 21(5) & (6).
\textsuperscript{246} A similar arrangement is also apparent in RFMOs; see GUILFOYLE, supra note 8, at 106.
obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.\textsuperscript{247}

The 1988 U.N. Narcotics Convention,

Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.\textsuperscript{248}

The 2002 Protocol to UNTOC,

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:
   (a) Ensure the safety and humane treatment of the persons on board;
   (b) Take due account of the need not to endanger the security of the vessel or its cargo;
   (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
   (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:
   (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
   (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.\textsuperscript{249}

The 2005 SUA Protocol,

9. When carrying out the authorized actions under this article, the use of force shall 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. Any use of force pursuant to this article shall not

\textsuperscript{247} 1995 Fish Stocks Agreement, \textit{supra} note 180, art. 22(1)(f).
\textsuperscript{248} 1988 U.N. Narcotics Convention, \textit{supra} note 182, art. 17(5).
\textsuperscript{249} 2002 Protocol to UNTOC, \textit{supra} note 223, art. 9.
exceed the minimum degree of force which is necessary and reasonable in the circumstances.

10. Safeguards:
(a) Where a State Party takes measures against a ship in accordance with
this article, it shall:
(i) take due account of the need not to endanger the safety of life at
sea;
(ii) ensure that all persons on board are treated in a manner which
preserves their basic human dignity, and in compliance with the
applicable provisions of international law, including international
human rights law;
(iii) ensure that a boarding and search pursuant to this article shall be
conducted in accordance with applicable international law;
(iv) take due account of the safety and security of the ship and its
cargo;
(v) take due account of the need not to prejudice the commercial or
legal interests of the flag State;
(vi) ensure, within available means, that any measure taken with
regard to the ship or its cargo is environmentally sound under the
circumstances;
(vii) ensure that persons on board against whom proceedings may be
commenced in connection with any of the offences set forth in
article 3, 3bis, 3ter or 3quater are afforded the protections of
paragraph 2 of article 10, regardless of location;
(viii) ensure that the master of a ship is advised of its intention to
board, and is, or has been, afforded the opportunity to contact the
ship's owner and the flag State at the earliest opportunity; and
(ix) take reasonable efforts to avoid a ship being unduly detained or
delayed.
(b) Provided that authorization to board by a flag State shall not per se give
rise to its liability, States Parties shall be liable for any damage, harm or
loss attributable to them arising from measures taken pursuant to this
article when:
(i) the grounds for such measures prove to be unfounded, provided
that the ship has not committed any act justifying the measures
taken; or
(ii) such measures are unlawful or exceed those reasonably required
in light of available information to implement the provisions of
this article.
State Parties shall provide effective recourse in respect of such damage,
harm or loss.
(c) Where a State Party takes measures against a ship in accordance with
this Convention, it shall take due account of the need not to interfere
with or to affect:
(i) the rights and obligations and the exercise of jurisdiction of
coastal States in accordance with the international law of the sea;
(ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.

(d) Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding articles 2 and 2bis, the provisions of this article shall apply.

(e) For the purposes of this article “law enforcement or other authorized officials” means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Convention, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding. 250

Thus, the use of force in PSI maritime interdiction follows limited use of force in other maritime interdictions recognized under international law. 251

250 2005 SUA Protocol, supra note 7, art. 8.
Chapter 5

Status of the PSI under International Law

First considered or claimed to be a foreign-policy initiative, the PSI has transformed into a norm of international law by adding the new motive of illicit trafficking of WMD to the list of maritime interdiction practices conducted worldwide. Analysis of this new motive addresses its object and purpose, methods, and designs, and argues that the PSI neither contradicts nor violates relevant provisions of international law, in particular the international law of the sea enshrined in the UNCLOS. Comparison with other maritime interdictions recognized under international law has also revealed that PSI interdictions have several similar practices to other maritime interdictions, including but not limited to requirements of flag-state consent, compensation, and use of force. In addition, that ninety-eight countries have voluntarily agreed to conduct PSI interdictions is further evidence of the PSI developing as a norm under international law. Considering these premises, it is difficult not to consider PSI as a developing norm under international law.

The discussions thus far have covered an analysis of the PSI, its compatibility with international law, and a comparison of the PSI with other maritime interdictions recognized under international law. The following discussion addresses the PSI as a developing norm based on the status of the PSI under international law. The underlying general theme concerning the status of the PSI is whether it gives rise to international legal rights and obligations. The scope of international legal rights and obligations extends not only to PSI-participating states but also to third parties and the international community. In addressing the general theme, this discussion is framed in
two parts. The first part is analysis of the PSI as unilateral acts, including legal force and relevant international legal rights and obligations. The second part situates the PSI within sources of international law enshrined in Article 38 of the I.C.J. Statute.

The rationale behind the first part is to detach the PSI from its current forms, primarily its statement of interdiction and ship-boarding agreements, and treat it as a valid state act in the international community. Doing so is important because the discussion provides not only clear ideas about the PSI but also guidance for the second part. The first part also discusses the legal character and identifies any relevant international legal obligation. The second part frames the PSI in the category of sources of international law reflected by Article 38 of the I.C.J. Statute. The sources of international law discussed are treaty and customary international law. The second part also shows that the PSI, irrespective of its forms, has legal character and reflects norms recognized as customary international law.

