

LEGAL LIMITATIONS ON ENSURING AUSTRALIA'S MARITIME SECURITY

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[In the wake of September 11, 2001, efforts to protect against future terrorist attacks have affected many areas of international law, including the law of the sea. Australia's interests in improving its maritime security were articulated at the end of 2004 with the adoption of the Australian Maritime Identification System, which is intended to identify vessels within 1000 nautical miles of Australia's coast. One difficulty faced is that the steps that Australia may take to ensure better protection of maritime assets and shipping against terrorist attack are limited under international law. States have endeavoured to improve the existing legal framework through the adoption of the International Ship and Port Facility Security Code, the Proliferation Security Initiative, bilateral treaties to allow ship-boarding, and a new protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. However, inadequacies remain because states are constantly constrained by the fundamental principles of the law of the sea, which emphasise the freedom of navigation and the exclusive authority of flag states. It is argued here that it is only when exclusive interests in flag state control and inclusive interests in the freedom of navigation are reconceived to account for a common interest in enhancing maritime security that weaknesses in the existing legal regime may be overcome.]

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I INTRODUCTION

The events of September 11, 2001 brought myriad security concerns to international attention and provided the catalyst for significant changes in both national and international legal regimes. International rules concerning the use of force, international humanitarian law and human rights law have been adapted, or breached, in the face of perceived threats posed by al Qaeda and its associated organisations. Given the deadly use of aircraft on September 11, attention has subsequently been focused on the possibility of other modes of international transport being used for terrorist purposes. It is in this context that the maritime industry has been subjected to scrutiny, prompting modifications to existing legal regimes that deal with maritime security issues.

Threats to maritime security may take various forms. Ships may be used for the transportation of terrorists, their supplies and their weapons. Of particular concern is the possibility of weapons of mass destruction being sent to terrorists or to states involved in the proliferation of these weapons. There is also the further risk of a large oil tanker, or a vessel shipping liquid natural gas, being hijacked and exploded in a narrow strait, or being rammed into a major port. Equally, small boats may be used to collide with an oil tanker or comparable vessel to similar effect.¹ In addition to the potential for loss of life and injury, the economic ramifications of a major terrorist attack against international shipping are significant, given that approximately 80 per cent of the world's goods are transported via the ocean.² Closure of a major port hub or vital shipping route could cause severe economic repercussions on a global scale.³

The Australian Government is keenly aware of the dangers posed by maritime terrorism, including the proliferation of weapons of mass destruction among non-state actors. Alexander Downer, the Minister for Foreign Affairs, has stated that 'so sophisticated and widespread is this threat [of proliferation] that we must confront it directly — with action, not merely talk of action'.⁴ One step that Australia took in this regard was the establishment of the Australian Maritime

¹ This last threat was graphically illustrated by the attack against the French-registered oil tanker, *Limburg*, off the coast of Yemen in October 2002. See Michael Richardson, *A Time Bomb for Global Trade* (2004) 18.

² *Ibid* 3.

³ See *ibid* 3–4.

⁴ Alexander Downer, Minister for Foreign Affairs, Commonwealth of Australia, 'The Threat of Proliferation: Global Resolve and Australian Action' (Speech delivered at the Lowy Institute for International Policy, Sydney, Australia, 23 February 2004), available at <http://www.foreignminister.gov.au/speeches/2004/040223_lowy.html> at 1 October 2006.

Identification System ('AMIS').⁵ Australia initially proposed that a Joint Offshore Protection Command ('Joint Command'), comprising the Australian Defence Force and the Australian Customs Service, would implement, coordinate and manage the identification of vessels (including their crew, cargo and course of journey) proposing to enter Australian ports when those vessels are still 1000 nautical miles from the coast. It was also envisaged that the Joint Command would identify all vessels, except day recreational boats, transiting Australia's Exclusive Economic Zone ('EEZ').⁶ Not only would Australia request such information, but the Australian Defence Force would also enforce these security measures by engaging in interdictions.⁷ The provision of this information was designed to enhance the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities from terrorism.⁸

Australia's unprecedented assertion of authority over vessels at such distance from its coast, particularly the claim of authority to interdict vessels over which Australia has no jurisdiction, raised serious concerns about the legality of the AMIS under international law.⁹ As a result, Australia reformulated the AMIS so that ships will now be requested to provide information on a wholly voluntary basis and the AMIS will be based on cooperative international arrangements, particularly with neighbouring states.¹⁰ Australia has emphasised that its actions under the AMIS will conform to existing international law.¹¹ This episode illustrates both the need to improve maritime security and the limitations faced by states under the current international legal regime.

The AMIS, as originally formulated, reflected the steps that Australia wished to take in order to enhance its maritime security. However, the questionable legality of the AMIS and its unilateral nature means that Australia must (or, at least, should) explore other avenues to improve its maritime security in

⁵ In its original formulation, the AMIS was described by the Australian Prime Minister as a 'Maritime Identification Zone' ('MIZ'): John Howard, Prime Minister of Australia, 'Strengthening Offshore Maritime Security' (Press Release, 15 December 2004), available at <www.pm.gov.au/news/media_releases/media_Release1173.html> at 1 October 2006 ('PM Media Release'). However, following concerns voiced by Australia's neighbours over a perceived unilateral assertion of authority, Australian officials began referring to the 'zone' as the AMIS. For a summary of the reaction of Australia's neighbours to the announcement of the MIZ, see Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 *International and Comparative Law Quarterly* 337, 338–9. The subsequent shift in terminology was never formally announced but is exemplified by the following Government statements: see, eg, Commonwealth of Australia, Department of Transport and Regional Services, *Strengthening Australia's Offshore Maritime Security* (Industry Briefing Paper, February 2005), available at <http://www.dotars.gov.au/transport/security/maritime/pdf/Strengthening_offshore.pdf> at 1 October 2006.

⁶ PM Media Release, above n 5.

⁷ 'The Australian Defence Force will take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities, including the protection of offshore oil and gas facilities and the offshore interdiction of ships': ibid.

⁸ Ibid.

⁹ See generally Klein, above n 5.

¹⁰ Michelle Wiese Bockmann, 'Maritime Zone Plans Scrapped — Terror in London', *The Australian* (Sydney, Australia), 11 July 2005, 2.

¹¹ Ibid, referring to a statement by the Australian Customs Service. Australia is also making arrangements to ensure the lawful operation of the AMIS at a national level: see Cameron Moore, 'Turning King Canute into Lord Neptune: Australia's New Offshore Protection Measures' (2006) *University of New England Law Journal* (forthcoming).

conformity with international law. This article addresses this issue by considering the following questions: what is Australia permitted to do? What are the legal limitations on those actions? What gaps remain and how might they be overcome? The existing legal parameters demonstrate the limits imposed on Australia (as well as other states with comparable concerns) and reveal the remaining gaps in the international law regime.¹² These inadequacies cannot simply be addressed by entering into another treaty as they are indicative of deficiencies in the very nature of the law of the sea. The difficulties faced in endeavouring to protect maritime security — the gaps in the existing legal regime — are a result of the framework of the law of the sea and its ongoing emphasis on the predominant position of the flag state and the protection of the long-entrenched freedom of navigation. It is argued here that it is only when exclusive interests in flag state control and inclusive interests in the freedom of navigation are reconceived to account for a common interest in enhancing maritime security that weaknesses in the existing legal regime may be overcome.

To explore these inadequacies, this article first provides a brief overview of the traditional framework of the law of the sea, particularly as it is relevant to maritime security. Such an analysis demonstrates the emphasis placed on the freedom of navigation and flag state authority. The ensuing sections then examine the major legal developments relevant to maritime security since September 11, 2001 and analyse the limits imposed on Australia in the operation of these instruments and agreements. This discussion reveals that it is the traditional construct of the law of the sea, and the inability of states to conceive of maritime security as a shared interest to prevail over exclusive interests in the sanctity of flag states, which undermines Australia's efforts to ensure its maritime security. It is proposed that the traditional construct of the law of the sea needs to be re-examined if efforts at improving maritime security are to succeed.

II THE BALANCE OF STATES' INTERESTS IN DIFFERENT MARITIME ZONES

Historically, the oceans have been divided between two legal regimes: the territorial sea — a narrow belt of waters closest to land over which states exercise sovereignty; and the high seas — the waters beyond the territorial sea over which no state may exercise sovereignty.¹³ This legal construct controlled the uses of the oceans for well over three centuries. It was only after World War II that this dichotomist approach to the law of the sea was challenged, as improvements in technology permitted the development of increasingly sophisticated fishing fleets and also led to the discovery of important natural

¹² As noted by Australian Foreign Affairs Minister Alexander Downer:

We will need to consider how best we can use existing domestic and international laws to confront this threat. But we should also look at how domestic and international laws could be strengthened to support our efforts to safeguard international security. In a time of high demand and limited resources, a results-oriented approach is what is needed to address this urgent security challenge.

Alexander Downer, Minister for Foreign Affairs, Australia, 'Weapons of Mass Destruction: The Greatest Threat to International Security' (Speech delivered at the Proliferation Security Initiative, Brisbane, Australia, 9 July 2003), available at <http://www.foreignminister.gov.au/speeches/2003/030709_wmd.html> at 1 October 2006.

¹³ R R Churchill and A V Lowe, *The Law of the Sea* (3rd ed, 1999) 71–2.

resources in the seabed.¹⁴ These economic interests prompted states to claim rights over ocean space that had previously been regarded as the high seas. The strong state interests in protecting rights in high seas areas influenced the recognition of authority over both the continental shelf and those areas that ultimately became the EEZ. This balance of rights and duties in the territorial sea, the continental shelf and EEZ, and the high seas is examined in this Part, with particular regard to security interests in each of these maritime zones and the varying rights and obligations of states in these areas.

A *The Freedoms of the High Seas*

At the start of the 17th century, Dutch jurist and diplomat Hugo Grotius argued that the oceans ought to be open to all users rather than placed under the dominion or sovereignty of a small number of states.¹⁵ Grotius advocated the principle of *mare liberum* — the freedom of the seas — in order to promote the idea that all states shared an interest in using the oceans for the transportation of goods and people across the globe and to fish freely in areas beyond their territorial seas.¹⁶ While there was initially some resistance to Grotius' position,¹⁷ recognition of the common interests in utilising ocean space, as well as the physical limitations involved in policing maritime areas in a manner comparable to policing land territory,¹⁸ resulted in a widespread and enduring endorsement of *mare liberum*.¹⁹

The freedoms of the high seas that are generally accepted are the freedoms of navigation, fishing, overflight, scientific research, construction of artificial

¹⁴ See *ibid* 2.

¹⁵ Hugo Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (Ralph Magoffin trans, 1916 ed) [trans of: *Mare Libervm, sive, de ivre quod Batavis competit ad Indicana Commercica: dissertatio*].

¹⁶ Grotius was particularly arguing the case of the Dutch East Indies Company, which was seeking to ensure that its trade routes would not be claimed as Portuguese sovereign territory: *ibid* chs V–VII.

