NEW MARITIME SECURITY MEASURES AND THEIR IMPLICATIONS FOR THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Dissertation submitted to Jawaharlal Nehru University in partial fulfillment of the requirement for the award of the Degree of

MASTER OF PHILOSOPHY

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CERTIFICATE

This is to certify that the dissertation entitled "**NEW MARITIME SECURITY MEASURES AND THEIR IMPLICATIONS FOR THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**", submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** is my own work and has not been previously submitted for the award of any other degree of this or any other university.

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We recommend that this dissertation be placed before the examiners for evaluation.

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Tiey V. Thomas

CONTENTS

LIST OF ACRONYMS

BWC - Biological Weapons Convention

COLREGS - Convention on the International Regulations for Preventing Collisions at Sea

CSC - International Convention for Safe Containers

CTBT- The Comprehensive Nuclear Test Ban Treaty

C-TPAT - Customs Trade Partnership Agreement against Terrorism

CWC - Chemical Weapons Convention

EEZ - Exclusive Economic Zone

GAR - General Assembly Resolution

IAEA- International Atomic Energy Agency

ICJ - International Court of Justice

ILO - International Labour Organisation

IMB - International Maritime Bureau

IMO - International Maritime Organisation

ISPS - International Ship and Port Facility Security

LEG - Legal Committee

MSC - Maritime Safety Committee

MTCR - Missile Tehnology Control Regime

NATO - North Atlantic Treaty Organisation

NPT - The Nuclear Non- Proliferation Treaty

OPCW - Organisation for the Prohibition of Chemical Weapons

PCIJ - Permanent Court of International Justice

PSI - Proliferation Security Initiative

SCR - Security Council Resolution

SLOC - Sea Lanes of Communication

SOLAS- International Convention for the Safety of Life at Sea

SOPs - Statement of Interdiction Principles

STCW-F - Certification and Watch keeping for Fishing Vessel Personnel

SUA - Convention on the Suppression of Unlawful Activities against the Safety of Maritime Navigation

SUA- PROT - Protocol to the Convention on the Suppression of Unlawful Activities against the Safety of Fixed Platforms and Continental Shelf

UK - United Kingdom

UN - United Nations

UNCLOS - The United Nations Convention on the Law of the Sea

US - United States of America

WMD - Weapons of Mass Destruction

Dedicated to

my Teacher...

Chapter I

Introduction

Chapter I

INTRODUCTION

The 1982 United Nations Convention on Law of the Sea (UNCLOS)[1] is a watershed in the codification and progressive development of international law. The legal significance of the UNCLOS lies in the precipitation of the state practice into customary and general international law, thus binding even states, which are not party to it.[2] The UNCLOS, which forms the basis of the existing international maritime regime, encompasses a broad range of provisions for ensuring safe, secure and effective maritime navigation. An efficacious and unimpeded movement of commerce is vital to the operation of international economy. The existing international norms pertaining to jurisdictional rights albeit freedom of the high seas, right of innocent passage, state control over entry of foreign ships, and flag state jurisdiction in high seas are strong and well-established through state practice and judicial precedents.

The International Maritime Organization (IMO) plays a significant role in ensuring maritime safety and security. The IMO renewed its focus on security issues in the wake of the terrorist attacks against the United States in September 2001, and agreed on a new comprehensive security regime for international shipping. It includes a number of mandatory security measures, like amendments

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[1] Adopted on 10 December 1982, entered into force on 16 November 1994, signed by 157 States and ratified by 148 States. India signed it on 29 June 1995. For its text, see 1833 UNTS 397 reprinted in 21 *ILM* 1261.

[2] The customary law status of the UNCLOS has been reiterated by various decisions of the International Court of Justice. The court in *Military and Para-military Activities in and against Nicaragua Case* (Nicaragua v. USA) (Merits) *ICJ Reports*,1986, p. 14, upheld the customary status of coastal state sovereignty provided in Articles 2, 5-14; the court in *Corfu Channel Case* (Albania v. Britain) (Merits), *ICJ Reports*, 1949, pp. 30-32 upheld the customary status of the right of innocent passage under Article 17; the customary law status of the institution of Exclusive Economic Zone (Articles 55-62, 68, 73-74) was reiterated in the *Continental Shelf Case* (Libya v. Malta), *ICJ Reports*, 1985, p. 33; and the freedom of high seas was recognised as a part of customary international law in the *S.S. Lotus Case* (France v. Turkey), *PCIJ* 1927, p. 70.

to the 1974 Safety of Life at Sea Convention (SOLAS)[3] to enhance maritime security. In addition, IMO's Legal Committee is reviewing the 1988 Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)[4] and its related Protocol for the Suppression of Unlawful Activities Against the Safety of Fixed Platforms Located in the Continental Shelf 1988 (SUA PROT)[5]. This Convention and its Protocol, which forms the SUA regime, are the existing international legal instruments governing maritime security along with the guiding principles in the UNCLOS. Maritime Security represents a new dimension to the maritime safety factor. Where the maritime safety includes measures against negligence, poor procedure, design and equipment of the shipping industry, the maritime security guards against terrorists and regimes seeking to harm the shipping industry.

The proposed amendments to the SUA regime seek to broaden the range of offences to include acts of terrorism, which threaten the security of passengers and crews and the safety of ships in its ambit. It also expands the extradition and prosecution obligations of contracting governments and introduces provisions for boarding of vessels suspected of being involved in terrorist activities.

The international community, in the aftermath of terrorist attack against the World Trade Center has been attempting to seriously address and reconsider

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[3] Adopted on 1 November 1974, entered into force on 25 May 1980, signed by 75 states and ratified by 113 states. For its text, see 1184 UNTS 3[C/E] reprinted in 14 *ILM* 959.