The PSI as a Unilateral Act

First, the PSI is a unilateral act. It was created by states primarily to combat proliferation of WMD, which the international community recognized as a threat to international peace and security. This threat is further escalated by the possibility of terrorists acquiring WMD, which the international community also considers as a threat to international peace and security. Considering this threat, states that shared similar concerns agreed to develop an arrangement to suppress such threats. In the arrangement, the states set political commitments as well as measures to fight the threats. The measures range from national and international undertakings to the exchange of information to maritime interdictions.
Degan argues that the validity of a unilateral act is comparable to that of a treaty; that is, it is conducted by states in accordance with international law at their expressed will and does not require a fixed form.\textsuperscript{252} Degan bases his arguments on Dionisio Anzilotti's requirements of a legal act recognized by international law.\textsuperscript{253} In this context, the PSI meets all the requirements of a valid unilateral act. For the first and third requirements, PSI members are the ninety-eight states in the world that have expressed their commitment publicly under the PSI statement of interdiction. The second requirement follows the commitments set out in the PSI statement of interdiction, which, as established in the previous chapter, are permissible under international law in terms of both motives and methods employed.\textsuperscript{254} In addition, the PSI stresses a commitment in its implementation to comply with provisions of national and international law.

With regard to the last requirement, the form, the PSI is close to international engagements that are usually reflected in declarations. Examples of this type of declaration include the 2001 International Plan of Action on IUU Fishing, the 1970 Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, and the G8 Declaration on Non-Proliferation and Disarmament. Whether this type of declaration has a binding character is subject to interpretation, which includes analysis of the parties' intentions, language selection, and circumstances surrounding such a declaration. The P.C.I.J. held that international engagement may have an obligatory character:

\textsuperscript{252} V. D. DEGAN, SOURCES OF INTERNATIONAL LAW 286 (1997).
\textsuperscript{253} Id. at 259.
\textsuperscript{254} See Chapter 3, "PSI and International Law," supra.
From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes.²⁵⁵

Similarly, the I.C.J. affirmed that declarations may have a binding character to their parties:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.²⁵⁶

There are, of course, declarations that merely reflect political concern and the position of states and are not intended to create legal binding force.²⁵⁷ Nevertheless, even if these declarations do not have the legal binding force comparable to that of a treaty, the I.C.J. indicated this type of declaration might express existing rules of international law.²⁵⁸

In the case of the PSI, its statement of interdiction principles does have a binding character. Although PSI participants claim that it is voluntary in nature, such

²⁵⁵ Customs Regime between Germany and Austria Case, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 47, para. 35 (Sept. 5).
²⁵⁶ Nuclear Test, supra note 43, at 267, para. 43.
²⁵⁷ See Haya de la Torre Case (Colombia v. Peru), Judgment, 1951 I.C.J. (June 13), p. 71 for examples of acts or declarations of comity; see also North Sea Continental Shelf (Germany v. Denmark/Netherlands), Judgment, 1969 I.C.J. (Feb. 20), p. 3 [hereinafter North Sea Continental Shelf].
claims do not necessarily eliminate or weaken the binding character. The selection of wording in the PSI statement of interdiction indicates clear intentions and commitments. The PSI statement of interdiction not only describes common political interests but also includes commitment to actions to enforce such common interests. The clear intentions and commitments of the PSI are reflected in the chapeau of the PSI statement of interdiction:

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, 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 U.N. Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to.²⁵⁹

Thus, states adhering to the PSI, according to the chapeau, are obliged to follow interdiction principles set out therein. Such obligation is expressed in the clear declaration adopting the PSI principles of interdiction. This declaration shares similar characteristics with the PSI, for example, being a unilateral act. For instance, the declaration of Colombia agreeing to follow the PSI states:

By adhering to the Proliferation Security Initiative (PSI) Colombia expresses its willingness to work jointly with members of PSI to prevent and stop the transport of weapons of mass destruction, their delivery systems and related materials. Colombia will devote resources and efforts to interdiction operations and capabilities within the framework of the Initiative, in accordance with its national law and national capabilities, and without prejudice of the efforts and resources that Colombia should allocate to the maintenance of public order and defense of the institutions against the actions of the illegal armed groups.²⁶⁰

²⁵⁹ PSI: Statement of Interdiction, supra note 19, para. 3.
Under international law, the declaration of Colombia binds Colombia as a state to comply with the PSI. From P.C.I.J. to I.C.J. cases,\(^{261}\) international law confirms that such a declaration has legal binding force. One may argue that it would be a violation of principles of good faith and *pacta sunt servanda* if, after such a declaration, Colombia did not comply with the PSI statement of interdiction.

Furthermore, when a state adopts the PSI statement of interdiction, it may participate in the arrangements set out under ship-boarding agreements between the United States and major flag-state countries provided that the state agrees to follow the provisions of ship-boarding agreements.\(^{262}\) Thus, the initially bilateral ship-boarding agreements might bind a third participating state. Considering the similar frameworks of the PSI statement of interdiction and ship-boarding agreements, mixed participation in both instruments is likely to occur. Under such mixed participation, it would be difficult to distinguish obligations set out by the PSI statement of interdiction from those of the ship-boarding agreements, further indicating the binding character of PSI membership.

**The PSI under Sources of International Law Framework**

The primary sources for the international law framework are international conventions, customary international law, and general principles of law as enshrined in Article 38 of the I.C.J. Statute,

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly organized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;

\(^{261}\) *See, e.g.*, Mavrommatis Palestine Concession Case (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 19 (Aug. 30); Nuclear Test, *supra* note 43.

\(^{262}\) *See, e.g.*, SBA St. Vincent and the Grenadines, *supra* note 6, art. 19.
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the
teachings of the most highly qualified publicists of the various nations,
as subsidiary means for the determination of rules of law.