¹⁷ The counterargument to Grotius' *mare liberum* was argued by British scholar John Selden: see John Selden, *Of the Dominion, Or, Ownership of the Sea* (Marchamont Nedham trans, 1652 ed) [trans of: *Mare clausum seu, de dominio maris*].

¹⁸ Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2000–01) 33 *New York University Journal of International Law and Politics* 703, 706–8.

¹⁹ For example, during the second major effort to codify the law of the sea — the 1958 UN Conference on the Law of the Sea — the Soviet Union affirmed the continuing relevance of *mare liberum* in the international legal system:

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

First United Nations Conference on the Law of the Sea, Official Records (vol 4), 2nd Comm, 7th mtg (10 March 1958) 9 [10] (USSR).

islands, and the laying of cables and pipelines.²⁰ There has not been an exhaustive listing of high seas freedoms,²¹ and a variety of military activities are typically regarded as other freedoms of the high seas.²² For example, in the 1950s, the United States justified the testing of nuclear weapons on the high seas by reference to *mare liberum*, arguing that the only restriction on states' activities on the high seas was one of reasonable regard to the rights of other users.²³ This example illustrates how the freedoms of the high seas have been used to support claims that promote security interests.

Rather than exerting sovereignty over the high seas, each state instead has jurisdiction over the vessels that bear the flag of that state. A ship is to sail under the flag of only one state,²⁴ and that state sets the conditions for the grant of nationality to ships and for the right to fly their flag.²⁵ A vessel is then subject to the exclusive jurisdiction of the state to which it is flagged, with any exception limited to those expressly provided for by treaty.²⁶ Warships and ships owned or operated by a state and used only for governmental non-commercial service are entitled to complete immunity from the jurisdiction of any state besides that of the flag state when on the high seas.²⁷ These exclusive rights of the flag state stand in contrast to the emphasis on inclusive interests that is otherwise a hallmark of the high seas legal regime.

Given the exclusive jurisdiction accorded to flag states and the inclusive interests in maintaining the freedoms of the high seas, there are only limited instances in which states may exercise any kind of law enforcement jurisdiction over vessels not bearing their flags (referred to here as 'foreign vessels'). The limitations most relevant to security issues are the right of visit and the right of

²⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, art 87 (entered into force 16 November 1994) ('*UNCLOS*').

²¹ See *ibid*. The preferred legal formulation has been to set out an inclusive list of high seas freedoms (signalled by the phrase '*inter alia*' in art 87).

²² Military activities have customarily been included among the traditional freedoms of the high seas, even if not explicitly stated. For example, the freedom of navigation has usually been viewed as encompassing the free movement of warships across the high seas. See Daniel O'Connell, *The International Law of the Sea* (Ivan Shearer, revised ed, 1984) 809; Pemmaraju Sreenivasa Rao, 'Legal Regulation of Maritime Military Uses' (1973) 13 *Indian Journal of International Law* 425, 435.

²³ For an explanation of this position, see Myres McDougal and Norbert Schlei, 'The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security' (1955) 64 *Yale Law Journal* 648, 659–61, 682–8. *UNCLOS* now requires that states show a due regard for the interests of other states in their respective exercise of the freedoms of the high seas: *UNCLOS*, above n 20, art 87(2).

²⁴ *UNCLOS*, above n 20, art 92.

²⁵ *Ibid* art 91(1).

²⁶ *Ibid* art 92.

²⁷ *Ibid* arts 95–96.

hot pursuit.²⁸ The right of visit involves a warship sending a boat under the command of an officer to a foreign vessel and checking its documents.²⁹ If suspicion remains, the foreign vessel may then be boarded for further examination. Warships and military aircraft are only justified in visiting and boarding a foreign vessel on the high seas when there are reasonable grounds for suspecting that the foreign vessel is engaged in piracy, the slave trade or unauthorised broadcasting activities; or when the vessel is without nationality or is the same nationality of the warship, even though it may be flying a foreign flag or refusing to show its flag.³⁰ The right of visit is deferential to flag state authority, as it provides only for the enforcement of designated prescriptions as permitted under international treaties with respect to vessels that are not accorded immunity.³¹

Another instance in which a state may assert jurisdiction against a foreign vessel on the high seas is when exercising the right of hot pursuit.³² The right is premised on the coastal state beginning the pursuit of a foreign vessel in one of its maritime zones when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that particular zone.³³ As Poulantzas explains, '[t]he right of hot pursuit — an exception to the freedom of the high seas — is at the same time a right of the littoral State established for the effective protection of areas under its sovereignty or jurisdiction'.³⁴ The right of hot pursuit is therefore a limited derogation from the freedom of navigation. It is associated with the rights accorded to coastal states over their maritime zones, as the pursuit must be commenced while the

²⁸ A further limitation on military activities on the high seas could be the reservation of the high seas for peaceful purposes: *UNCLOS*, above n 20, art 88. Larson, however, considers that this reservation is virtually redundant. He argues:

Exactly what this means in practice is rather difficult to define, since the superpowers in particular use the [high seas] to deploy sub-surface submarines and surface vessels and use the air space above for naval and other military purposes. As a result, the practical effect of reserving the [high seas] for peaceful purposes is almost nonexistent.

David Larson, 'Security Issues and the Law of the Sea: A General Framework' (1985) 15 *Ocean Development & International Law* 99, 116. See also Scott Truver, 'The Law of the Sea and the Military Use of the Oceans in 2010' (1985) 45 *Louisiana Law Review* 1221, 1242 (stating that art 88 'seems to have very little substance'); Kenneth Booth, 'The Military Implications of the Changing Law of the Sea' in John King Gamble Jr (ed), *Law of the Sea: Neglected Issues* (1979) 328, 341 (describing art 88 as 'a familiar piece of pious rhetoric, calculated to degrade respect for the document rather than legitimize new patterns of behavior').

²⁹ The right of visit also applies to any other duly authorised ships or aircraft clearly marked and identifiable as being on government service: *UNCLOS*, above n 20, art 110(5).

³⁰ *Ibid* art 110(1). Concerns about the nationality of the *M/V So San* provided the legal justification for the Spanish Navy to board a Cambodian vessel in which 15 Scud missiles were discovered: see J Ashley Roach, 'Initiatives to Enhance Maritime Security at Sea' (2004) 28 *Marine Policy* 41, 53–4.

³¹ *UNCLOS*, above n 20, art 110(1).

³² The right of hot pursuit has long been accepted as part of the law of the sea: see, eg, O'Connell, above n 22, 1078–9 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea). See also Robert Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the *Law of the Sea Convention*' (1992–93) 33 *Virginia Journal of International Law* 557, 557.

³³ *UNCLOS*, above n 20, art 111(1)–(2).

³⁴ Nicholas Poulantzas, *The Right of Hot Pursuit in International Law* (1969) 39.

foreign ship or one of its boats is within the waters of the pursuing state,³⁵ and may only be continued on the high seas if the pursuit has not been interrupted.³⁶ Framed in this way, the right of hot pursuit is completely consistent with the emphasis placed on the exclusive control of the flag state and *mare liberum*.

The freedoms of the high seas therefore accord to all states a wide scope for action, including the ability to conduct a variety of military activities provided that those activities are undertaken with due regard to the rights of other vessels. As the high seas are open to all states, the only authority exercised by states in these ocean areas is over vessels bearing their flag. The sanctity of the flag state's control over its vessels is evident in the limited, and carefully prescribed, instances in which other states may pursue, stop and board foreign vessels. The emphasis on community interests in maintaining freedoms of the high seas has influenced subsequent claims to ocean areas. This focus, combined with the concomitant exclusive control of vessels in these waters, is what currently constrains efforts to develop an effective legal regime to confront threats to maritime security.

B Sovereignty over Territorial Seas

In contrast to the high seas — on which all states share the associated freedoms — the territorial sea is the belt of water, extending up to 12 nautical miles, adjacent to a coastal state and over which that state exercises sovereignty.³⁷ In many respects, the rights of the coastal state over its territorial sea are comparable to those enjoyed over its land territory, particularly with regard to rights to enact and enforce legislation in this maritime area. Most relevant for present purposes is that a state may exercise criminal jurisdiction over foreign vessels in its territorial sea 'if the consequences of the crime extend to the coastal State' or 'if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea'.³⁸ Coastal state authority to proscribe acts of maritime terrorism may come into play as 'it may be conspiracy to commit a terrorist act and preparatory steps towards such an act may be criminal matters, the consequences of which might extend to the coastal State, or disturb its peace or good order'.³⁹

The main limitation on the coastal state's sovereignty over its territorial sea is that ships of all states enjoy the right of innocent passage through these waters.⁴⁰ Article 19 of *UNCLOS* provides that passage will be considered innocent if it is

³⁵ The foreign vessels may be in the internal waters, archipelagic waters, territorial sea or contiguous zone of the pursuing state: *UNCLOS*, above n 20, art 111(1).

³⁶ *Ibid.* Equally, hot pursuit may begin in the EEZ and the continental shelf for offences against the law relating to those zones: art 111(2). If the foreign vessel enters the territorial sea of a third state, then the pursuing state's right of hot pursuit is extinguished: art 111(3).

³⁷ *Ibid.* art 2. The sovereignty of the coastal state extends to the bed, subsoil and the airspace over the territorial sea: at art 2(2).

³⁸ *Ibid.* art 27. This article further provides that criminal jurisdiction may be exercised in relation to drug-trafficking and if requested by the master of the ship or by a diplomatic or consular officer. Without these connections, a coastal state may not exercise criminal jurisdiction over a foreign vessel.

³⁹ Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) *Israel Yearbook on Human Rights* 205, 215.

⁴⁰ *UNCLOS*, above n 20, art 17.

not prejudicial to the peace, good order or security of the coastal state.⁴¹ The article sets out a number of activities that could be considered prejudicial to the peace, good order or security of the state, and its final clause sets a low threshold for the entire range of activities by stipulating that any activity 'not having a direct bearing on passage' could mean that the passage is not innocent.⁴² A number of these activities relate specifically to warships and other military vessels, including threats of the use of force in violation of the *Charter of the United Nations*, weapons exercises, and the launching and landing of aircraft and military devices, as well as the collection of information or the dissemination of propaganda.⁴³ The determination as to whether passage is innocent or not is left to the discretion of the coastal state.⁴⁴ Within the territorial sea, the exclusive jurisdiction of a flag state is still respected, given the existence of the right of innocent passage, but a coastal state's powers over this narrow band of water are more likely to prevail because of its sovereignty over this maritime zone.