[4] The origin of this Convention could be traced back to the Achille Lauro incident of 1985. In this instance, four Palestinian terrorists hijacked the Italian ship, Achille Lauro, and murdered a disabled American man, Mr.Leon Klinghoffer, after holding almost four hundred passengers as hostages for two days. This resulted in the adoption of the SUA Convention and SUA PROT by the International Maritime Organization in pursuance of General Assembly Resolution 40/61 of 9 December 1988 and IMO Assembly Resolution A. 584(14) of 20 November 1985, which called for development of measures to prevent unlawful acts which threaten the safety of ships and security of passengers and crew. The Convention was adopted on 10 March 1988, entered into force on 1 March 1992, reprinted in 27 *ILM* 672; *see* also I.M.O Document SUA/Conv/16/Rev./ of 10 March 1988.

[5] Adopted on 10 March 1988, entered into force on 1 March 1992 reprinted in 27 *ILM* 685; *see* also I.M.O Document SUA/Conv/16/Rev./ of 10 March 1988.

the terrorism-related risks posed to maritime trade and security. The United States of America (US), in particular, is playing a proactive role in initiating measures to thwart terrorism and Weapons of Mass Destruction (WMD) related risks. IMO has also been active and has adopted new security standards.

Two of the many major US and IMO-initiated security measures are (a) the Proliferation Security Initiative (PSI) of the US and (b) the Review of the SUA Convention and SUA-PROT. These measures are introduced to legalize the interdiction of shipments of WMDs and its related materials in the high seas.

1. 1. *Focus of the Study*

This study examines some of the challenges, which PSI throws up for the international community from a legal perspective. Its focus is on the two new maritime security measures that are mentioned above. The central concern of the study is the existing international maritime norms in this area and the implications of the new maritime security measures for the discipline of international maritime law and the international community. Particular attention is paid to the implications for developing countries like India, which have always advocated for a strong multilateral non-proliferation regime. The study also focuses attention on the imperative to consider the balance of interests and on the need to develop rules and cooperative enforcement mechanisms to stymie the unilateral actions taken by the super powers and at the same time to constructively abate the threat of non-state actors and WMD proliferation.

This study has undertaken a study of the well-established concepts and general principles of international maritime law like maritime zones, coastal state jurisdiction over maritime zones, flag state sovereignty, freedom of navigation and the right of innocent passage. It also portrays the meaning and implications of these principles and the propensity on the part of US to change these norms, to suit the US perception of necessity. An attempt is also made to extrapolate the developments of new techniques in the context of bilateral relations by way of

bilateral agreements legalising the boarding and interdiction of ships in the high seas.

However, the central question is whether states should agree to trade off the well-established norms of maritime order for a new practice curtailing the freedom of the high seas. In other words, whether the present world order necessitates a review of UNCLOS? What would be the long-term effect of such a change through an initiative like PSI?

A final theme, which emerges, concerns the "Sea-blindness" in India when it comes to the matter of maritime security. It entails the laxity on the part of the Indian government to enact a specific legislation on maritime security

1. 2. *Review of Literature*

A plethora of literature exists on the evolution, concepts, and basic principles of the law of the sea, which was a much debated and deliberated subject of international law during the mid-eighteenth century. This study includes a review of the writings of many international scholars that have dealt with various aspects of the law of the sea.[6] These works concur on the significance, the prescriptive and customary status of UNCLOS in international law. The inadequacy of the UNCLOS and the existing maritime security regime to counter the instances of terrorism at sea underlines the works of many scholars.

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[6] D.P.O.Connell, *The International Law of the Sea*, vol. I and II (Clarendon Press : Oxford, 1982-84); Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (Yale University Press: New Haven and London, 1962); Robert R. Churchill and A.V.Lowe, *The Law of the Sea* , 2nd edn. (Manchester University Press : Manchester, 1988); R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Martinus Nijhoff Publishers: The Hague, 1983); Anand, *New Law of the Sea: Emergent Norms and Institutions*, Lectures delivered at the Institute of International Public Law and International relations, Aristotle University, Thessaloniki, Greece, 1996; Nagendra Singh, *Maritime Flag and International Law* (Thompson Press Ltd: New Delhi, 1978); Natalio Ronzitti, ed., *Maritime Terrorism and International Law* (LSE and Routledge: London, 1997).

The scholars[7] (Choudhary, 1995) (Ronzitti, 1997) (Higgins & Florey 1997) (Mahan, 2003) have debated on the extent of balance between security, freedom and justice in this context. Though the early works on the freedom of high seas points to the conflicting views expressed in maintaining a large measure of freedom from interference,[8] the incidence of 11 September 2001 and many instances of terrorism at sea seem to induce the questioning of the freedom of the seas. The contemporary writings like that of Becker (2005)[9] and Mellor (2004)[10] argue for the guarding of this freedom except through a legitimate multilateral framework on the ground of collective security and balance of interests.

However, the attempt to study the new maritime security initiative, PSI was facilitated by the works of authors like Joseph (2004),[11] Persbo and Davis (2004).[12] Their works emphasised the need to consider PSI only as a component

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[7] Jeoffery Till, *Sea Power Theory and Practice* (Frankcass Publishers: London, 1994); Rahul Roy Choudhary, *India's Maritime Security* (Knowledge World Publishers: New Delhi, 2000); Rosallyn Higgins & Maurice Florey, ed., *Terrorism and International Law* (LSE and Routledge : London, 1997); Alfred T. Mahan , *The Influence of Sea power Upon History 1600-1783* (Natraj Publishers: New Delhi, 2003).

[8] Hersch Lauterpacht has said, "the principle of freedom of the seas cannot be treated as a rigid dogma incapable of adoption to situations which were outside the realm of possibilities in the period when that principle first became part of international law." See Lauterpacht, "Sovereignty Over Submarine Areas", *British Yearbook of International Law*, vol. 27 (1950), p. 377 as quoted in Anand, n. 6, p. 49. See also "Memorandum on the Regime of the High Seas" said to have been prepared by Gidel in 1950 for the UN Secretariat, UN Doc. A/CN.4/32, 14 July 1950, p. 74 where he opines, "the principle of the freedom of the high seas need not remain absolute should the satisfaction of legitimate interests require that freedom to be waived." as quoted in Anand, n. 6, p. 49.