These three primary sources have their own binding characters. International
conventions, for instance, bind only the parties agreeing to the conventions while
customary international law may be binding to all states except those that have
exercised objection persistently, and general principles of law apply to all states
without exception. Within these primary sources, first the I.C.J. normally searches for
a norm in international conventions due to its evidential factor. Doing so, however,
does not mean that international conventions have a higher status than other sources of
international law. There is no hierarchy under I.C.J. mechanisms to indicate primary
sources. In certain cases, a norm can also be included in two sources of international
law, that is, international conventions and customary international law, and thus bind
the relevant parties. One example of such a case is that of the Nicaragua judgments, in
which the I.C.J. affirmed that it
cannot dismiss the claim of Nicaragua under principles of customary and
general international law, simply because such principles have been enshrined
in the texts of the conventions relied upon by Nicaragua. The fact that the
above mentioned principles, recognized as such, have been codified or
embodied in multilateral conventions does not mean that they cease to exist
and to apply as principles as customary law, even as regards countries that are
parties to such conventions. Principles such as those of the non-use of force,
non-intervention, respect for independence and territorial integrity of States,
and the freedom of navigation, continue to be binding as part of customary
international law in which they have been incorporated. (I.C.J. Report 1984, p.
424, para. 73)\textsuperscript{263}

The secondary source of I.C.J. mechanisms refers to judicial decisions and
teaching of the most highly qualified publicists. Examples of such a secondary source

\textsuperscript{263} Nicaragua, \textit{supra} note 43, at 93, para. 174.
are decisions of the I.C.J. and the writings of Lauterpacht and Anzelotti. Generally, the I.C.J. applies secondary sources to determine a norm of customary international law and general principles of law. Secondary sources function as a subsidiary means for identifying norms if primary sources fail to do so. This function, however, is different from that of a requirement of customary international law, that is, *opinio juris sive necessitatis* or a sense of legal obligation of a state over an act invoked.

**Treaty.** Three international instruments related to the PSI are available to the public: the statement of interdiction, the declarations of PSI participants, and ship-boarding agreements. Based on their functions, one may frame the declarations as representations of the political wills of states that support the PSI, primarily encapsulated in the statement of interdiction. Similarly, the ship-boarding agreements serve as complements to the statement of interdiction. Hence, the instrument that is closest to describing the PSI in its character is the statement of interdiction. Nevertheless, if one is to consider the binding force of these instruments based on international treaty law, ship-boarding agreements rank first, followed by the declarations and then the statement of interdiction.

International treaty law as enshrined in the 1969 Vienna Law of Treaties, the 1978 Vienna Convention on Succession of States in respect of Treaties, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, defines a treaty as follows:

"treaty" means an international agreement concluded between States [or between one or more States and one or more international organizations or between international organizations] in written form and governed by
international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.\textsuperscript{264}

According to this definition, the three primary characteristics of a treaty are that the parties conclude the agreement, it is in written form, and it is governed by international law. While these characteristics may seem to be ideal elements of a treaty, international treaty law recognizes the notion that content supersedes form. In other words, in determining the legal binding force that gives rise to international rights and obligations, international law considers the contents of an instrument rather than its form. For example, an instrument may have legal binding character even though it is not in written form.\textsuperscript{265}

In terms of procedures, the international community acknowledges two types of treaty: formal and simplified. Under a formal treaty, all requirements and procedures of a formal treaty are met, ranging from consent to be bound to ratification to termination and settlement of disputes. A simplified treaty, on the other hand, meets only certain requirements and procedures of a formal treaty. One of the primary differences between the two types of treaties is that a formal treaty needs ratification and incorporation into national law while a simplified treaty does not. Nevertheless, this difference does not affect the legal binding character of a simplified treaty. In fact, in terms of quantity, simplified treaties outnumber formal treaties because of their simplicity.

\textsuperscript{264} Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations (Mar. 21, 1986), 25 I.L.M. 543, art. 2(1)(a) [brackets added]; 1969 Vienna Law of Treaties, supra note 22, art. 2(1)(a); Vienna Convention on Succession of States in Respect of Treaties (Aug. 23, 1978), 17 I.L.M. 1488, art. 2(1)(a).

\textsuperscript{265} See 1969 Vienna Law of Treaties, supra note 22, art. 3; see also Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 1994 I.C.J. (Jul. 1), p. 112; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 44 (2000).
In the context of the PSI, the question lies in whether the PSI, represented by its statement of interdiction, has legal character and whether such character binds the states supporting it. Based on the three primary characteristics of a treaty governed by the 1969 VCLT, the PSI falls under the second type of treaty, the simplified treaty. First, the initial group of PSI participants—Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States—concluded and adopted the PSI statement of interdiction on September 4, 2003, followed by additional declarations and adoptions from more than ninety other states in the world.266 This fact satisfies the requirement of states being subject of the agreement. Second, as established in previous chapters, the PSI does not contradict international law. Instead, it complements the existing regimes of terrorism and WMD. It also emphasizes the requirement to comply with relevant rules of national and international law in its implementation; hence, the PSI meets the requirement of being “governed by international law.” With regard to the form, the PSI takes the form of a declaration.