States also exercise sovereignty over their ports and their internal waters.⁴⁵ Ports are essentially assimilated to the land territory of a state and, as such, states have absolute sovereignty over these areas and may control entry into their ports and the conditions under which vessels may enter. As McDougal and Burke have noted:

It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.⁴⁶

The restrictions that are imposed on the port state's application of its laws to vessels in ports only relate to the inapplicability of local labour laws and to situations in which a vessel has entered port because it is in distress.⁴⁷

Compared with the rights of states on the high seas, the authority of the coastal state is paramount over other states when controlling activities in its territorial seas, internal waters and ports.⁴⁸ This control provides the coastal state with a wide scope of action in taking steps to enhance its maritime security. However, the difficulty here is that states may not wish to wait for a suspicious vessel to come into port or even to enter its territorial sea. In the very institution

⁴¹ Ibid art 19(1).

⁴² Ibid art 19(2)(1).

⁴³ Ibid art 19(2)(a)–(f).

⁴⁴ See Charles Pirtle, 'Transit Rights and US Security Interests in International Straits: The "Straits Debate" Revisited' (1978) 5 *Ocean Development & International Law* 477, 481 (noting the far-reaching powers of the coastal state in this regard).

⁴⁵ Internal waters are those that lie landward of the baseline from which the territorial sea and other maritime zones are measured: *UNCLOS*, above n 20, art 8.

⁴⁶ Myres McDougal and William Burke, *The Public Order of the Oceans* (1962) 156 (citations omitted).

⁴⁷ Kaye, above n 39, 210–11.

⁴⁸ The coastal state is also permitted to exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws in the contiguous zone, which may extend 24 nautical miles: *UNCLOS*, above n 20, art 33. The coastal state may therefore have additional powers if there is a link between these prescribed powers and the particular facts of certain terrorist activity.

of the AMIS, it is evident that the Australian Government perceived 12 nautical miles as being too close for comfort when seeking to obtain identification information from vessels approaching Australia's coast.

C *Sovereign Rights and Jurisdiction over the EEZ and the Continental Shelf*

Between the extremes of the freedoms of the high seas and sovereignty over territorial seas, a state has sovereign rights and jurisdiction over its continental shelf and EEZ. The nature of the rights accorded to coastal states over these maritime spaces is a consequence of the continuing importance attributed to maintaining the freedoms of the high seas in as wide a space as possible.

When states discovered the means to locate and exploit natural resources occurring in the continental shelf, economic incentives motivated claims to exclusivity over areas that were previously part of the high seas. While the freedom of the high seas remained a 'paramount principle',⁴⁹ the newly discovered interest in and ability to access offshore hydrocarbons provided impetus for a modification to the high seas regime:

With regard to the legal status of the continental shelf in relation to the high seas, it should be remembered that the principle of the freedom of the high seas had won international recognition at a time when navigation and fishery had been the only means of exploiting the sea. The technical advances of the modern age made it necessary to impose certain limitations on that principle.⁵⁰

A legal regime for the exploration and exploitation of the continental shelf was adopted in the 1958 *Geneva Convention on the Continental Shelf*.⁵¹ One of the goals in drafting this instrument was to ensure that adequate protection for other uses of the high seas would be maintained, while still allowing for maximum exploitation of the natural resources of the continental shelf.⁵² To this end, coastal states are accorded 'sovereign rights' over the continental shelf rather than 'sovereignty'.⁵³ The use of this term was a 'justifiable and realistic modification of the principle of the freedom of the high seas'.⁵⁴

When states were negotiating new rights in the high seas for the purposes of exploring and exploiting the continental shelf, demands were also extended to the water column above the continental shelf.⁵⁵ Improvements in fishing technology, as well as a growing awareness of the problems associated with over-fishing, inspired coastal states to seek greater exclusive control over the living resources in their adjacent waters extending well beyond the territorial sea.

⁴⁹ International Law Commission, 'Report of the International Law Commission to the General Assembly' [1956] 2 *Yearbook of the International Law Commission* 298.

⁵⁰ *First United Nations Conference on the Law of the Sea*, Official Records (vol 4), 4th Comm, 11th mtg (17 March 1958) 26 [35] (Indonesia).

⁵¹ Opened for signature 29 April 1958, 499 UNTS 312 (entered into force 10 June 1964).

⁵² See Carl Franklin, 'The Law of the Sea: Some Recent Developments (With Particular Reference to the United Nations Conference of 1958)' (1959–60) 53 *International Law Studies* 1, 12.

⁵³ *Geneva Convention on the Continental Shelf*, above n 51, art 2. *UNCLOS* repeats the language of the *Convention* in describing the rights of the coastal state over the continental shelf: *UNCLOS*, above n 20, art 77(1).

⁵⁴ *First United Nations Conference on the Law of the Sea*, Official Records (vol 4), 4th Comm, 11th mtg (17 March 1958) 23 [9] (Republic of Korea).

⁵⁵ See Franklin, above n 52, 12–14.

These claims, too, were countered by ongoing interests in preserving the freedoms of the high seas to the greatest extent possible.⁵⁶

In balancing claims of exclusive and inclusive use, it was decided that coastal states would not have sovereignty over the EEZ. Instead, a system of 'sovereign rights' and 'jurisdiction' was preferred.⁵⁷ A broad category of high seas freedoms was anticipated as coexisting with the exclusive rights of the coastal state in the EEZ, as all states enjoy in the EEZ 'the freedoms ... of navigation ... and other internationally lawful uses of the sea related to these freedoms'.⁵⁸

As the EEZ is a maritime area in which rights of the coastal state and high seas rights coexist, coastal states have entertained different views as to the types of military activities that may be undertaken in their EEZ. Some governments argue that various military activities, such as weapons exercises and testing, may not be conducted without coastal state consent.⁵⁹ By comparison, Rauch has argued that the freedom of navigation associated with the 'operation' of ships allows for a range of internationally lawful military activities, including manoeuvres, deployment of forces, exercises, weapons tests, intelligence gathering and surveillance.⁶⁰ Some states have sought to establish 'security zones' within their EEZ, but such actions have been met by protest.⁶¹ The insistence on the continuing rights of navigation and associated military activities, in the face of coastal state claims to exclusivity, reinforces the strong adherence to inclusive interests in the freedoms of the high seas.

⁵⁶ See Churchill and Lowe, above n 13, 2–3, 144.

⁵⁷ *UNCLOS*, above n 20, art 56(1)(a) states that the coastal state has sovereign rights

for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ...

The coastal state also has jurisdiction in relation to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment: art 56(1)(b).

⁵⁸ *Ibid* art 58(1). Other high seas freedoms are incorporated into the EEZ provided that they are not incompatible with the EEZ regime in pt V of *UNCLOS*: art 58(2).

⁵⁹ Brazil, Cape Verde and Uruguay have taken this view: see, eg, United Nations Office of the Special Representative of the Secretary-General for the Law of the Sea (1985) 5 *Law of the Sea Bulletin*, 6–8, 24, available from <http://www.un.org/Depts/los/doalos_publications/los_bult.htm> at 1 October 2006. This argument is based on an interpretation of *UNCLOS* that focuses on the listing of the specific freedoms in art 58 and the fact that not all military activities are related to those specified freedoms: see A V Lowe, 'The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea' (1991) 64 *International Law Studies: The Law of Naval Operations* 111, 113. An attempt to introduce a requirement of coastal state consent for naval operations other than navigation in the EEZ during the drafting of *UNCLOS* did not succeed: Francesco Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea' (1985) 18 *Cornell International Law Journal* 203, 215.

⁶⁰ Elmar Rauch, 'Military Uses of the Oceans' (1984) 28 *German Yearbook of International Law* 229, 252. Francioni, above n 59, remarks, '[f]rom the text and legislative history of article 58 [of *UNCLOS*], it seems difficult to infer that the establishment of the EEZ has involved a limitation on military operations of foreign navies other than pure navigation and communication': at 216.

⁶¹ See Jon Van Dyke, 'Military Exclusion and Warning Zones on the High Seas' (1991) 15 *Marine Policy* 147, 153–4; George Galdorisi and Alan Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2002) 32 *California Western International Law Journal* 253, 290–1.

Limitations on coastal state rights within the EEZ are also evident in view of the specific rights accorded to coastal states to enforce laws and regulations. A carefully defined regime has been established for the enforcement of laws relating to pollution⁶² and to fishing.⁶³ The enforcement jurisdiction of coastal states extends to the authority to seize vessels violating coastal state laws and regulations related to these issues.⁶⁴ These enforcement powers are specifically articulated so as to minimise the likelihood of coastal states interfering unnecessarily with navigation.⁶⁵ As Robertson notes:

Coastal State enforcement competence in the exclusive economic zone is qualified by a number of safeguards. Many of these are restraints on action by the coastal State that might physically interfere with or interrupt the freedom of navigation in the exclusive economic zone.⁶⁶

This highly prescriptive regime means that coastal states may not prescribe or enforce laws related to their security interests within their EEZ, as these extended maritime zones are only intended to give coastal states economic-related rights.

The continental shelf and the EEZ therefore continue to accommodate the freedoms of the high seas and the exclusive rights of flag states with regard to navigational activities, which may include the shipping of weapons of mass destruction and related materials. The focus on economic interests in these maritime spaces means that the interests of the coastal state in taking steps to ensure its maritime security are not accommodated in the existing legal regime. Rather, the operation of the freedoms of the high seas and the exclusivity of rights over flag vessels prevail even in the context of security-related activities. It is this construct of the law of the sea that is now proving problematic in Australia's efforts to improve its maritime security.

III POST-SEPTEMBER 11 LEGAL DEVELOPMENTS TO ENHANCE MARITIME SECURITY

Against this background, states have considered new legal regimes that could be put in place to address their fears of terrorist attacks on maritime shipping, or of the use of vessels in support of terrorist activities. The initiatives undertaken by states in this regard include the development of the International Ship and Port Facilities Security Code,⁶⁷ the Proliferation Security Initiative, bilateral

⁶² This regime addresses enforcement with respect to pollution from land-based sources, seabed activities or dumping, and pollution from or through the atmosphere: *UNCLOS*, above n 20, arts 213, 214, 216, 222.

⁶³ *Ibid* art 73.

⁶⁴ *Ibid* arts 73, 220(6), 226(1)(c).

⁶⁵ Horace Robertson, 'Navigation in the Exclusive Economic Zone' (1984) 24 *Virginia Journal of International Law* 865, 902.

⁶⁶ *Ibid*.

⁶⁷ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002 [2003] ATNIF 11 (entered into force 1 July 2004), annex (International Code for the Security of Ships and of Port Facilities) ('ISPS Code'). The ISPS Code was passed as an amendment to the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980), which adopted a new chapter XI-2, entitled 'Special Measures to Enhance Maritime Security', which required that states comply with the ISPS Code.

treaties to allow ship-boarding and the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.⁶⁸ These developments are explored below with particular regard to their scope and utility for Australia's purposes, especially as articulated in the institution of the AMIS. The limitations inherent in each of these initiatives are analysed by reference to the traditional construct of the law of the sea.