[9] Michael A. Becker, "The Shifting of Public Order of The Oceans: Freedom of Navigation and the Interdiction of Ships at Sea", *Harvard International Law Journal*, vol. 46 (2005), pp. 131-230.

[10] Justin S.C.Mellor, "Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism", *American University International Law Review*, vol. 18 (2002), pp. 341-396.

[11] See Jofi Joseph, "The Proliferation Security Initiative", *Arms Control Today*, June 2004 available at http://www. armscontrol.org/act/2004_06.

[12] See Andreas Persbo and Ian Davis, "Sailing into Unchartered Waters?" BASIC Research Report 2004, available at <http://www.basicint.org/pubs/Research/04PSI.htm>

of a broader non-proliferation tool box like diplomacy, treaty regimes, export controls and threat reduction efforts. The understanding of unilateralist nature of this initiative in international law is also ascertainable from their works.

The works of Goldblat (1992),[13] and Pugh (1994)[14] are resourceful in understanding the role of maritime cooperation and confidence building as an attractive proposition and an essential consideration for meeting the maritime security concerns. An evaluation of the maritime security in India required the review of the works of the scholars like Ramunny (1993),[15] Paleri (2003),[16] Mathur (2002).[17] These writings consider the significance of Indian Ocean and the threats faced by India at sea. Ramunny pays special attention to maritime traditions of India highlighting the need for a comprehensive maritime strategy for India to curb real and palpable threats of WMD and terrorists.

However, it could be seen that none of the aforementioned studies have attempted a comprehensive study of the legal implications of the PSI, the review of the SUA regime and Security Council Resolution 1540 of 28 April 2004, on the existing international maritime regime. Therefore, a study of these new maritime security measures is timely and needs prompt attention.

1. 3. *Objective of the Study*

The proposed study shall focus on the legal compatibility of the PSI to ensure maritime security through interdiction of shipments of WMD, their

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[13] See, Josef Goldblat, ed., *Maritime Security: the Building of confidence*, UNIDR, 1992.

[14] See Michael Pugh, *Maritime Security and Peacekeeping: A Framework for United Nations Operations* (Manchester University Press: Manchester, 1994).

[15]See Murkot Ramunny, *Ezhimala: The Abode of Naval Academy* (Northern Book Centre: New Delhi, 1993).

[16] See Prabhakaran Paleri, *Indian Coast Guard: 25 Glorious Years* (The Coast Guard Head Quarters: New Delhi, 2003).

[17]See Anand Mathur, "Growing importance of the Indian Ocean in Post Cold War Era and Its Implication for India", *Strategic Analysis*, vol. 26 (2002), pp. 550-559.

delivery systems and related materials. The study shall attempt to examine the nature and scope of new non-proliferation consensus under the existing international maritime regime and general principles of international law. The study would not include within its purview other existing non-proliferation treaties or regime and their relationship to the PSI. The study shall examine India's stand on PSI and would also try to put forth probable implications of the ongoing SUA review negotiations, to which India is a party, if the review comes into force in October 2005.

1. 4. *Scope of the Study*

The proposed study is intended to cover the following issues:

(a) Whether the interdiction action provided in the Statement of Interdiction Principles (SOPs) in PSI is permitted under the 1982 UNCLOS and other international legal frameworks?

(b) What is the legal jurisdiction for interdiction of shipping in case of different maritime zones?

(c) What is the relationship between the PSI on the one hand and the UNCLOS and the relevant UN Security Council Resolutions on the other?

(d) Whether the PSI and its interdiction principles are congruent with the right of innocent passage as provided under Article 19 of UNCLOS and customary international law?

(e) Whether the PSI is compatible with the 'freedom of navigation', which is one of the fundamental freedoms of the high seas?

(f) What is the scope for compensation in case of wrongful interdiction under PSI?

(g) What are the probable implications of the review of the SUA regime?

(h) What is the scope of settlement of maritime security disputes?

1. 5. *Outline*

The present study consists of five chapters. Chapter I provide a general introduction to the issues that are dealt within the subsequent chapters and attempts to define the scope and importance of the subject. It also encompasses the conceptual framework within which the proposed study is envisaged. Chapter II titled "New Maritime Security Measures" attempts to study the *threats* to maritime security, especially non-traditional threat of terrorism. It also extrapolates the essential vulnerabilities of maritime transport and tries to portray two new maritime security measures *via* PSI and amendment to the SUA regime initiated to meet these threats. This chapter also endeavours an analysis of the above measures. Chapter III titled "Implications to the Existing Maritime Security Regime" tries to undertake a study of the well-established concepts and general principles of international maritime law as embodied in UNCLOS like the concept of flag state sovereignty, freedom of navigation and the right of innocent passage. Thereby, an attempt is made to study the compatibility with the new measures on UNCLOS, Security Council Resolutions and state practice. The chapter also tries to understand the scope of settlement of maritime security disputes. Chapter IV undertakes a study of the maritime security in India, the existing domestic legislation regulating maritime security and argues that India is sea-blind because of the laxity on the part of the government to enact a specific legislation to incorporate the SUA regime into the domestic law. It also tries to justify the stand taken by India on PSI. The last Chapter concludes the study with some suggestions and recommendations in the light of the findings of Chapters II and III.

Chapter II

New Maritime Security Measures

Chapter II

NEW MARITIME SECURITY MEASURES

The tremendous increase in international trade and the resultant shrinking of the world into a global village has caused a state of uncertainty[18]and complacency in the post-cold war international order. Maritime trade constitutes the backbone of global economy as it provides the facilitation mechanism for the carriage of almost 92 per cent of the world trade through international shipping.[19] The IMO, a specialized agency of the United Nations (UN), is entrusted with the responsibility of ensuring safe, secure and efficient shipping on cleaner oceans.[20] Though shipping is largely considered to be safe, efficient and environment-friendly, the twenty-first century witnessed acceleration[21] in the number of

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[18] The uncertainty in the post cold war international order is the result of the uncertainty in the alliances, the uncertainty of borders and the primacy of economics. See Jaque Grinberg, "Security in Post-Cold War Era: An Australian Perspective" in Jasjit Singh, ed., *Maritime Security* (Institute for Defence and Strategic Analysis: New Delhi, 1993), p. 22; Lawrence Freedman, "Order and Disorder in the New World", *Foreign Affairs*, vol. 17 (1999), p. 22; Ted Galen Carpenter, "The New World Disorder", *Foreign Policy* (1991), p. 29.