As an instrument, the PSI statement of interdiction meets the requirements of a simplified treaty. It does not, however, constitute a formal treaty governed primarily by the 1969 Vienna Convention on Law of Treaties. A formal treaty that shares the concern of the PSI statement of interdiction can be found in the 2005 SUA Protocol. The protocol, which was adopted by the International Conference on the Revision of the SUA Treaties on October 14, 2005, and entered into force on July 28, 2010, currently has twenty state parties. The member states of the protocol consider the

illicit transfer of WMD to be a crime. The protocol functions not only as a revision of the 2005 SUA Convention but also an implementation thereof.

Another form of PSI motive that meets the requirements of a formal treaty is reflected in the provisions for ship-boarding agreements. Concluded by the United States and major flag-state countries, the purpose of ship-boarding agreements is to stop the flow by sea of WMD, their delivery systems, and related materials. All these ship-boarding agreements recognize the widespread consensus that proliferation of WMD and terrorism seriously threaten international peace and security. In addition, these ship-boarding agreements follow the PSI statement of interdiction principles. The formal treaty, in this context, follows the simplified form of a treaty.

Thus, based on the foregoing analysis, it is concluded that international law recognizes the PSI motive in both the simplified and the formal form of a treaty. The ship-boarding agreements and the 2005 SUA Protocol take the form of formal treaties. Under international law, both instruments bind all their member states and give rise to international obligations to stop the illicit trafficking of WMD. Similarly, in the simplified treaty form, of which the PSI statement of interdiction meets the requirement, has a legally binding character and mandates international obligation of its participating states.

*Customary international law.* The debates on customary international law, particularly concerning its context of formation, range from defining and classifying requirements as state practices and *opinio juris* to identifying authoritative tribunals with the capacity to declare a norm of customary international law. The issues have been extensively discussed and stretched to such a degree that they have reached the
point at which legal commentators question the very existence of customary international law as a valid source of international law. For example, in agreement with many other legal commentators, Goldsmith and Posner doubt the role of customary international law in establishing genuine legal obligation in international law.267 They further indicate that customary international law remains a puzzle that lacks a lawmaker, enforcer, and decision-maker, while stressing that its origin and content cannot be understood by the international community and generally supports the interest of powerful nations.268 Another example can also be seen in the opinion of Norman and Trachtman, who, while rejecting the view submitted by Goldsmith and Posner, agree that customary international law has limits and variations in its effectiveness.269 This subsection does not add more to the already-extensive debate on customary international law. It addresses only the basic tenets of customary international law, that is, the requirements under Article 38 of the I.C.J. Statute, which are applied to show that PSI interdiction is developing into a norm.

Article 38 of the I.C.J. Statute governs the requirements of customary international law as state practices and opinio juris sive necessitatis. The state-practices element refers to unilateral acts of states in an international plane, and opinio juris is the belief that the state is under a legal duty to carry out its unilateral acts. The state-practices element alone is not sufficient to show there is a norm of customary

268 See Posner, supra note 267, at 1114.
international law in play. *Opinio juris* functions as a filter to differentiate state practices with legal character from those without legal character, such as ceremonial acts, acts reflecting comity, or even acts that derive from reasonable common practices.\(^{270}\) The I.C.J. highlights the significance of *opinio juris*:  

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and nor by any legal sense of legal duty.\(^{271}\)

In addition to the existence of a subjective element, customary international law requires that state practices in the objective element meet several conditions, such as quantity\(^{272}\) and quality.\(^{273}\) Variables of these conditions are primarily uniformity, consistency, time, and number of states. In terms of decisiveness, uniformity and consistency\(^{274}\) rank first before other variables. If states have practiced a uniform act consistently, the act may develop as customary international law, irrespective of the

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\(^{270}\) North Sea Continental Shelf, *supra* note 257, at 34: The fact that a state practices equidistance methods in delimitation does not automatically constitute customary international law.

\(^{271}\) *Id.* at 44, para. 77. See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1958 I.C.J. (Jun. 3), p. 30, para 27; Nicaragua, *supra* note 43, at 98, para. 184; the S.S. Lotus Case (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7).

\(^{272}\) ANTHONY A. D’AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 56 (1971).

\(^{273}\) *Id.* at 66.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed as the time when respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provisions invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.\textsuperscript{275}

Similar to the element of the number of states, international law suggests no limitation qualification.\textsuperscript{276} According to this qualification, a norm of customary law does not have to be universally applicable. Instead, it may be applicable only regionally or bilaterally.

Besides regional and bilateral application, customary international law also has exceptions. One such exception is persistent objection. A state that acts persistently objecting the applicability of a rule may qualify for an exception. The I.C.J. stated that such qualification was inapplicable to the 10-mile rule because of Norway's persistent objection:

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sounds which

\textsuperscript{275} North Sea Continental Shelf, supra note 257, at 43, para. 74; see also Ryszard Piotrowicz, The Time Factor in the Creation of Rules of Customary International Law, 21 POLISH Y.B. INT'L L. 69, 85 (1994).

\textsuperscript{276} See Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. (Nov. 20), p. 266; see also Case Concerning Right of Passage over Indian Territory (Merits) (Portugal v. India), Judgment, 1960 I.C.J. (Apr. 12), p. 6.
fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law. In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States, both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event then ten-mile rule would appear to be inapplicable as against Norway inasmuch as she always opposed any attempt to apply it to the Norwegian coast. 277

To make a valid claim of international customary law exception, however, the acts should always be framed outside the rule being objected. In other words, if the acts are based on exceptions or justifications derived from the rule, then such acts are confirming rather than objecting. In the Nicaragua case, the I.C.J. stressed the following:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rules. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. 278

Both exceptions, objecting to a rule and state practices confirming a rule, can manifest in internal and external acts. Internal acts generally are domestic legislation and judicial decisions while external acts are associated with international commitments that may take such forms as diplomatic correspondence, declarations,

international participation and arrangement, and international agreements. Taking into account the forms of evidences, identifying a rule of customary international law can be a difficult task, particularly if the purpose of such identification is to establish a new rule rather than to confirm an existing one. In the case of the PSI, the task is a mix of the former and the latter. It involves both because the PSI is derived from existing rules.