A *The International Ship and Port Facility Security Code*

Following the attacks of September 11, the International Maritime Organization ('IMO') Assembly resolved to review existing legal and technical measures to prevent and suppress terrorist acts against ships both at port and at sea, and to improve security aboard and ashore.⁶⁹ One of the key developments in addressing ship and port security was the adoption of the ISPS Code. The Code was developed as an amendment to the *International Convention for the Safety of Life at Sea ('SOLAS Convention')*⁷⁰ and came into force in July 2004. The ISPS Code is enshrined in regulation XI-2 of the *SOLAS Convention*.⁷¹ Part A of the ISPS Code sets out mandatory security-related requirements for governments, port authorities and shipping companies. Part B comprises a series of non-mandatory guidelines as to how these requirements might be met. Australia has implemented the ISPS Code through the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

The ISPS Code applies to passenger ships and cargo ships of 500 gross tonnage and above, including high speed craft, mobile offshore drilling units and port facilities serving such ships engaged on international voyages.⁷² The extent to which the ISPS Code applies to ships depends on 'the type of ship, its cargoes and/or passengers, its trading pattern and the characteristics of the port facilities visited by the ship'.⁷³ The IMO has reported that 'more than 98 percent of the

⁶⁸ Opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (not yet in force) ('*SUA Protocol 2005*').

⁶⁹ *Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers*, IMO Res A 22/924, Assembly, 22nd sess (22 January 2002).

⁷⁰ Opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

⁷¹ In attaching the ISPS Code to the *SOLAS Convention*, states parties to *SOLAS* agreed to amend ch XI of this treaty to include special measures to enhance maritime security in a new part. The amendments to the *SOLAS Convention* were made under what is known as the 'tacit acceptance' system whereby the amendments automatically come into force once adopted by the IMO, unless a specified number of states object: see Graeme Hale, 'Does the ISPS Code Address Post 9/11 Maritime Security Threats?' (2005) 116 *Journal of the Australian Naval Institute* 1, 2. It was the desire to create a legally binding regime that motivated the extension of the scope of the *SOLAS Convention* beyond questions of maritime safety to issues of maritime security. The IMO tends to distinguish between maritime safety and security such that the former deals with accidents or unintended incidents related to maritime shipping whereas the latter addresses intentional acts that threaten international shipping.

⁷² *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002 [2003] ATNIF 11, reg XI-2 [2.1] (entered into force 1 July 2004).

⁷³ Hartmut Hesse, 'Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security' (2003) 18 *International Journal of Marine and Coastal Law* 327, 331.

world's international shipping fleet' operates under the *SOLAS Convention*.⁷⁴ The ISPS Code does not apply to warships or other government ships used for non-commercial service, nor does it apply to any fishing vessel of any size.⁷⁵

The ISPS Code is intended to be a risk management exercise whereby levels of security are determined by the extent of risk to which a port is exposed and by the measures that need to be put in place in relation to the assessed risk.⁷⁶ In this regard, Hesse states that '[t]he purpose of the ISPS Code is to provide a standardised, consistent framework for evaluating risk, enabling governments to offset changes in threat levels with changes in vulnerability for ships and port facilities'.⁷⁷ Security assessments involve identifying and evaluating important assets and infrastructure that could cause significant loss of life or harm if damaged; identifying the threats to those assets and infrastructure; and assessing various possible aspects of port vulnerability.⁷⁸ In order to reduce vulnerabilities, the ISPS Code requires that ships are 'subject to a system of survey, verification, certification, and control to ensure that their security measures are implemented'.⁷⁹

The ISPS Code thus goes some way to fulfilling Australia's ambition of identifying those vessels that are proceeding to Australian ports:

SOLAS Chapter XI-2 and the ISPS Code will require certain 'information' to be provided to the IMO and information to be made available to allow effective communication between Company/Ship Security Officers and the Port Facility Security Officers responsible for the port facility their ships serve.⁸⁰

So, for example, the Port Facility Security Officer is to seek advice and guidance on possible action when that Officer becomes aware of the intended arrival of a ship that has stopped at the port of a non-contracting government, or is flying the flag of a non-contracting government.⁸¹

The information to be provided by ships prior to entry into port, as set out in Part B of the ISPS Code, includes information on the security level at which the ship is currently operating and had been operating during the previous 10 port visits, as well as any special or additional security measures that were undertaken in any previous port.⁸² Further information may be sought in relation to ship-to-ship activity, as well as a range of other practical security-related

⁷⁴ IMO, *MSC Intersessional Working Group on Maritime Security: 9–13 September 2002* (2002) <http://www.imo.org/Newsroom/mainframe.asp?topic_id=110&doc_id=2514> at 1 October 2006.

⁷⁵ Hale, above n 71, 3. Further, vessels involved only in trade internally within a state are not subject to the ISPS Code, but rather would be subject to the laws of the state in which they operate: at 3.

⁷⁶ IMO, *Diplomatic Conference on Maritime Security: 9–13 December 2002* (2002) <http://www.imo.org/Newsroom/mainframe.asp?topic_id=110&doc_id=2515> at 1 October 2006.

⁷⁷ Hesse, above n 73, 331.

⁷⁸ IMO, *Diplomatic Conference on Maritime Security*, above n 76.

⁷⁹ *Ibid.*

⁸⁰ Hesse, above n 73, 332.

⁸¹ IMO Maritime Safety Committee, *Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code*, MSC/Circ.1111 (7 June 2004) Annex 1 [11] ('*Guidance for ISPS Code*').

⁸² *Ibid* Annex 2 [3.1].

information, though not in relation to the ship's security plan.⁸³ The IMO Maritime Safety Committee has made proposals as to the type of security information to be provided prior to entry into port, with the intention of harmonising the data set that may be required from each port.⁸⁴ However, Australia still retains the option to seek additional or supplementary information as a condition of entry into a port located within its territory.⁸⁵ The minimum time required for the submission of information is not to be less than 24 hours, which is roughly equivalent to a distance of 500 nautical miles from Australia's coast.⁸⁶

The problem with the ISPS Code for Australia's purposes under the AMIS is that it is limited in terms of the enforcement options available to port states. If a master of a ship declines to provide the requested information, then Australia may opt to deny entry of that ship into port. In the further event that the assessment of the available information leads to the conclusion that there are clear grounds for believing that the ship is in non-compliance with the requirements of ch XI-2 of the *SOLAS Convention*, or with those of pt A of the ISPS Code,⁸⁷ then Australia may require that efforts be undertaken to rectify the non-compliance.⁸⁸

If the non-compliance is not rectified, Australia is entitled to: require that the ship proceed to a specific location in its territorial sea or internal waters; inspect the ship in its territorial waters prior to entry into port; or deny the ship entry into port.⁸⁹ Before those steps may be initiated, the master of the ship is to be notified of Australia's intentions in this regard so that the master has the opportunity not to enter that port.⁹⁰ For the inspection of the ship in the territorial waters, the IMO Maritime Safety Committee envisages that it would

be undertaken normally when there was information/intelligence, usually received before arrival of the ship, suggesting that there were 'clear grounds' for suspecting that the ship was not in compliance with the provisions *or posed a threat to the port facility*.⁹¹

⁸³ *Ibid.*

⁸⁴ IMO Maritime Safety Committee, *Guidance to Masters, Companies and Duly Authorized Officers on the Requirements Relating to the Submission of Security-Related Information Prior to the Entry of a Ship into Port*, MSC/Circ.1130 (14 December 2004) annex.

⁸⁵ *Ibid* [15].

⁸⁶ See Klein, above n 5, 339 (noting that 48 hours' notice would be equivalent to a distance of 1008 nautical miles for a ship traveling at 21 knots).

⁸⁷ It should further be noted that the very failure to provide the information requested is an example of clear grounds of non-compliance: *Guidance for ISPS Code*, above n 81, Annex 2 [3.7.6].

⁸⁸ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002, [2003] ATNIF 11, ch XI-2, reg 9.2.4 (entered into force 1 July 2004). See also *Guidance for ISPS Code*, above n 81, Annex 2 [3.4].

⁸⁹ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, above n 88, ch XI-2, reg 9.2.5. See also *Guidance for ISPS Code*, above n 81, Annex 2 [3.5].

⁹⁰ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, above n 88, ch XI-2, reg 9.2.5. See also *Guidance for ISPS Code*, above n 81, Annex 2 [3.6].

⁹¹ IMO Maritime Safety Committee, *Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code*, MSC/Circ.1097 (6 June 2003) [23] ('2003 *Guidance for ISPS Code*') (emphasis added). Any inspection is to be carried out within the scope of the *SOLAS Convention*: at [24].

The obvious difficulty here is that if a security threat is perceived by virtue of this information-seeking process, Australia is only able to take steps to reduce or eliminate that threat once the vessel is in port or within 12 nautical miles of Australia's coast. Such proximity to Australia's maritime assets may be quite undesirable.

If Australia allows the ship to enter port where clear grounds of non-compliance exist, control measures may be imposed. These measures are limited to inspecting, delaying or detaining the ship; imposing restrictions on its operations in port; or lesser administrative or corrective measures.⁹² These control measures are to be implemented in such a manner as to ensure that they are proportionate, reasonable and of the minimum severity and duration necessary to rectify or mitigate the non-compliance.⁹³ Again, the problem arises that the very presence of the vessel in port may be a danger in its own right. Yet the ISPS Code does not intend to create any additional rights beyond maritime areas under a coastal state's sovereignty.

Australia is, however, left with some discretion, as the Maritime Safety Committee of the IMO envisaged the possibility of action in addition to the measures available in response to threats anticipated under the ISPS Code:

On the question of what was understood to be an 'immediate threat' in regulation XI-2/9.3.3, the Committee agreed that this could cover two scenarios: firstly, that the ship did not comply with the provisions of *SOLAS* chapter XI-2 and part A of the ISPS Code and therefore was considered to be a threat, or secondly, ... intelligence or other information had been received indicating that the ship posed an immediate threat or was under threat itself. The Committee recognized that there may be other scenarios where, under international law, Contracting Governments could take additional measures outside of *SOLAS* regulation XI-2/9 for national security or defence, even if a ship fully complied with *SOLAS* chapter XI-2 and part A of the ISPS Code.⁹⁴

Although 'additional measures' may therefore be taken, these steps remain constrained by the dictates of the existing law of the sea.

A critical issue in relation to the success of the ISPS Code in responding to the threats to maritime security is the question of compliance with its requirements — '[i]t is to be anticipated that market forces and economic factors will drive compliance'.⁹⁵ However, there is justified concern that the reliance on flag states to adhere to the requirements of the ISPS Code will undermine its effectiveness. This concern stems from the lack of economic capacity of developing states with considerable fleets, such as Panama, to administer the requirements of the ISPS Code.⁹⁶ Thus far, despite initial concerns about the

⁹² *Guidance for ISPS Code*, above n 81, Annex 2 [3.8.1.1].

⁹³ ISPS Code, above n 67, pt B, [4.43]; *Guidance for ISPS Code*, above n 81, Annex 2 [6.1].