[19] The theme for World Maritime Day 2005 is "International Shipping- Carrier of World Trade" which affirms the importance given to the maritime trade. See the decision of the International Maritime Council (IMO Council) in November 2004, available at <www.imo.org >

[20] It could be seen that safe shipping, navigation and cleaner oceans were the objectives, which were bestowed on this Organisation and not security of oceans. As per Article 1(a) of the IMO Convention 1958, its purpose is: "to provide machinery for cooperation of the governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships". The Organisation is also empowered to deal with administrative and legal matters related to these purposes.

[21] Where the number of pirate attacks in the late1990's was around 275, the total number of reported attacks increased to 445 in 2003. For details *see* ICC-International Maritime Bureau, Piracy and Armed robbery against Ships, Annual Report 2003, p. 5 as cited in Tamara Renee Shie, "Ports in a Storm? The Nexus between Counter-Terrorism, Counter-Proliferation and Maritime Security in South East Asia", *Issues and Insights*, vol. 4 (2004), p. 12, available at http:// www.csis.org.

unlawful activities at sea in a variety of forms including piracy,[22] drug-trafficking,[23] illegal fishing[24] and degradation of environment[25] indicating a critical gap in the effectiveness of the prescriptive norms of United Nations Convention on the Law of the Sea. The attacks on the *USS Coleman* in 2000[26] and the French tanker *MT Limburg* in 2002[27] demonstrated that international terrorist organisations are capable of carrying out acts of terrorism at sea. The heinous and devastating destruction of the World Trade Center in NewYork on 11 September

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[22] Vijay Sakhuja, "Maritime Order and Piracy", *Strategic Analysis*, August (2001), p. 923; U.N. Div. For Ocean Affairs and the Law of the Sea, *Oceans: The Source of Life-United Nations Convention on the Law of the Sea-20th Anniversary* (2002) available at <http://www.un.org/Depts/los/covention_agreements/convention_20years/oceansourceoflife.pdf > [hereinafter Oceans: The Source of Life] as cited in Becker, n. 9, p. 130; ICC-International Maritime Bureau, Piracy Reporting Centre, January 2003, available at <http://home.wanadoo.nl/m.bruyneel/archive/modern/imb2002.htm> which provides the reported incidents and their specific details. The report says that pirates are better armed now.
The annual report of the International Maritime Bureau (IMB) breaks down the reported incidents into specific details:

(1) The number of hijacked ships and hostage takings has increased since 2001.

(2) The pirates on the whole are also better armed: more pirates have knives or other weapons compared to last year. The number of pirates carrying guns has gone down, however the types of ships that have been more attacked in 2002 are Bulk carriers, General cargo ships, and fishing vessels. See also Jayant Abhyankar, "Piracy Today-An Overview", *Journal of Indian Ocean Studies*, vol. 7 (2000), p. 146; O.P.Sharma, "Piracy at Sea: Legal Aspects", *Journal of Indian Ocean Studies*, vol. 7 (2000), p. 157.

[23] Sakhuja, Ibid; Sakhuja, "Indian Ocean and the Safety of Sea Lanes of Communication", *Strategic Analysis* (2001), p. 693; *Oceans: The Source of Life*, n. 22, describes the rising profitability of human and drug trafficking by sea; K.R.Singh, "Regional Cooperation in the Bay of Bengal: Non conventional Threats-Maritime Dimension", *Strategic Analysis* (2001), p. 2199; Nirupama Subramanian, "Tamil Nadu: On the Drug Route", *India Today*, 30 September 1994.

[24] See Helen Bours et al., "Pirate Fishing Plundering the Oceans", Greenpeace International, available at http://archive.greenpeace.org/oceans/reports/pirateen.pdf. See also *Oceans: The Source of Life*, n. 22, p. 5

[25] *Oceans: The Source of Life*, n. 22, p. 4

[26] The U.S Navy destroyer *U.S.S. Coleman* was attacked on 12 October 2000 by a small boat laden with explosives during a brief refueling stop in the harbor of Aden, Yemen. The suicide terrorist attack killed 17 members of the ship's crew, wounded 39 others and seriously damaged the ship available at <http://www.caller2.com/specials/usscole>

[27] The French double- hulled oil tanker *MT Limburg* was attacked by terrorists on 8 October 2002 in the port of Ash Shihr Terminal, Yemen. The blast was carried by a small boat packed with explosives that ran into the tanker deliberately and caused the explosion, available at http:// www.smany.org/sma/Arbitrat_July 2004.html.

2001, which is imputed to the *al Qaeda*[28] terrorist group of Osama bin Laden, brought home the reality of international terrorism, its dangerous nature and the vulnerability of even the most powerful Western states to attack by sea as well as air.[29]

This incident caused the world community and the US in particular to reappraise their vulnerabilities against this new threat, which resulted in the implementation of various unilateral and bilateral initiatives to increase the security of the maritime trade. Thus the concept of *maritime security* that had received scant attention from the international community as well as IMO, except for the SUA regime, suddenly became a prominent subject. Although most of the post -11 September 2001 security initiatives are unilateral initiatives implemented by the US to secure its interests, the fact that the US is the world's largest economy with a share of almost twenty per cent of total world trade means that the measures have huge impact on every aspect of global maritime trade. The initiatives have forced industries involved in maritime trade to change their focus towards security.

Before embarking upon a legal and analytical study of PSI and the SUA review, it is necessary to understand the threats faced by maritime shipping.