State practice. The foundations of the PSI are the regimes of combating terrorism and the proliferation of WMD. Based on memberships of international instruments concerning these regimes, state practices are uniform and consistent. The international community recognizes any act of terrorism as a threat to international peace and security.279 In terms of treaty or convention type alone, there are currently fourteen universal conventions and four amendments on combating terrorism, besides regional and bilateral arrangements. Similarly, through international instruments, primarily the 1968 Non-Proliferation of Nuclear Weapons Treaty, the 1972 Biological Weapons Convention, and the 1993 Chemical Weapons Convention, the international community commits to prohibition and elimination of WMD. Falling between the two regimes is the UNSC Resolution 1540, which treats illicit trafficking of WMD as a threat to international peace and security. Thus, the international community recognizes the PSI motive.

As of 2011, 193 states were listed as members of the U.N. About eighty percent of those are members to international instruments on the two regimes. Concerning terrorism, for example, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft has 185 state parties, and the 1999

International Convention for the Suppression of the Financing of Terrorism has 175 state parties. Concerning proliferation of WMD, the NPT has 190 state parties, followed by the CWC with 188 and the BWC with 164. These statistics do not include other types of international instruments, such as declarations and strategies.

Currently, ninety-eight states in the world have committed to the PSI method, interdiction of illicit trafficking of WMD. This number includes more than 50% of all U.N. member states. According to geographic location, Europe ranks first with forty-two states, followed by Asia (thirty-two), Oceania (six), the Americas (five), and Africa (five). These numbers suggest that PSI interdiction is a uniform and consistent state practice on the European continent (forty-two states out of forty-seven) and Asia (thirty-two states out of forty-four) where major shipping lines are located. PSI interdiction, however, has fewer commitments from Africa (five states out of fifty-four), the Americas (five states out of thirty-six), and Oceania (six out of fourteen). These PSI-participating states are also members in the international instruments of the regimes on combating terrorism and WMD. Based on the number of current PSI-participating states, on average, at least eight states have committed to the PSI.

280 Other examples include: 1970 Unlawful Seizure of Aircraft (185 parties); 1971 Unlawful Acts against Safety of Civil Aviation (188 parties); 1973 Internationally Protected Persons (173 parties); 1979 International Convention against Taking Hostages (168 parties); 1997 Suppression of Terrorist Bombing (164 parties); and 2005 Suppression of Acts of Nuclear Terrorism (77 parties). For status and updates on these conventions, see http://www.un.org/terrorism/instruments.shtml.
annually since its inception in 2003. With conducive international situations such as the entry into force of the 2005 SUA Protocol allowing interdiction of the illicit transfer of WMD in 2010, the number of PSI-supporting states is expected to continue growing.

The growing trend of PSI support is not without valid reason. The fact that PSI practice derives not only from the existing regime of international law but also in accordance with international law makes it less likely that a state will resist supporting the PSI. Another factor that creates fewer objections from the international community is that PSI interdiction hinders the transfer of only suspected cargo.\textsuperscript{284} In fact, to date, all ships stopped under PSI interdiction have only been requested to return to either their country of origin or a certain neutral port. This practice is consistent throughout PSI interdiction measures.

Interestingly, the practice of hindering transfer of WMD or any other weapons has been conducted by states not participating in the PSI. This practice is not new in the international community, for instance, in the case of Thailand stopping a North Korean shipment in December 2009.\textsuperscript{285} A similar act occurred when India conducted an investigation of a foreign ship suspected of carrying a cargo of WMD.\textsuperscript{286} Another example of hindering transfer of suspected cargo is South Africa interdicting a North Korean shipment bound to the Congo.\textsuperscript{287} These examples show that the PSI is only a

\textsuperscript{284} See Chapter 3, "PSI and International Law," supra.
form that conveys international concerns already shared and practiced by the international community.

**Opinio juris sive necessitatis.** Being a party to international instruments indicates not only a willingness to be bound but also recognition of that particular international instrument as law. This indication constitutes evidence of *opinio juris* as held by the I.C.J. in the Nicaragua case:

As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave form of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their opinio juris as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.288

In the context of the PSI, this author argues that *opinio juris* indicates that any state act preventing the illicit transfer of WMD is derived from a legal obligation. This argument stands on three primary premises: legal obligations from treaty or convention, PSI arrangements, and domestic legislation. The first premise has two parts, which are primary and secondary treaty legal obligation. *Primary-treaty legal obligation* refers to an international instrument that allows interdiction of illicit transfer of WMD as a crime, which its state parties are under legal obligation to prevent. The secondary-treaty legal obligation points to international instruments that treat illicit transfer of WMD as a crime but do not directly specify interdiction *per se*

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as a means to counter the crime, which in this case, is terrorism and proliferation of WMD.