⁹⁴ *2003 Guidance for ISPS Code*, above n 91, [26].

⁹⁵ IMO, *FAQ on ISPS Code and Maritime Security* (2002) <http://www.imo.org/Legal/mainframe.asp?topic_id=897> at 1 October 2006.

⁹⁶ Hale, above n 71, 4.

necessary measures being established in time,⁹⁷ compliance with the ISPS Code has been favourably reported.⁹⁸

As a risk management exercise for ports, ensuring that procedures are in place to handle terrorist threats, the ISPS Code is a considerable advance in the laws related to maritime security. It fits squarely within the traditional construct of the law of the sea, as it is consistent with the sovereignty exercised by states over their ports, internal waters and territorial seas. Moreover, certain deference is still accorded to the freedom of navigation, as the master of a ship is given the opportunity to avoid a port when that master knows control measures may be instituted against the ship. In addition, the control measures are balanced against the need to maintain the efficiency of international shipping. It does seem, however, that the restriction of the port state's responses to assessed risks to areas within its territorial seas, internal waters and ports will not alleviate concerns that states will be able to counter-terrorism threats as required.

B *The Proliferation Security Initiative*

The Proliferation Security Initiative ('PSI') was initially conceived as a 'collection of interdiction partnerships'⁹⁹ among 11 core members (including Australia). The PSI subsequently expanded to 16 core members, with another 60 states supporting the principles.¹⁰⁰ The participants in this arrangement committed themselves to establishing

a more coordinated and effective basis through which to impede and stop shipments of [weapons of mass destruction], delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council.¹⁰¹

In hosting one of the PSI meetings, the Australian Foreign Affairs Minister

⁹⁷ 'Consternation over Security', *Fairplay* (Redhill, United Kingdom), 3 April 2003, 23 ('observers are almost certain that the July 1, 2004 deadline for compliance with the IMO's maritime security code will not be met by everyone'). See also Regina Asariotis, 'Implementation of the ISPS Code: An Overview of Recent Developments' (2005) 11 *Journal of International Maritime Law* 266, 267–9 (referring to range of concerns about ensuring timely compliance).

⁹⁸ Frances Huggett, 'ISPS — One Year On', *Fairplay* (Redhill, UK), 22 September 2005. Huggett states that 'despite the burdens now being placed on crew and security officers, the general consensus within the shipping industry and the IMO is that onboard security has been implemented effectively': at 21–2.

⁹⁹ Jack Garvey, 'The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative' (2005) 10 *Journal of Conflict & Security Law* 125, 129. See also Samuel Logan, 'The Proliferation Security Initiative: Navigating the Legal Challenges' (2005) 14 *Journal of Transnational Law and Policy* 253, 255 (referring to the PSI as a 'loose alliance').

¹⁰⁰ The core participants are: Australia, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Turkey, the UK and the US. In August 2005, the core group was dismantled, particularly because it was not needed once the basic principles of interdiction were adopted: see Mark Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (2005) 26–31.

¹⁰¹ The White House, Office of the Press Secretary, *Fact Sheet: Proliferation Security Initiative: Statement of Interdiction Principles* (2003) <<http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>> at 1 October 2006 ('Statement of Interdiction Principles').

Alexander Downer stated:

Australia is proud to be a key driver of the PSI, a practical and informal arrangement among countries to cooperate with each other, as necessary, in intercepting and disrupting illicit WMD trade, their delivery systems and related materials.¹⁰²

The Minister correctly emphasised that the PSI is ‘a practical and informal arrangement’ — the PSI has often been described as an activity, not an organisation.¹⁰³ In a similar vein, Paul O’Sullivan, a Deputy Secretary in the Australian Department of Foreign Affairs and Trade and Chairman of the Brisbane Conference of PSI participants, commented that ‘there is a need for some other structure outside the formal system’.¹⁰⁴ The informality of the arrangement has been aptly described by Joseph:

One can liken PSI and its day-to-day execution to that of a deputized posse: the United States and a group of other like-minded states, using existing legal powers, have organized to hunt down illicit shipments of dangerous weapons. On any particular day, some members of that posse may choose not to ride out.¹⁰⁵

The PSI does not intend to create legally binding commitments.¹⁰⁶ Instead, the *Statement of Interdiction Principles* adopted by participants calls on states to ‘[t]ake specific actions in support of interdiction ... to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks’.¹⁰⁷ This loose framework for action tends to avoid the imposition of any distinct legal requirements on Australia, including any finding of legal responsibility should Australia act inconsistently with the goals or political commitments of the PSI.

Nonetheless, in operating consistently with ‘obligations under international law and frameworks’,¹⁰⁸ the PSI participants have recognised in the non-binding *Statement of Interdiction Principles* the existing legal limitations on their abilities to conduct interdictions to prevent the transfer of weapons of mass destruction and related materials for terrorist purposes.¹⁰⁹ In recognition of the greater authority that states have over their ports, internal waters and territorial seas, the participant states are committed to taking appropriate action in respect of vessels that are reasonably suspected of carrying cargoes of proliferation

¹⁰² Alexander Downer, Minister for Foreign Affairs, Commonwealth of Australia, ‘Proliferation Security Initiative’ (Press Release, 31 May 2005), available at <http://www.foreignminister.gov.au/releases/2005/fa070_05.html> at 1 October 2006.

¹⁰³ See Garvey, above n 99, 129 (referring to the various US descriptions of the PSI as an ‘international partnership of countries’, principles that states are ‘committed to’, ‘an activity, not organization’, and ‘a collection of interdiction partnerships’).

¹⁰⁴ As quoted in Valencia, *Making Waves in Asia*, above n 100, 26.

¹⁰⁵ Jofi Joseph, ‘The Proliferation Security Initiative: Can Interdiction Stop Proliferation?’ (2004) 34(5) *Arms Control Today* 6, 8. See also Andrew Winner, ‘The Proliferation Security Initiative: The New Face of Interdiction’ (2005) 28(2) *Washington Quarterly* 129, 130.

¹⁰⁶ Ted McDorman, ‘From the Desk of the Editor-in-Chief’ (2005) 36 *Ocean Development & International Law* 381, 382.

¹⁰⁷ *Statement of Interdiction Principles*, above n 101, principle 4.

¹⁰⁸ *Ibid.*

¹⁰⁹ Shearer notes that the ‘statement of interdiction principles ... steps carefully around the jurisdictional difficulties posed by the doctrine of the freedom of the high seas’: Ivan Shearer, ‘Jurisdiction’ in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005) 154, 181.

concern in these areas.¹¹⁰ These actions may involve stopping and/or searching vessels, or enforcing conditions on vessels entering or leaving ports, internal waters or territorial seas and which require the boarding, searching and seizure of cargoes of proliferation concern.¹¹¹ Australia could argue that any actions taken pursuant to these interdiction principles are consistent with Australia's sovereignty over these particular maritime spaces.

However, one limitation on Australia's authority in the territorial sea, as with other PSI participants, is that it must not disrupt the right of innocent passage.¹¹² In analyses of the PSI, commentators have raised doubts that the mere passage of weapons of mass destruction through the territorial sea is a violation of the right of innocent passage.¹¹³ Garvey, for example, argues that this right

is not offended by a shipment of WMD material that does not constitute a threat to the coastal state, which of course would describe the typical situation, in that the threat presented by WMD material is determined by the intended use at the point of destination, not transit.¹¹⁴

In addition, the laws and regulations that a coastal state is allowed to adopt do not ostensibly provide a basis for coastal states to deal with the transport of weapons of mass destruction through territorial waters.¹¹⁵ Other commentators have observed that rules relating to the right of innocent passage do not foreclose an interpretation that the *Statement of Interdiction Principles* is consistent with this right.¹¹⁶ It may therefore be concluded that there is some ambiguity as to how well the PSI commitments in the territorial sea align with established legal principles in this regard.

Under the *Statement of Interdiction Principles*, Australia is also (politically, not legally) committed to taking action to board and search any suspect vessel flying its flag when such vessels are either in its territorial seas or internal waters, or outside the territorial waters of any other state.¹¹⁷ Further, Australia must give serious consideration as to whether other states should be permitted to board and search suspect Australian vessels in pursuit of the PSI objectives.¹¹⁸ These commitments pay appropriate deference to the pre-eminence of flag state control over vessels and the right of vessels not to be stopped and boarded by foreign warships on the high seas. In this respect, the PSI is more limited in its

¹¹⁰ *Statement of Interdiction Principles*, above n 101, principle 4(d).

¹¹¹ *Ibid.*

¹¹² '[S]hips of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea': *UNCLOS*, above n 20, art 17. See above Part II(B).

¹¹³ See, eg, Logan, above n 99: 'it is not the mere transport of WMD that threatens a state's sovereignty, but the use of these weapons against it': at 259–60.

¹¹⁴ Garvey, above n 99, 131.

¹¹⁵ Kaye, above n 39, 213–14 (referring to art 21(1) of *UNCLOS* in this regard).

¹¹⁶ Thomas Lerhman, 'Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture' (2004–05) 45 *Virginia Journal of International Law* 223, 232. See also Kaye, above n 39, who argues:

Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed: at 214.

¹¹⁷ *Statement of Interdiction Principles*, above n 101, principle 4(b).

¹¹⁸ *Ibid* principle 4(c).

actions compared with Australia's initial intentions with regard to the interdiction of vessels under the AMIS. No new right of visit is created by virtue of the PSI arrangement — rather, consent must still be sought from the flag state, as required under the well-established international law principles.¹¹⁹

Ultimately, the PSI does not advance Australia's interests in ensuring maritime security precisely because participants have avowed adherence to the existing legal structures. The PSI will only operate to the extent participants are willing, and with ongoing deference to the dictates of *mare liberum* and the sanctity of flag state control. Flag state consent will still be required to conduct interdiction activities on the high seas, and it is easily imagined that not all states will be forthcoming with their consent, especially those that have not declared their support for the PSI. The notable example here is North Korea, which has asserted that any interdiction of its vessels would be viewed as an act of war and an abrogation of the Armistice Agreement that ended the Korean War.¹²⁰ As such, Lerhman is correct in noting that 'principles of international maritime law may frustrate the implementation of the PSI in particular contexts and situations'.¹²¹

C Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

To some extent, the weaknesses of the PSI arrangement may now have been overcome by a new international instrument that creates a legal regime for boarding ships on the high seas. In addition to the adoption of the ISPS Code, the IMO Assembly also decided that consideration should be given to the possible amendment of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.¹²² The *SUA Convention* was developed as a response to the hijacking of the *Achille Lauro* and the murder onboard of a US national. As laws relating to piracy were inapplicable,¹²³ Austria, Egypt and Italy

¹¹⁹ See *UNCLOS*, above n 20, art 110.