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[28] al-Qaeda,"the base" in Arabic, is the network of extremists organized by Osama bin Laden. al-Qaeda's ideology, often referred to as "jihadism," is marked by a willingness to kill "apostate" and Shiite Muslims and an emphasis on *jihad*. Although "jihadism" is at odds with nearly all Islamic religious thought, it has its roots in the work of two modern Sunni Islamic thinkers: Mohammad ibn Abd al-Wahhab and Sayyid Qutb. For the history of "*al-Qaeda*" visit < http://www.usdoj.gov/ag/moussaouiindictment.htm >.

[29] See n. 10, p. 341. For discussion on the vulnerability of ports and shipping, to terrorist activities see *Canadian Security and Military Preparedness Fifth Report to the Canadian Standing S. Comm. on National Security And Defence* (2002) available at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-E/defe-e/rep-e/rep05feb02-e.htm;>*Weak Links: Assessing the Vulnerability of US Ports and Whether the Government is Adequately* Structured to Safeguard Them: Hearing Before the Senate Comm. on Governmental Affairs, 106th Cong. (2001) available at http://www.senate.gov/~gov_affairs/120601witness.htm

2.1. THREATS TO MARITIME SECURITY

International relations have entered into a new phase where the international strategic environment has acquired a new dimension.[30] The concept of power and security has thereby undergone a drastic change. In the present world, the traditional security relations between the core powers are more co-operative because of the flourishing global trade and the unprecedented turn of events in international relations. This process has further changed the perceptions of states' regarding vital aspects of statehood like national sovereignty, which resulted in the unprecedented cooperation in the United Nations enabling it to play an active role in the maintenance of a peaceful world.

The concept of security or threat to security has also undergone a drastic change. The so-called conventional threats have been supplemented by the non-conventional threats, both of which are basic aspects of comprehensive security. The conventional threat includes threat to sovereignty, territorial disputes and interstates' military posture, which are considered vital to the survival of a state. The non-conventional threats to security encompass economic security, terrorism, environmental pollution, drug-trafficking, transnational crimes etc., which were beyond the concerns of conventional threats.[31] The differences between conventional and non-conventional threats are:[32]

a) Actors and sources of non-conventional threats are comparatively unclear. They may be non-state actors, social groups or individuals;
b) Non-conventional threats are more pronounced in terms of socialisation, transnationalisation and globalisation. These surpass political limitations,

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[30] Singh, n. 18, p. 21.

[31] Singh, n. 23, p. 2200; William Gilmore, "Drug Trafficking at Sea: the Case of Charrington and Others", *International and Comparative Law Quarterly*, vol. 4 (2000), p. 477.

[32] Xu Jian, "New Challenges, New Approaches: Unconventional Security and International Security Cooperation", in K. Santhanam and Srikanth Kondapalli, ed., *Asian Security Review 2003* (Shipra Publications: New Delhi, 2004), p. 26; Sudha Raghavan, "Concept of Security: From Military to Non-Military Environment as a Factor", *Journal of Indian Ocean Studies*, vol. 10, (2002), p. 375.

national boundaries and cultures resulting in the spill over from one country to another thus becoming a global issue;

c) The non-conventional threats tend to show strong inertia, once set in motion. These become ineradicable in a short period and difficult to resolve through efforts of a few countries by virtue of their complex roots.

One glaring example of such a non-conventional threat is terrorism or terrorist activities that have become quite common today all over the world, many of which are specific to the sea. These non-conventional maritime threats can be divided as follows:

First, exploitation of natural resources by unauthorised persons in the sovereign hydrospace of a State;

Second, causing intentional ecological damage;

Third, posing threat to life and property on board a ship or platform or continental shelf and

Fourth, threat to national peace and security.

The last three categories can be included within the purview of acts of terrorism since it impedes the good order at sea which are guaranteed under the law of the sea and grounded in strong evidence of State practice. The 11 September 2001 incident that was perpetrated by ramming two aircraft with full fuel tanks against the World Trade Center exposed the glaring vulnerability of terrorist targets and the catastrophic effects of such an attack.

The close connection between international terrorism and the illegal movement of nuclear, chemical, biological and other deadly materials was noted by the UN Security Council in its Resolution 1373 of 28 September 2001.[33] This resolution categorised this connection as a threat to international security. US President George W.Bush linked the dual threats of terrorism and proliferation in

[33] For the text of the resolution, see 40 *ILM* 5, p. 1278.

his 2002 State of the Union address when he stated the two primary objectives[34] of the U.S. Later that year the National Security Strategy of the US also reiterated the same relationship between terrorism and WMD. The UN High Level Panel on Threats, Challenges and Change also urges the international community to rethink on the concept of collective security so as to encompass not only terrorism but also threats posed by WMD.[35]

Therefore, in addition to the threat of general terrorist acts against the maritime transport sector, there is concern that terrorists might exploit the insecurity of shipping trade and ports to illegally acquire, transport, or detonate WMD and its related material. The possibility of a terrorist attack against maritime targets could not be ignored because of its probable devastating consequences.

2.1.1 *Vulnerabilities at Sea*

Three essential characteristics of maritime transport that expose the industry to various ways by which terrorist organizations might exploit the traditional freedom and anonymity of the global commercial shipping industry are: containers, ships and seafarers.

2.1.1.1 Containers

The attempts to simplify and improve the handling of marine general cargo resulted in the implementation of the system of containerisation[36] that has

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[34] The first objective was the shut down of terrorist camps, disruption of terrorist plans, and bringing terrorists' to justice. The second objective was to prevent the terrorist and regimes that seek chemical, biological and nuclear weapons from threatening the U.S and the world.