**Primary-and secondary-treaty legal obligation.** As of 2011, apart from shipboarding agreements, only one international treaty shared PSI motive and method, that is, allowing interdiction to prevent illicit transfer of WMD: the 2005 SUA Protocol. Concluded in 2005, this protocol entered into force in 2010 and as of 2012 has twenty member states. According to this treaty, member states are under obligation to stop illicit transfer of weapons of mass destruction. For its twenty member states, the 2005 SUA Protocol is a law that must be enforced. This condition is conclusive of *opinio juris* of interdiction to prevent illicit transfer of weapons of mass destruction. The fact that the 2005 SUA Protocol has entered into force signifies PSI influences on international law.

For the secondary-treaty legal obligation, the PSI motive shares legal obligation primarily with regimes of combating terrorism and proliferation of WMD. A state party to, for example, the 1999 International Convention for the Suppression of the Financing of Terrorism is under a legal duty to punish the offenses set out therein. Another example is an obligation of member states not to transfer nuclear weapons, as enshrined in the 1968 Non-Proliferation of Nuclear Weapons Treaty. In addition, UNSC Resolution 1540 also indicates legal obligation to prevent illicit trafficking of weapons of mass destruction. These international instruments that give rise to legal obligations for state parties evince *opinio juris* for combating terrorism,

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290 NPT, *supra* note 88, art. 1.
proliferation of WMD, and the illicit trafficking of WMD. *Opinio juris* for the PSI motive, stopping the illicit trafficking of WMD, is evident in these instruments.

While *opinio juris* is conclusive for the PSI motive, such is not the case for the PSI method. Under the secondary-treaty legal obligation, the international community opinion varies concerning legal justification for an act of interdiction. One of the indications thereof is the fact that UNSC Resolution 1540 does not recognize interdiction as a means for stopping the illicit trafficking of WMD. Thus, China, for example, threatened to veto any reference to acts of interdiction.\(^\text{291}\) Although China recognizes the PSI motive, it is not yet convinced of the PSI method. Therefore, one may assume that, for PSI non-participating states, there is not sufficient evidence of *opinio juris* to argue legal obligation for conducting interdiction to stop the illicit trafficking of WMD. Nevertheless, with the grave risk posed by WMD terrorism, it is only a matter of time before the entire international community recognizes a legal obligation to conduct interdiction to stop it.\(^\text{292}\)

Indication of the grave risk of WMD is apparent in another instrument under secondary-treaty obligation, UNSC Resolution 1874.\(^\text{293}\) This instrument, to some extent, shares the PSI method application, which is interdiction by calling states to conduct vessel inspection on the high seas:


Calls upon all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8(a), 8(b), or 8(c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions. 294

Furthermore, UNSC Resolution 1874 refers to USNC Resolution 1540 in its preamble, indicating significant relations to the PSI motive. Despite the fact that the UNSC intended this resolution for North Korea only, it does recognize interdiction on the high seas for vessels suspected of carrying cargo governed by the resolution, similar to the PSI method. Moreover, taking into account the form of the UNSC resolution, it carries legal obligation for U.N. member states.

The PSI arrangement as legal obligation. For PSI-participating states, the act of interdiction to stop illicit trafficking of WMD is based on their commitments of joining the PSI. As established earlier, the PSI arrangement is a simplified form of agreement. Qualifications from selection of wording to form suggest a legally binding character for the PSI instruments. The PSI instruments consist of the statement of interdiction, ship-boarding agreements, and the declarations of commitment signifying the legal obligation to conduct interdiction. As a package, these instruments provide legal justification for PSI-participating states to conduct interdiction. Hence, they offer conclusive evidence of opinio juris among PSI-participating states.

For non-participating states, particularly in the shipping industry, the PSI creates another requirement that must be considered. The shipping industry must now consider types of cargo falling under the classification of WMD to avoid the risk of interdiction by PSI-participating states. Furthermore, the shipping industry must be

294 Id. ¶ 12.
selective in offering its services because of PSI restrictions on state and non-state actors of proliferation concerns. The ship-boarding agreements concluded between the United States and major flag-state countries are indications of *opinio juris* that the latter enforce PSI requirements for all of their registered ships.

*National legislation of legal obligation.* There are three sources for national legislation of legal obligations: the PSI Statement of Interdiction, the 2005 SUA Protocol, and the Secondary Treaty Legal Obligation. For the first source, the PSI statement of interdiction, in its third principle, stresses the commitment to national legislation in supporting the PSI:

Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.\(^{295}\)

Similarly, the 2005 SUA Protocol requires ratification by its member states. In other words, the 2005 SUA Protocol has become the law of the land for the member states because it has been incorporated into their national legislation, hence an indication of *opinio juris*.

Based on international instruments mentioned in the secondary-treaty legal obligation section, *opinio juris* is conclusive concerning the foundations of the PSI motive, that of combating terrorism and proliferation of WMD. Considering that these instruments are binding to the state parties and generally should be incorporated into their domestic laws,\(^{296}\) it is valid to argue that *opinio juris* concerning the PSI motive is also evident from the existence of such domestic laws. For example, the Australian

\(^{295}\) PSI statement of interdiction, *supra* note 19, 3rd principle.