¹²⁰ Mark Valencia, 'Unsettling Asia for Security's Sake' (2005) 168(3) *Far Eastern Economic Review* 55, 56. See also Valencia, *Making Waves in Asia*, above n 100, 61. One commentator has referred to Australia's desire to take greater action against North Korea, stating that 'Australia's Foreign Minister, Alexander Downer, has also expressed support for changing the law permitting free navigation on the high seas in order to stop North Korea's shipping of missiles, nuclear materials, and drugs to allies or customers': Jon Van Dyke, 'Perspective: Balancing Navigational Freedom with Environmental and Security Concerns' (2003) *Colorado Journal of International Environmental Law and Policy* 19, 27 (referring to Lincoln Wright, 'Change to High Seas Law Sought', *Canberra Times* (Canberra, Australia), 12 June 2003, 4).

¹²¹ Lerhman, above n 116, 228.

¹²² Opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992) ('*SUA Convention*').

¹²³ As passengers on the vessel perpetrated these crimes and the crimes were for political, not private, purposes, the traditional definition of piracy was inapposite: see *UNCLOS*, above n 20, art 101; Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the *IMO Convention on Maritime Safety*' (1988) 82 *American Journal of International Law* 269.

proposed the adoption of a treaty under the auspices of the IMO to set forth

comprehensive requirements for the suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives; jeopardise the safety of persons and property; seriously affect the operation of maritime services and, thus, are of grave concern to the international community as a whole.¹²⁴

The importance of this treaty at the time of its adoption was that it identified unlawful acts against ships and provided bases by which states could establish jurisdiction over the perpetrators of those unlawful acts.

In reassessing maritime security after September 11, a number of states within the IMO advocated that the range of offences set forth in the *SUA Convention* be expanded.¹²⁵ It was further decided that beyond establishing jurisdiction over the offences, a means would be created to exercise that jurisdiction over vessels and the persons on those vessels. To this end, the *SUA Protocol 2005* addresses offences such as the use of a ship in a manner that causes death or serious injury or damage; the use against or on a ship, or the discharge from a ship, of any explosive, radioactive material or biological, chemical or nuclear weapon; the transportation of any explosive or radioactive material knowing that it is to be used in a terrorist attack; and the transportation of biological, chemical and nuclear weapons.¹²⁶ In addition, the new protocol sets out procedures by which states parties may request that flag states of suspect vessels consent to the boarding of their vessels outside the territorial sea of any state.¹²⁷ For boarding to be authorised under the *SUA Protocol 2005*, a requesting state must have 'reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of' one of the offences set out in the *SUA Convention* or the *SUA Protocol 2005*.¹²⁸

In authorising the boarding of a ship for the purposes of the *SUA Protocol 2005* under art 8*bis*, states parties may either consent on an ad hoc basis; consent implicitly if prior authorisation is notified to the IMO Secretary-General and no response to a request is forthcoming after four hours; or consent if prior authorisation is notified to the IMO Secretary-General.¹²⁹ This structure reinforces the fact that permission to board requires express flag state authorisation and that tacit and advance authorisations to board are optional.¹³⁰

¹²⁴ Hesse, above n 73, 328.

¹²⁵ *Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers*, IMO Res A 22/924, Assembly, 22nd sess (22 January 2002).

¹²⁶ *SUA Protocol 2005*, above n 68, arts 4(5), 3*bis*.

¹²⁷ *Ibid* art 8*bis*(2)(10)(c)(i).

¹²⁸ *Ibid* art 8*bis*(4).

¹²⁹ *Ibid* art 8*bis*(5).

¹³⁰ IMO Legal Committee, *Report of the Legal Committee on the Work of Its Eighty-Ninth Session*, LEG 88/16, 89th sess, Agenda Item 16 (4 November 2004) [51] (supporting China's proposal that a provision specifically stating the need for express authorisation be included).

When proceeding on an ad hoc basis, the requesting state must await confirmation of nationality from the flag state before seeking authorisation to board and must take appropriate measures with respect to the suspect ship.¹³¹ These procedures related to the securing of flag state consent have reaffirmed the adherence to exclusive flag state control of vessels on the high seas.

As a general obligation under art 8*bis*, states parties must respond to requests pursuant to this article as expeditiously as possible.¹³² Ambiguity as to the time constraint appears to have been preferred to a specific timeframe. In earlier formulations of art 8*bis*, the US had proposed that requesting states could infer authorisation if a flag state did not respond to the request to board after four hours. The US considered that a four hour default rule was

essential to the prompt conduct of the boarding, to minimize delay of the suspect ship, and to the early release of the warship (or other ship clearly marked and identifiable as being on government service and authorized to that effect) to conduct its other missions.¹³³

The four hour time limit was criticised as impracticable due to the problem of time zones and public holidays.¹³⁴ Ultimately, the need for express consent for boarding prevailed and the lack of any precise time pressure on the flag state to respond was endorsed.

Any boarding request ‘should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information’.¹³⁵ These requests do not have to provide information explaining why the requesting state has reasonable grounds to suspect that a ship or person on board a ship is involved in a proscribed act.¹³⁶ However, the right of the flag state to impose conditions on its authorisation to board or the general reference to ‘other relevant information’ may provide a means by which information related to the suspected offences must be disclosed if desired by the flag state.

A number of safeguards for the flag state and for the individuals on board its vessels are incorporated into art 8*bis* to moderate the way in which a boarding may be conducted and to ensure consistency with existing international law

¹³¹ *SUA Protocol 2005*, above n 68, art 8*bis*(5)(b).

¹³² *Ibid* art 8*bis*(1).

¹³³ IMO Legal Committee, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf, Draft Amendments to the SUA Convention and SUA Protocol*, LEG 86/5, 86th sess, Agenda Item 5 (26 February 2003) Annex 1, 23.

¹³⁴ IMO Legal Committee, *Report of the Legal Committee on the Work of Its Eighty-Eighth Session*, LEG 88/13, 88th sess, Agenda Item 13 (18 May 2004) [73].

¹³⁵ *SUA Protocol 2005*, above n 68, art 8, 8*bis*(2).

¹³⁶ France had made a proposal to this effect but it was not incorporated into the text: see IMO Legal Committee, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf, Draft Amendments to the SUA Convention and SUA Protocol*, LEG/SUA/WG.1/2/1, 1st sess, Agenda Item 2 (30 June 2004) art 8*bis*(2).

standards.¹³⁷ To this end, para 10 sets out the duties imposed on the requesting state, such as the protection of the persons on board, the safety and security of the ship and its cargo, and not prejudicing the commercial or legal interests of the flag state. Article 8*bis* provides that the use of force by the requesting state is to be avoided 'except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions'.¹³⁸ Requesting states are further required to use only the minimum degree of force necessary and reasonable in the circumstances.¹³⁹

In addition to these safeguards, the flag state is entitled to decide how the boarding of one of its vessels should proceed. It may authorise the boarding by the requesting state — either on its own or with officials of the flag state — and may make the boarding subject to any conditions relating to responsibility for, and the extent of, measures to be taken.¹⁴⁰ Alternatively, the flag state may conduct the boarding and search the suspect vessel itself, or may even completely decline to authorise a boarding and search.¹⁴¹ What appears to be lacking is an obligation on the flag state to take measures against one of its vessels when reasonable grounds exist to suspect the involvement of that vessel in the commission of an offence under the *SUA Convention* or the *SUA Protocol 2005*. This possibility appears to be an unfortunate lacuna in the enforcement regime created by the *SUA Protocol 2005*.

If evidence of unlawful conduct in relation to the offences under the *SUA Convention* and the *SUA Protocol 2005* is discovered as a result of the boarding, the flag state is to be promptly informed.¹⁴² The flag state may authorise the detention of the ship, cargo and persons on board.¹⁴³ In these circumstances, the *SUA Protocol 2005* specifies that the flag state has the right to exercise jurisdiction, or that it may consent to another state exercising jurisdiction if that state would have jurisdiction by virtue of the *SUA Protocol 2005* and the *SUA Convention*.¹⁴⁴ This formulation, emphasising the authority of the flag state, reflects earlier drafts that explicitly referred to the primary right of the flag state

¹³⁷ These provisions were primarily driven by the International Confederation of Free Trade Unions, which insisted on maintaining protections for seafarers in the *SUA Protocol 2005* in a comparable manner to those afforded in the ISPS Code and the *SOLAS Convention*, as well as being consistent with the high priority accorded to what was referred to as the human element in the work of the IMO: IMO Legal Committee, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf*, LEG 87/5/2, 87th sess, Agenda Item 5 (11 September 2003) [4]–[6].

¹³⁸ *SUA Protocol 2005*, above n 68, art 8*bis*(9).

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* 8*bis*(5)(c), (7).

¹⁴¹ *Ibid* 8*bis*(5)(c).

¹⁴² *Ibid* art 8, 8*bis*(6).

¹⁴³ *Ibid.*

¹⁴⁴ It was acknowledged during the course of negotiations that:

while as a general rule, the flag State will normally remain in charge of the boarding operation and of the subsequent steps that might follow, including criminal prosecutions, there may be situations in which it would be more sensible to allow the intervening State — or a third State — to exercise its jurisdiction.

IMO Legal Committee, *Report of the Legal Committee on the Work of Its Eighty-Ninth Session*, LEG 88/16, 89th sess, Agenda Item 16 (4 November 2004) [56].

to exercise jurisdiction.¹⁴⁵ As such, the possibility arises that the requesting state which conducts the boarding and uncovers unlawful conduct may not ultimately be authorised to proceed with the prosecution of the alleged offenders if a jurisdictional nexus does not otherwise exist.

While the *SUA Protocol 2005* is an improvement on the AMIS and the PSI insofar as it is a legally binding, multilateral instrument pursuant to which states parties may take lawful action to promote maritime security, the terms of the treaty are marked by the ongoing deference to flag state authority over vessels on the high seas. This was recognised by the Legal Committee of the IMO, which stated during the course of negotiations:

the inclusion of boarding provisions constituted a significant departure from the fundamental principles of freedom of navigation on the high seas and exclusive jurisdiction of flag states over their vessels. It was accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognized in that a boarding by another State on the high seas could only take place in exceptional circumstances. Any exception must be precise, unambiguous and internationally accepted.¹⁴⁶

The need for express consent to board, the possibility of conditions being attached to the boarding, and the prospect that the flag state will take no action in response to information about a suspect vessel all tend to indicate that the *SUA Protocol 2005* is consistent with the traditional construct of the law of the sea.

D *US Bilateral Ship-Boarding Agreements*

Pending the negotiation of the *SUA Protocol 2005* and in view of the legal constraints within which the PSI operates, the US initiated agreements with states on a bilateral basis in order to create a legal means to board vessels on the high seas. The US sought to enter into these ship-boarding agreements with states holding the largest shipping registries — and which are hence responsible for the greatest number of flag vessels — in order to establish authority to board vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems or related materials. In pursuit of this policy, the US has signed ship-boarding agreements with Belize, Croatia, Cyprus, Liberia, the

¹⁴⁵ IMO Legal Committee Working Group, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf*, LEG/SUA/WG.1/2/6, 1st sess, Agenda Item 2 (30 June 2004) [16]. See also IMO Legal Committee Working Group, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf*, LEG/SUA/WG.1/2/2, 1st sess, Agenda Item 2 (30 June 2004) [10]; IMO Legal Committee Working Group, *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf*, LEG/SUA/WG.1/2/6, 1st sess, Agenda Item 2 (12 July 2004) art 46.