[35] Report by UN High Level Panel on Threats, Challenges and Change to Secretary-General on 2 December 2004; Report by UN Millennium Project , *Investing in Development: A Practical Plan to Achieve Millenium Development Goals* of January 2005 available at <www.unmilleniumproject.org>

[36] James Anderson, a British national, articulated the first plan for containerization in 1801. He was subsequently granted patent for it in 1845 but it was not implemented until mid 1950. The real revolution occurred when Malcolm McLean implemented the system by rigging fifty-eight containers to a tanker ship's deck. See Mellor, n. 10, p. 347; Syahiram Baharom Shah, *Securing Maritime Trade: Post 9/11 Maritime Security Initiatives and Their Implications on Malaysia* (Centre For Ocean Law and Policy: Maritime Institute of Malaysia, 2004), p. 15.

allowed the shipping industry to keep pace with the demands for ever faster shipments at affordable levels. The speed and efficiency of the shipping industry is attributable to the shipping containers. It effectuates the standardisation of the containers in which the cargo/goods are transported and makes the transfer easy from such containers to the ground transportation networks. It is this efficiency of containerised system that makes it vulnerable to misuse by terrorists via carrying WMD or terrorist personnel themselves[37] because of the lack of adequate inspection and transparency as to the content of the container.[38]

2.1.1.2 Ships

The backbone of international trade is the ocean going ships, which are attractive; both as targets of terrorism[39] and as instruments that facilitate terrorism.[40]

This is evident from many instances that have happened in the last few years in various places like India,[41] Israel,[42] Yemen,[43] etc.

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[37] See Mellor, n. 10, p. 343; Susan Kelleher, "Big Hole in Nation's Defences: Our Ports" available at http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=seaport28mo&date=20011028&query=susan+kelleher> (highlighting a situation in October 2001 when Italian inspectors discovered a suspected al Qaeda member hiding in a container, destined for Toronto fitted with a makeshift bed and toilet).

[38] For detailed account on inspection of containers and the problems associated with it, see Stephen E. Flynn, "Beyond Border Control", *Foreign Affairs* (2000), p. 57; Sakhuja, "Shipping Containers or Trojan Horses-Challenges for Maritime Security", *Journal of Indian Ocean Studies*, vol. 10 (2002), p. 388. One response to the threat posed by the containers is the Container Security Initiative (CSI), whereby high-risk containers are identified and pre-screened well in advance, as well as introduction of "smart" containers fitted with anti-tampering sensors. The US also enacted the Maritime Transportation Security Act, 2002 including provisions for foreign port assessment, enhanced crewmember identification and automatic identification system for large commercial vessels.

[39] There are numerous terrorist threats against ships. Terrorists can detonate tampered cargoes placed earlier on the ship or board the ship before blowing it up. See Shah, n. 36, p. 17; Singh, n. 18, p. 2201; Gal Luft and Anne Korin, "Terrorism Goes at Sea", *Foreign Affairs*, vol. 83 (2004), p. 65;

[40] As to the risk of ships being used as instruments to facilitate terrorism, the risk currently receiving greatest attention is the possibility of ships being used as weapons to target strategic facilities by carrying WMD on the board, or hijacking of the ships and using it serve their purpose.

[41] India, in the past few years, has experienced some major maritime crimes of this nature though very few affected her directly. *M.V. Vasantha*, a small ship that was employed to transport cargo between the islands of Andaman and Nicobar, set sail on 2 July 1999 and was 'lost'. Reportedly, it

Open registries and flags of convenience are another characteristic of the shipping industry that exposes it to abuse. Because of this, terrorists need not even hijack commercial ships to carry out their activities. It is indicated that *al Qaeda* own a fleet of twenty to fifty commercial ships[44] that are registered mostly

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was hijacked by some elements from Myanmar. More sensational was the case of hijacking/piracy *of MV Alondra Rainbow*. It was a Japanese-owned vessel, which was operating under the flag of Panama. It was reported to be hijacked while on way to Mike in Japan from the port of Kuala Tanjung in Indonesia. It had sailed from the port on 22 October 1999. The ship was carrying 7,000 tons of aluminium ingots. It had a mixed crew of two Japanese and 12 Philipinos. The first report about the ship being hijacked was made on 27 October 1999. The crews of the ship were found drifting in a boat in the Malacca Strait on 10 November. The Inernational Maritime Bureau Centre in Kuala Lumpur sent out message of hijacking and alerted international shipping. On 14 November, a merchant ship, *MV al-Shuhadaa*, reported sighting a vessel similar to the lost ship to the Indian Coast Guard authority which located the ship near the coast of Kanyakumari and alerted the Coast Guard ships that were sent to verify. Interrogated on the radio, the ship gave its name as *MV Mega Rama*, registered in Belize. When the Coast Guard ships tried to intercept it, it increased speed to 14 knots and tried to escape. A chase began on the high sea. Navy's missile-armed corvette, INS Prahar, was dispatched. It closed in with the ship by midnight on 15 November but boarded it only in the morning of 16 November on the high seas off Goa. It was brought to Bombay where the crew was arrested so that they could be tried.
While the case of *MV Alondra Rainbow* was treated as an act of piracy, the case against *MV Gloria Kopp*, which was on the 'wanted' list and which was boarded by Indian authorities near Pondicherry in December 1999, was not treated as one of piracy but case was filed by the Customs in the court at Chennai. The case of *MV Med Star*, which was apprehended by the Coast Guard near Okha on June 2000 as a case of suspected hijacking, was finally treated as one of stowaways. See K.R.Singh, "Maritime violence and Non- State Actors: with Special Reference to the Andaman Sea and its Environment", *Dialogue*, vol. 4 (2003) available at <http://www.asthabharati.org/Dia_Apr03/krs.htm >; Jayant Abhyankar, "Armed Robbery, Piracy and Terrorism at Sea", ORF Workshop on Maritime Counter Terrorism, 29 November 2004, p. 4, available at < http://www.observerindia.com/reports/maritime/PAbhyankar.pdf >

[42] A third ship carrying weapons for Palestinian terrorists was intercepted by the Israel Defense Force's naval branch some 40 miles off the northern Israeli coastline on Thursday, 22 May 2003. The *Abu Hassan*, an Egyptian-owned fishing boat, along with the eight people aboard, including at least one Hizbullah operative had on the vessel materials and electronic devices used to fabricate the explosive vests favored by suicide bombers. Israeli authorities recovered rocket fuses and electronic bomb-making components, as well as Hizbullah compact discs containing instructions on how to assemble explosive belts used by suicide bombers.
Israeli defence forces had intercepted two other Palestinian arms smuggling ships, the *Karine-A* in January 2002 and the *Santorini* in May 2001 available at <http://www.jinsa.org/articles/articles.html/function/view/categoryid/852/documentid/2045/history/3,2360,654,852,2045 >

[43] See n. 27.