\(^{296}\) See, *e.g.*, Tokyo Convention reservation requirements, *supra* note 133, art. 20; NPT, *supra* note 88, art. 9.
Crimes (Aviation) Act 1991 incorporates the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft\(^{297}\) into Australian domestic law, as does the Weapons of Mass Destruction Act 1995, which prohibits the supply or export goods used to create weapons of mass destruction.\(^{298}\) Another example is the Indonesian Act No. 2 Year 1976 that ratifies the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft\(^{299}\) and Act No. 8 Year 1978 that incorporates the NPT into Indonesian domestic law.\(^{300}\)


Chapter 6

Conclusion

Introduced in 2003, the PSI has developed into a norm of international law. The PSI statement of interdiction has gained status as a principle for conducting maritime interdiction to stop the illicit trafficking of WMD. As of 2011, ninety-eight countries, more than 50% of all countries in the world, have committed to practicing PSI. In addition, eleven ship-boarding agreements concluded with major flag-state countries have given the PSI access to more than 75% of commercial ships worldwide. In the international forum, the PSI has influenced international law, evidenced by the passing of UNSC Resolution 1540 in 2004, UNSC Resolution 1874 in 2009, and the recent entry into force of the 2005 SUA Protocol in 2010, all of which share PSI motives and methods as conveyed in the PSI statement of interdiction. This dissertation has shown how the PSI has developed into a norm of international law.

Chapter 2 included analysis of the PSI in detail, ranging from principles as stipulated in its statement of interdiction, declarations of commitment from participating states, memberships, ship-boarding agreements, program and activities, and selected views from both participating and non-participating countries. That chapter concluded that the PSI statement of interdiction serves as a brief guide for the scope of its maritime interdiction. It establishes the PSI motive (the deterrence of the proliferation of WMD), and treats illicit trafficking of WMD as a threat to international peace and security. It also sets the PSI methods, maritime interdiction, to address such threats. In so doing, the PSI complies with both national and international law.
Chapter 3 discussed the PSI within the framework of international law. It included analysis of the PSI motive and methods in terms of relevant regimes of international law: sovereignty, freedom of navigation, combating terrorism, proliferation of WMD, and the use of force. In its motive, the PSI complements regimes combating terrorism and proliferation of WMD, and in its methods, the PSI employs limited use of force and consent of flag-states permissible under regimes of sovereignty, freedom of navigation, and the use of force. Of course, concerns arise about the PSI being politically motivated, for example, in the list of state and non-state actors. The practice of its maritime interdictions, however, shows that the PSI remains objective and non-discriminatory. In addition, the PSI does not currently seize or confiscate cargoes from interdicted ships, returning them to their original shipping countries instead.

Chapter 4 included a comparison of PSI maritime interdiction with other maritime interdiction recognized under international law, specifically UNCLOS-based maritime interdiction, fisheries, drugs, the 2005 SUA Protocol, and human trafficking. The PSI not only follows but also is comparable to UNCLOS-based maritime interdiction. Similarly, the PSI resembles other maritime interdictions recognized under international law, notably in its reference to the consent of flag states and limited use of force. The PSI requires flag-state consent or other agreed-upon arrangements prior to maritime interdiction. In addition, the PSI employs limited use of force, indicating safeguards as necessary like any other maritime interdiction governed by international law. As of April 2012, no reports of PSI-conducted maritime interdiction indicate casualties or damages.
Chapter 5 provided conclusive indication of the PSI status under international law. In terms of regimes of unilateral acts, the PSI binds its participating states in their commitments and practices. Set within an international law framework, the PSI fits into the treaty and customary international law categories. In the treaty category, the PSI motive and methods are clear in the entered into force of the 2005 SUA Protocol, as well as the PSI motive shared with UNSC Resolution 1540, regimes for combating terrorism and proliferation of WMD. In terms of customary international law, PSI state practices are indicative in the vast network of the ninety-eight PSI-participating states and their practices both in motive and method.

The *opinio juris*, however, is only conclusive in PSI motive. The international community remains divided on the method of PSI. Nevertheless, the dissertation submits that there is a strong indication that the international community is gradually accepting PSI method as a means to counter illicit trafficking of WMD. Such indication ranges, among other things, from the entry into force the 2005 SUA Protocol that criminalizes WMD and the conclusion of UNSC Resolution 1874 in 2009 that shares the method of PSI. Based on the foregoing analysis, this author submits that PSI maritime interdiction to stop the illicit trafficking of WMD has developed into a norm of international law. This analysis adds, *inter alia*, PSI maritime interdiction to lists of international maritime interdiction recognized by international law.

In general, this dissertation has demonstrated that the PSI including its maritime interdiction is practiced and recognized by over half of the countries around the world. Nevertheless, within its limitation, this dissertation does not specifically
discuss commercial impacts of PSI and third-state participation in the PSI including legal status of such participation under international law. In addition, relevant future works or projects following up this dissertation may include investigation on possible trend of non-consensual maritime interdiction under international law and maritime interdiction from environmental law perspective.
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Appendices
Appendix A

Ship-Boarding Agreements with the United States


Appendix B

UNCLOS Hot Pursuit, Article 111

(1) The hot pursuit of a foreign ship may be undertaken when competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been violation of the rights for the protection of which the zone was established. (Article 111)
Appendix C

2005 SUA Protocol, Article 5, Paragraph 5 (1)(b)

Transports on board a ship: (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or abstain from doing any act; or (ii) any BCN weapon, knowing it to be BCN weapon as defined in article 1; or (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA safeguards agreement; or (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.
Appendix D