¹⁴⁶ IMO Legal Committee, *Report of the Legal Committee on the Work of Its Eighty-Eighth Session*, LEG 88/13, 88th sess, Agenda Item 13 (18 May 2004) [66].

Marshall Islands and Panama.¹⁴⁷ According to the US:

The combination of states with which we have signed bilateral ship boarding agreements, plus the commitments made by other Proliferation Security Initiative partners under the *Statement of Interdiction Principles*, translates into more than 60 percent of the global commercial shipping fleet dead weight tonnage now being subject to rapid action consent procedures for boarding, search, and seizure.¹⁴⁸

These treaties are relevant to Australia's efforts to enhance its maritime security to the extent that they may provide an opening for third states to exercise the right of visit on the high seas. These agreements also function as a possible model for Australia in entering into its own bilateral agreements with relevant states.

The bilateral agreements, by their very nature, are intended to bind only the states parties to these treaties. Consistent with the law of treaties, the bilateral agreements do not create rights or duties for third states, such as Australia.¹⁴⁹ However, the agreement with Liberia does include a specific provision whereby Liberia agrees to extend all rights concerning suspect vessels claiming its nationality to third states as it may deem appropriate.¹⁵⁰ In this instance, the possibility exists for these bilateral agreements to confer rights on Australia, but

¹⁴⁷ *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 11 February 2004, KAV 7065 (entered into force 9 December 2004); *Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, opened for signature 12 May 2004 (entered into force 1 December 2004); *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 13 August 2004, KAV 7064 (entered into force 24 November 2004); *Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials*, opened for signature 1 June 2005 (not yet in force), available at <<http://www.state.gov/t/isn/trty/47086.htm>> at 1 October 2006; *Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 25 July 2005, KAV 7228 (entered into force 12 January 2006); *Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 4 August 2005 (not yet in force), available at <<http://www.state.gov/t/isn/trty/50809.htm>> at 1 October 2006.

¹⁴⁸ US Department of State, Office of the Spokesman, 'The United States and Belize Proliferation Security Initiative Ship Boarding Agreement' (Press Release, 4 August 2005), available at <<http://www.state.gov/r/pa/prs/ps/2005/50787.htm>> at 1 October 2006.

¹⁴⁹ 'A treaty does not create either obligations or rights for a third State without its consent': *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 34 (entered into force 27 January 1980).

¹⁵⁰ *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 18.

some discretion is still exercised by Liberia, as it is entitled to determine whether the extension of the agreement is appropriate. The agreements with Panama and the Marshall Islands contain comparable provisions.¹⁵¹

There may be reasons for the US to seek a broader application of these agreements, given that it may not have the necessary vessels to undertake the boarding and inspection in the relevant location. In this situation, the US may seek permission from the flag state for a third state to conduct the boarding in its stead. For example, Australia may have particular suspicions of a vessel and have its own warships or other government vessels in the vicinity with the ability to carry out a boarding. While there is no formal requirement for Croatia, Cyprus or Belize to permit such action under the bilateral agreements, as a matter of comity, permission may be granted in any given instance. Obviously, there is no guarantee that consent would be forthcoming and Australia would then have to revert to the strictures of the traditional legal framework, which preserves the exclusive rights of the flag state in these instances.

Rather than relying on rights derived from the US bilateral agreements, Australia may seek to use these agreements as templates for its own bilateral treaties with the states of the largest ship registries or with states in the region. In formulating these agreements, it should be borne in mind that a significant aspect of these bilateral treaties is that a flag state has a limited time to respond to a request for authority to board a suspect vessel. The time allowed for a response in the US bilateral treaties is two hours for Belize,¹⁵² Liberia¹⁵³ and Panama,¹⁵⁴ and four hours for Cyprus¹⁵⁵ and the Marshall Islands.¹⁵⁶ If there is no response within that time, the requesting country is deemed to have such authority (a notable exception is the US–Croatia ship boarding agreement¹⁵⁷). As such, these

¹⁵¹ *Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, above n 147, art 2; *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 18.

¹⁵² *Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 4.

¹⁵³ *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 4.

¹⁵⁴ *Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, KAV 6074, art X (signed and entered into force 5 February 2002).

¹⁵⁵ *Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 4.

¹⁵⁶ *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, above n 147, art 4.

¹⁵⁷ *Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials*, above n 147, art 4.

agreements mark a distinct deviation from the pre-eminence of exclusive flag state control. However, this system of implied consent has been subject to criticism, as it reflects the unequal bargaining power of the US vis-à-vis Belize, Liberia, Panama, Cyprus and the Marshall Islands. In this regard, Garvey notes that '[t]wo hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved'.¹⁵⁸ At best, he considers this notification period as 'window-dressing' for sovereign equality.¹⁵⁹ When placed in the multilateral setting of negotiations for the *SUA Protocol 2005*, the US was unable to implement a comparable system of implied notice.¹⁶⁰ This precedent of failure at the multilateral level, coupled with Australia's lesser political power, may mean that Australia will not achieve the same results as the US in modifying the exclusivity of flag state authority in formulating bilateral ship-boarding agreements.

E *Security Council Resolution 1540*

The UN Security Council may provide a mechanism by which Australia would receive greater authority to undertake action to prevent the proliferation of weapons of mass destruction and could thereby promote its maritime security. A right to 'stop and inspect' vessels has been accorded to states under Chapter VII of the *UN Charter* in order to enforce sanctions established by the Security Council.¹⁶¹ The Security Council has authorised such interdictions under Chapter VII in relation to the 1991 Gulf War¹⁶² and the action in Afghanistan in 2001,¹⁶³ as well as in connection with the 1991–93 war in Yugoslavia,¹⁶⁴ the 1993–94 conflict in Haiti,¹⁶⁵ and the 1997 civil war in Sierra Leone.¹⁶⁶ There has not, however, been a resolution adopted that provides Australia with the scope of action it considers desirable in view of the goals set forth in establishing the AMIS, as well as in relation to Australia's involvement in the PSI.

*Resolution 1540*¹⁶⁷ was adopted by the Security Council shortly after the discovery of the nuclear trafficking ring headed by Pakistani scientist Dr Abdul Qadeer Khan. This resolution was intended to deal with the problem of the existing non-proliferation regimes not being concerned with the transfer of

¹⁵⁸ Garvey, above n 99, 133.

¹⁵⁹ *Ibid* 142 (fn 66).

¹⁶⁰ See discussion above nn 129–135 and accompanying text.

¹⁶¹ John Astley III and Michael N Schmitt, 'The Law of the Sea and Naval Operations' (1997) 42 *Air Force Law Review* 119, 146.

¹⁶² SC Res 665, UN SCOR, 45th sess, 2938th mtg, UN Doc S/RES/665 (25 August 1990). See also Valencia, *Making Waves in Asia*, above n 100, 34 (referring to the Maritime Interdiction Operation under resolutions relating to Iraq).

¹⁶³ See Valencia, *Making Waves in Asia*, above n 100, 34 (referring to the Leadership Interdiction Operation and NATO's Operation Active Endeavour, targeting the Taliban and al Qaeda operatives).

¹⁶⁴ SC Res 787, UN SCOR, 47th sess, 3137th mtg, UN Doc S/RES/787 (16 November 1992); SC Res 820, UN SCOR, 48th sess, 3200th mtg, UN Doc S/RES/820 (17 April 1993).

¹⁶⁵ SC Res 875, UN SCOR, 48th sess, 3293rd mtg, UN Doc S/RES/875 (16 October 1993); SC Res 917, UN SCOR, 49th sess, 3376th mtg, UN Doc S/RES/917 (6 May 1994).

¹⁶⁶ SC Res 1132, UN SCOR, 52nd sess, 3822nd mtg, UN Doc S/RES/1132 (8 October 1997).

¹⁶⁷ SC Res 1540, UN SCOR, 59th sess, 4956th mtg, UN Doc S/RES/1540 (28 April 2004).

weapons of mass destruction to non-state actors.¹⁶⁸ Nor did such regimes comprehensively address the need for national action to be instituted in order to restrict the manufacturing and trafficking of weapons of mass destruction and related materials.¹⁶⁹ However, Winner notes that although *Resolution 1540* was 'proposed by the United States and others as an effort to have the international body criminalize proliferation on a broad scale, the result was a more narrow resolution that focused on nonstate actors and addressed the terrorist threat'.¹⁷⁰ Originally, the US and the UK sought a resolution from the Security Council that would authorise states to stop, board and inspect a vessel suspected of carrying weapons of mass destruction, their means of delivery or related material.¹⁷¹ The US effectively wanted to legitimise the PSI under international law but leave the enforcement aspects of interdiction activities outside the purview of the UN.¹⁷² The very fact that the US sought a resolution from the Security Council in relation to interdiction of vessels carrying weapons of mass destruction has been viewed as a tacit admission that authority did not otherwise exist under international law to carry out the interdictions on the high seas against foreign vessels.¹⁷³ Russia and China were both opposed to an express authorisation of interdictions that would legally validate the PSI.¹⁷⁴

Resolution 1540 was adopted under Chapter VII of the *UN Charter* and requires states to take and enforce measures at a national level to prevent proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.¹⁷⁵ In particular, states are to develop and maintain

law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law.¹⁷⁶

Resolution 1540 further recognises that some states will need to call on other states for assistance in order to fulfil their obligations under the *Resolution* and promote dialogue and cooperation on non-proliferation.¹⁷⁷

The closest endorsement, albeit not explicit, of the PSI can be discerned from para 10 of *Resolution 1540*, which calls upon all states

in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.¹⁷⁸

¹⁶⁸ Daniel Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law' (2005) 30 *Yale Journal of International Law* 507, 539.

¹⁶⁹ *Ibid* 540.

¹⁷⁰ Winner, above n 105, 136.

¹⁷¹ See Valencia, *Making Waves in Asia*, above n 100, 47.

¹⁷² *Ibid* 48.

¹⁷³ *Ibid* 47.

¹⁷⁴ *Ibid* 48.

¹⁷⁵ *Resolution 1540*, above n 167, [3].

¹⁷⁶ *Ibid* [3(c)].

¹⁷⁷ *Ibid* [7], [9].

¹⁷⁸ *Ibid* [10].

It should be noted that this paragraph 'calls upon' states to act rather than 'decides' that states shall take certain action, and as such can be construed more as 'invitation-making' instead of 'obligation-imposing'.¹⁷⁹ Further, there is no express reference to the interdiction of vessels, so the range of measures contemplated in the PSI and the AMIS is not fully endorsed by the *Resolution*.¹⁸⁰ It is therefore evident that while the Security Council had the potential under Chapter VII to institute change by authorising the policing of the oceans to combat international terrorism, insufficient political will among the key members of the Security Council prevented such a development. Once again, *mare liberum* has prevailed.