[44] The open registry system has made it easy for al Qaeda to maintain and operate its own fleet of merchant vessels. The al Qaeda 'Navy' is alleged to have been involved in activities like smuggling of conventional arms, WMD components, (alleged role in the 1998 African Embassy bombings) as well as using ships to attack other ships or coastal targets directly (attack on the *U.S.*

in countries like Panama, Liberia, Bahamas, Marshall Islands, etc., which are open registries.[45] In contrast to Nationalist or "closed" registries like that of India, Japan, UK, USA, and place strict criteria for registration of ships, the open registries permit "the registration of foreign owned and foreign controlled vessels under conditions which, for whatever reasons, are convenient and opportune for the persons who are registering the vessels".[46] In 1997 it was estimated that half of the entire world's merchant fleet operated under the flags of convenience.[47] Open registries have operated successfully despite the provisions in UNCLOS and

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S. Cole in 2000 and bombing of French oil tanker in 2002); John *Mintz*, "15 Freighters believed to be linked to al-Qaeda - US fears Terrorists at Sea; Tracking Ships is Difficult", *Washington Post*, 31 December 2002; Christopher Dickey, "al-Qaeda at Sea", *Newsweek*, 27 January 2003.

[45] Ship operators, seeking to lower costs, register their vessels in open registries that feature unrestrictive laws, and low tax liability, vessel registration fees, and crew costs. There are almost thirty-two open registries as of now. They are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma, Cambodia, Canary Islands, Cayman Islands, Cook Islands, Cyprus, Comoros Islands, German International Ship Register, Gibraltar, Honduras, Lebanon, Liberia, Luxembourg, Malta, Marshall Islands, Mauritius, Mongolia, Netherlands, Antilles, Tuvalu, and Vanautu. For market economies, their share of world general cargo vessel tonnage dropped to approximately 25 percent, while open registries gained, and continue to gain, in world tonnage. Open registries have captured approximately 60 per cent of the capacity of the world merchant fleet. In the year 2000, four of the top five registries were open registries. The United States, the world's largest trading nation, was in 13th place in 2000. See Vijay Sakhuja, "Proliferation Security Initiative", *Indian Defence Review*, vol. 19 (2004), p. 97; G.S.Khurana, "Proliferation Security Initiative: An Assessment", *Strategic Analysis*, vol. 28 (2004), p. 8.

[46] Boleslaw Adam Boczeck, Flags Of Convenience: An International Legal Study (1962) as cited in Tina Garmon, " International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the wake of September11th", *Tulane Maritime Law Journal*, vol. 27 (2003), p. 267; Julie A. Perkins, "Ship Registers: An International Update, *Tulane Maritime Law Journal*, vol. 22 (1997), p. 197; Becker, n. 9, p. 142; David Matlin, "Re-evaluating the Status of Flags of Convenience Under International Law", *Vanderbilt Journal of Transnational Law*, vol. 23 (1993), p. 1017.

[47] See Becker, Ibid. The lower cost of operating ships under a flag of convenience also gives many ship owners a competitive advantage over ships registered in states where regulations may be better enforced and more costly to comply with. But its significant to note that flag states like Liberia have apparently made serious efforts to improve safety records and ship standards, and the International Maritime Organization and various industry bodies have made improving the performance and image of flags of convenience a priority. See Mario Vlenzuela, Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction, in Davor Vidas and Willy Ostering ed., *Order for the Nations at the Turn of the Century* (1999) as cited in Becker, n. 9, p. 132; H.Edwin Anderson, "The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives", *Tulane Maritime Law Journal*, vol. 21 (1996), p. 156.

the 1958 Geneva Convention on the High Seas, which require a "genuine link between the state and the ship".[48] The prevalence of open registry system and the sometimes attenuated and mysterious links between the real parties controlling a given vessel and the vessel itself present obvious proliferation dangers.[49]

2.1.1.3 Seafarers

One of the great attractions of the open registries and flags of convenience is that they allow vessel owners to crew the ships with foreign nationals as a means to control costs. The employment of large number of foreign nationals makes the implementation of enhanced reliability checks almost impractical.[50] This threat is exacerbated by the existing instances of maritime certificate fraud that enables the seafarers to obtain their certificates fraudulently. If they can obtain fraudulent certificates, nothing can stop a terrorist from posing as a seafarer using the same system.

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[48] UNCLOS, n. 1, Article 91- on Nationality of Ships states:
"1) Every State shall fix the conditions for the grant of its nationality to the ships, for the registration of ships in its territory, for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2) Every State shall issue to its ships to which it has granted the right to fly its flag documents to that effect."
Convention on the High Seas 1958, which is considered as generally declaratory of established principles of international law in its Article 5, provides for the genuine link requirement. See U.N.Doc.A/Conf.13/L.52-L.55.
McDougal and Burke, n. 7, pp. 1032-5 stringently criticised the vagueness of the genuine link provision as included in the 1958 Convention on the High Seas. They opined that creation of a subjective standard by which states could unilaterally choose to recognise a particular vessel's nationality would result in the breakdown of the order of oceans. This provision has thus been reduced to nullity as it is considered to violate the basic principle of exclusive state jurisdiction in case of unilateral non-acceptance of a state's grant of nationality to a ship. Few activities contemplated by Proliferation Security Initiative (PSI), a new security initiative pioneered by US, which is the main subject of this study, seems to violate the right of State to grant nationality to a ship.

[49] See Becker, n. 9, p. 144.