2001 IAP IUU Fishing, Pt. 1, Para. 2

The Twenty-third Session of the FAO Committee on Fisheries (COFI) in February 1999 addressed the need to prevent, deter and eliminate IUU fishing. The Committee was concerned about information presented indicating increases in IUU fishing, including flying “flags of convenience”. Shortly afterwards, an FAO Ministerial Meeting on Fisheries in March 1999 declared that, without prejudice to the rights and obligations of States under international law, FAO “will develop a global plan of action to deal effectively with all forms of illegal, unregulated, and unreported fishing including fishing vessels flying “flags of convenience” through coordinated efforts by States, FAO, relevant regional fisheries management bodies and other relevant international agencies such as the International Maritime Organization (IMO), as provided in Article IV of the Code of Conduct.”; see also 1995 Fish Stocks Agreement, preamble, paragraph 5, “Seeking to address in particular the problems identified in chapter 17, programme area C, of Agenda 21 adopted by the United Nations Conference on Environment and Development, namely, that the management of high seas fisheries is inadequate in many areas and that some resources are overutilized; noting that there are problems of unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States.”
Appendix E

1998 U.N. Narcotics Convention, Preamble, Paragraph 4, 9, and 10

Recognizing also that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority; Determined to improve international co-operation in the suppression of illicit traffic by sea; and Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary.”; see also 2002 Protocol to UNTOC, preamble, paragraph 1, “Declaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels.”; see also 2002 TOC Convention, preamble, paragraph 7, “Deeply concerned by the negative economic and social implications related to organized criminal activities, and convinced of the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels.
Appendix F

Major Regional Fishery Management Organizations

The thirteen major Regional Fisheries Management Organizations (RFMOs) in the world are as follows:

AIDCP (Agreement on the International Dolphin Conservation Program) http://www.iattc.org/IDCPENG.htm

CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources) http://www.ccamlr.org/default.htm

CCSBT (Commission for the Conservation of Southern Bluefin Tuna) http://www.ccsbt.org/site/

GFCM (General Fisheries Commission for the Mediterranean) available at http://www.gfcm.org/gfcm/en

IATTC (Inter-American Tropical Tuna Commission) available at http://www.iattc.org/


IOTC (Indian Ocean Tuna Commission) http://www.iotc.org/English/index.php

NAFO (Northwest Atlantic Fisheries Organisation) http://www.nafo.int/

NASCO (North Atlantic Salmon Conservation Organisation) http://www.nasco.int/index.html

NEAFC (North-East Atlantic Fisheries Commission) http://www.neafc.org/

SEAFO (South East Atlantic Fisheries Organisation) http://www.seafo.org/

SPRFMO (South Pacific Regional Fisheries Management Organisation) http://www.southpacificrfmo.org/

WCPFC (Western and Central Pacific Fisheries Commission) http://www.wcpfc.int/
Appendix G

1995 Fish Stocks Agreement:

Basic Procedure for Boarding and Inspection

1. The inspecting State shall ensure that its duly authorized inspectors: (a) present credentials to the master of the vessel and produce a copy of the text of the relevant conservation and management measures or rules and regulations in force in the high seas area in question pursuant to those measures; (b) initiate notice to the flag State at the time of the boarding and inspection; (c) do not interfere with the master’s ability to communicate with the authorities of the flag State during the boarding and inspection; (d) provide a copy of a report on the boarding and inspection to the master and to the authorities of the flag State, noting therein any objection or statement which the master wishes to have included in the report; (e) promptly leave the vessel following completion of the inspection if they find no evidence of a serious violation; and (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

2. The duly authorized inspectors of an inspecting State shall have the authority to inspect the vessel, its licence, gear, equipment, records, facilities, fish and fish products and any relevant documents necessary to verify compliance with the relevant conservation and management measures.

3. The flag State shall ensure that vessel masters: (a) accept and facilitate prompt and safe boarding by the inspectors; (b) cooperate with and assist in the inspection of the vessel conducted pursuant to these procedures; (c) do not obstruct, intimidate or interfere with the inspectors in the performance of their duties; (d) allow the inspectors to communicate with the authorities of the flag State and the inspecting State during the boarding and inspection; (e) provide reasonable facilities, including, where appropriate, food and accommodation, to the inspectors; and (f) facilitate safe disembarkation by the inspectors.

4. In the event that the master of a vessel refuses to accept boarding and inspection in accordance with this article and article 21, the flag State shall, except in circumstances where, in accordance with generally accepted international regulations, procedures and practices relating to safety at sea, it is necessary to delay the boarding and inspection, direct the master of the vessel to submit immediately to boarding and inspection and, if the master does not comply with such direction, shall suspend the vessel’s authorization to fish and order the vessel to return immediately to port. The flag State shall advise the inspecting State of the action it has taken when the circumstances referred to in this paragraph arise. (1995 Fish Stocks Agreement, Article 22)
Appendix H

G-8 Declaration on Non-Proliferation and Disarmament

Art. 13. We are determined to promote a more concrete approach with regard to the fight against proliferation through the effective implementation of multilateral instruments and strong national measures. To fight proliferation financing, we support the process launched at the Financial Action Task Force (FATF) that will strengthen the financial vigilance of G8 countries in a coordinated manner. To support U.N. proliferation sanctions, we will bolster the existing criminal provisions in national legislation and encourage States to identify as a specific offence the proliferation of WMDs, their means of delivery and related materials. Such provisions will also target financing and financial services. To better counteract proliferation, we are committed to strengthening cooperation in this area among the G8 and with others, where appropriate, notably by increasing State endorsements of the Proliferation Security Initiative (PSI) and improving its effectiveness. We will continue to strengthen our national export control policies and we will exercise vigilance with regard to access to WMD and their means of delivery proliferation-related knowledge and know-how. Such actions will be taken to further implement Resolutions 1540 and 1887, as well as other UNSC resolutions. (G-8 2011 Summit, “Declaration on Non-Proliferation and Disarmament,” May 26-27, 2011, (emphasis added).