IV THE NEED TO RE-BALANCE STATES' INTERESTS TO ENHANCE MARITIME SECURITY

The developments of the international law of the sea in the area of maritime security have created limited means for Australia to achieve its security goals. While the adoption of the ISPS Code facilitates the acquisition of information from vessels seeking to enter Australian ports, any enforcement action to be taken by Australia is limited to maritime areas over which it exercises sovereignty (namely, its ports, internal waters and territorial sea). The PSI is a non-binding arrangement, dependent on the willing participation of like-minded states and otherwise confined to the pre-existing rules relating to the freedoms of the high seas and the exclusive jurisdiction of flag states in this maritime area. The ship-boarding agreements concluded by the US are bilateral and may only extend rights to Australia on the ad hoc agreement of the relevant flag state. As such, these treaties provide no additional legal mechanism to those which currently exist in the law of the sea. The *SUA Protocol 2005* is yet to enter into force, and even when operative, it will be circumscribed by the ad hoc and optional consent that flag states may afford for boarding a vessel suspected of being involved in terrorist activity. The Security Council has not endorsed any additional rights for states on the high seas in dealing with international terrorism under *Resolution 1540*, which may have trumped other rights as a Chapter VII Resolution that prevails over other entitlements in international law.¹⁸¹ While advances in the existing legal regime are undeniable, the inherent limitations in those improvements are also manifest.

Many of the difficulties in creating effective legal mechanisms to enhance maritime security are a result of the pre-eminent respect afforded to flag state authority. States' preference has been to permit encroachment on their exclusive rights to the minimum extent possible. A tension is consequently created between the need to improve maritime security (as evidenced in the various initiatives outlined in the previous Part) and the desire to curtail any disruption to the existing legal standards regarding flag state jurisdiction on the high seas. As such, the limitations on the capacity of any state, including Australia, to take steps to ensure its maritime security are derived from the traditional construct of

¹⁷⁹ Joyner, above n 168, 540–1.

¹⁸⁰ Kaye, above n 39, 209.

¹⁸¹ Article 103 of the *UN Charter* provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present *Charter* and their obligations under any other international agreement, their obligations under the present *Charter* shall prevail'.

the law of the sea and its long-held emphasis on the freedom of navigation and concomitant respect for the flag state's exclusive jurisdiction.

These limitations are evident in the various post-September 11 developments examined: participants in the PSI are unable to conduct interdictions on the high seas unless the suspect vessel is flagged to a participant state; the *SUA Protocol 2005* requires express consent for a boarding; the AMIS will only operate on a purely voluntary basis so as not to offend existing principles of international law; and control measures under the ISPS Code may only be taken within the ports and territorial seas of the relevant coastal states. In each instance, these limitations are created because of the importance of *mare liberum* and the accompanying deference to the exclusive powers of the flag state.

The benefits of the principle of *mare liberum* are undeniable in continuing to promote the interests of states in ensuring the free passage of ships around the globe for commercial and military purposes. When states have sought to extend their exclusive rights further from their coasts, these claims have been tempered or denied by other states wishing to maintain the freedom of navigation over as large an area as possible.¹⁸² The enduring importance of *mare liberum* has ensured that states' claims to exclusive rights over the economic resources off their coasts would be balanced with the inclusive interest in the freedom of navigation.¹⁸³ Regulation of international shipping has generally only occurred to the extent that it results in increased efficiency or greater safety. As the greatest portion of the world's cargo is transported by sea, and naval units continue to form an essential facet of states' military forces, these shared interests have meant that states are unlikely to endorse significant modifications to the freedom of navigation.

However, concerns about maritime security are not necessarily inconsistent with these shared interests. The efficient transport of goods could be significantly impeded by a terrorist attack that succeeds in closing down a vital shipping passage or a major international port. Halting, or slowing, the spread of weapons of mass destruction is a means of reducing these, and other, attacks. Given the potentially significant and far-reaching economic repercussions, the vast majority of states share an interest in ensuring that the freedom of navigation is not jeopardised by these activities. Ensuring maritime security can therefore be seen as part of this inclusive interest.

This shared interest in maritime security therefore needs to be balanced against the exclusive rights of the flag state over its vessels on the high seas. When account is taken of the inclusive interest in promoting maritime security, there is less motivation to uphold exclusive flag state authority tenaciously. Rather, it appears that the counterbalance of exclusive interests in flag states has

¹⁸² The intensive debates dealing with the extension of the accepted breadth of the territorial sea from three miles to twelve miles at the 1958 and 1960 UN Conferences on the Law of the Sea are illustrative of this point: see, eg, *First United Nations Conference on the Law of the Sea*, Official Records (vol 3), 1st Comm, 35th mtg (2 April 1958) 103–5; 36th mtg (3 April 1958) 105–8; 39th mtg (9 April 1958) 118–19; 40th mtg (10 April 1958) 122–5; 44th mtg (12 April 1958) 134–9; 45th mtg (12 April 1958) 139; 49th mtg (16 April 1958) 149–52; 50th mtg (16 April 1958) 153–5; 53rd mtg (18 April 1958) 163–7; 54th mtg (18 April 1958) 167–71; 55th mtg (19 April 1958) 171–4; *Second United Nations Conference on the Law of the Sea*, Official Records, Summary Records of Plenary Meetings and Meetings of the Committee of the Whole (17 March – 26 April 1960). See also Churchill and Lowe, above n 13, 79.

¹⁸³ See above Part II(C).

become overly burdensome. The initiatives to improve maritime security have so far been hindered by considerable deference to exclusive flag state control. A small rebalancing of inclusive and exclusive interests on the high seas should lessen this emphasis.

To apply this approach to the *SUA Protocol 2005*, it could be argued that if less deference had been accorded to flag state control, states may have been willing to create a basis of consent for the boarding of ships by virtue of the treaty, instead of insisting on a separate consent procedure. Less weight on exclusive flag state control may have further resulted in the removal of a clause permitting the flag state to impose conditions on the boarding additional to the safeguards already included in the instrument, or may have at least anticipated mutually agreed conditions. Such a shift would have been warranted because of the international community's interest in creating a viable legal framework to respond to suspected terrorist activity. Just a small change in emphasis in the traditional balance of inclusive and exclusive interests may have resulted in a more effective international instrument. A comparable argument could be made in relation to *Resolution 1540*, whereby the importance of the inclusive interest may have warranted reference to (if not endorsement of) the PSI, or may at least have articulated a need for flag states to be more amenable to maritime security measures in their international arrangements and agreements.

There is even scope to take this approach when justifying the application of the AMIS in the EEZ by reference to art 59 of *UNCLOS*.¹⁸⁴ At present, Australia can not justify seeking identification information from all vessels in its EEZ and undertaking interdiction activities to enforce those requirements in accordance with the rights accorded to coastal states.¹⁸⁵ Australia could instead argue that the identification information falls into a category of unattributed rights in the EEZ, as anticipated in art 59. This provision reads:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole.¹⁸⁶

The silence in *UNCLOS* on military activities in the EEZ may provide a means to argue that current security interests were not foreseen at the time the treaty was concluded and should now be considered as unattributed rights to be resolved through reference to 'equity and in the light of all the relevant circumstances'. In this situation, when regard may be had to all relevant circumstances and community interests in ensuring maritime security, Australia could arguably be justified in instituting the AMIS in respect of all vessels in its EEZ.¹⁸⁷ Again, the inclusive interest in ensuring maritime security could be given more weight than has presently been the case in the law of the sea.

¹⁸⁴ See Klein, above n 5, 359–60.

¹⁸⁵ *Ibid* 352–5.

¹⁸⁶ *UNCLOS*, above n 20, art 59.

¹⁸⁷ Klein, above n 5, 359–60.

Resistance to even a small shift in the balance is inevitable due to the historic reluctance of states to cede rights to interfere with their vessels on the high seas. Not all states will appreciate the urgency of adapting the current legal regime until the results of a major maritime terrorist attack are experienced. States with smaller naval and law enforcement fleets may well fear that states with greater military power will interfere unduly with their commercial vessels. Equally, Australia or the US may not wish North Korea or Iran to have the power to board and inspect their vessels on the high seas.

There is indeed a certain irony that states that have been the strongest adherents to upholding the freedom of navigation are now devising ways to limit the exercise of that freedom in support of their security policies. It would seem, though, that the very interest in the freedom of navigation would ensure that measures taken to enhance maritime security would continue to temper state action and potentially prevent abuse. As has been argued above, even a small shift in the balance against exclusive flag state authority may create improved opportunities to enhance security interests. Such a perspective may now be useful in determining how to interpret and apply the legal rules that have been established thus far.

V CONCLUSION

Under the AMIS, Australia sought to establish a legal regime whereby it would have greater certainty over vessels planning to enter Australian ports and over those traversing its EEZ through the collection of identification information and, if necessary, the interdiction of vessels. A particular focus for Australia has been efforts toward non-proliferation and counter-proliferation in relation to weapons of mass destruction, particularly evidenced by its participation in the PSI. The need to rely on the international legal framework, and to ensure its effective operation, has been emphasised by Australian Foreign Affairs Minister Downer:

The mainstay for stopping the spread of WMD remains the system of treaties, export control regimes and other instruments built up over several decades. Aside from significant security benefits, they provide legitimacy for the international community's non-proliferation efforts. Treaty regimes must have the strongest possible kit of legal and practical tools for verifying compliance. And parties to those multilateral treaties must be resolute in dealing with cases of non-compliance. Stronger disincentives are needed for those tempted to cheat on their treaty obligations and clearer incentives for those who comply in a genuinely transparent manner.¹⁸⁸

While Australia clearly recognises the importance of taking steps to improve its maritime security, this article has shown that the legal avenues available to do so are inherently limited.

Improvements in the present maritime security situation are not only dependent on states' willingness to engage with alternative perspectives on the law of the sea, but are also reliant on states developing the internal structure and capabilities to detect terrorist activity on their vessels, in their ports and territorial waters, and to respond appropriately. While the traditional law of the

¹⁸⁸ Downer, 'Weapons of Mass Destruction', above n 12.

sea construct prevails, Australia's interests may be best served by taking steps to set in place proper infrastructure and by ensuring adequate coordination between state and federal officials, as well as between the defence force and law enforcement agencies. It would also be advisable for Australia to take practical steps to assist states in the region to undertake similar processes.

These practical measures are essential as the theoretical premise on which the law of the sea is presently constructed has effectively prevented further developments in this regard. The inadequacies in the international legal framework are a result of the inability of states negotiating these instruments and arrangements to conceive of maritime security as an inclusive interest and to promote this interest above the exclusive interests inherent in flag state control. While this paradigm persists, a flawed legal regime will result.