[50] Anderson, n. 47, p. 163; Mellor, n. 10, p. 362.
As regards the development of Seafarers Identification Document, IMO's Maritime Safety Committee at its 75th Session (15-24 May 2002) invited International Labour Organisation (ILO) to do the same. ILO subsequently adopted a new Convention on Seafarers Identity Documents replacing the ILO's Seafarers' Identity Documents Convention, 1958 (No.158). The major feature of the new identification is a biometrics template based on fingerprint.

2.2 NEW RESPONSES TO THE THREATS

Although the above risks have always existed apropos maritime trade, the international community was living with these risks until 11 September 2001 incident. This incident and the resultant new maritime security measures[51] to the threats especially against terrorist activities is compelling the members of the international community to find a balance between the need for security and the smooth working of the international trade. India, as a major regional sea power, is also forced to decide on the conflicting issues of collective security and state sovereignty. It is in this context that a study of the seemingly two important new responses-PSI and the proposed amendments to the SUA regime-gains importance.

2.2.1 *Proliferation Security Initiative (PSI)*

PSI was announced by US President George W. Bush on 31 May 2003, to combat the threat posed by the proliferation of WMDs. It envisions the interdiction of illegal and dangerous cargo on the ground, in the air and at sea, to and from countries of proliferation concern.[52] The initiative originally had eleven members-Australia, Britain, France, Germany, Italy, Japan, Netherlands, Poland,

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[51] Major U.S and International Maritime Security Measures post- 9/11:
As regards containers and cargo-related risks a) Container Security Initiative (CSI); b) Customs-Trade Partnership Against Terrorism (C-TPAT) is a government business cooperation where participating businesses sign an agreement committing them to carry out a comprehensive self-assessment of the supply chain security using the C-PTAT security guidelines; c) 24-hours rule according to which ocean carriers must submit cargo manifests to US Customs 24 hours before US-bound containers are loaded in a foreign port.
As to the ship-related risks, the following measures were initiated: a) International Ship and Port Facility Security Code (ISPS Code); b) PSI; c) Protocol to the SUA Convention; d) 96-Hour Advance Notification of Arrival; and e) Maritime Transportation Security Act (US) 2002. For facing the challenges caused by seafarers, the following measures were adopted: a) International Seafarer Identification Card (ILO) but not accepted by US as a travel document or as a replacement for individual visa; b) US initiatives like Detain on Board and Guard service orders, 96-Hour Advance Notification Arrival, abolition of crew list visa and individual visa requirement and National Security Entry Exit Registration system.

[52] US Department of State, Fact Sheet, Bureau of Non-proliferation, Washington D.C, 27 December 2004 available at < http://www.state.gov/t/np/rls/fs/32725.htm >

Portugal, Spain, and United States. Later Canada, Denmark, Norway, Singapore, Turkey and Russia joined it making the total number of participants seventeen.[53]

In September 2003, the PSI participants agreed to a set of interdiction principles, which are to be the guiding principles for the PSI envisioned interdictions. It provides the objective of the initiative and the means to achieve this objective. The interdiction principles exhort the states to take effective measures to strengthen their domestic laws to support the interdiction efforts. These Statements of Interdiction Principles (SOPs) are meant;

> ...to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.[54]

The use of the words, "...builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes", as given in paragraph (1) of the SOPs[55] suggest that the PSI participants intend this initiative to be an enforcement mechanism for the existing web of treaties and international agreements[56] to limit the spread of nuclear, biological and chemical weapons.

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[53] US State Department reports that other than the seventeen PSI participating sates, sixty additional states have shown support for the initiative and the interdiction principles. But the US has disclosed only three countries' name- Argentina, Iraq and Georgia. See Fabrice Pothier, "The Proliferation Security Initiative: Towards a New Anti- Proliferation Consensus?", BASIC Notes, Occassional Papers on International Security Policy, 18 November 2004, available at http://www.basicint.org.

[54] The White House, Office of the Press Secretary, "Proliferation Security Initiative: Statement of Interdiction Principles", Fact Sheet, Washington D.C, 4 September 2003 (hereinafter SOPs) in para (1) < http://www.state.gov/t/np/rls/fs/23764.htm>; *see* Appendix I for the text of interdiction principles.

[55] See Appendix I, para (1).

[56] The elaborate set of existing non-proliferation treaty arrangements includes The Nuclear Non-Proliferation Treaty (NPT) Art.I and II; The Comprehensive Nuclear Test Ban Treaty (CTBT) Art.I; supervision of the International Atomic Energy Agency (IAEA); Biological and Toxin Weapons Convention (BWC) Art. I and III; Chemical Weapons Convention (CWC), with the compliance overseen by the Organisation for the Prohibition of Chemical Weapons (OPCW) Art.I,

The US has described the initiative just as a political commitment rather than a legally binding instrument. However, the wording of the principles suggests that the PSI be intended to be an embryo of a new legal regime.[57] There are a number of existing legal frameworks that regulate the use of air and the sea. Most significant of the regime, which governs the sea, is the UNCLOS 1982, which is signed and ratified by most of the PSI participants. The non-parties, specially the US the pioneer of this initiative has also accepted the customary status of UNCLOS.[58]

2.2.1.1 Objective and Scope of PSI

According to the Statement of Interdiction Principles (SOPs) the objective of the initiative is to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern. It emphasizes that the interdictions would be consistent with national legal authorities and relevant international law and frameworks, including the resolutions of the UN Security Council. The SOPs identifies four practical ways that PSI member states can pursue this objectives:

III and V and Missile Technology Control Regime (MTCR) Guidelines for Sensitive Missile-Relevant Transfers, paras I, III, IV and V.

[57] See n. 12.

[58] The US, although not a party to the UNCLOS, asserted that a large part of the Law of the Sea codified in the Convention relating to coastal state jurisdiction of territorial sea, EEZ., or continental shelf, as well as the rules relating to navigation and over flight through territorial sea and straits, had become part of customary law. James L. Malone, who was the Special Representative of the US President for the Law of the Sea Conference, stated: "The Convention does not make navigation and overflight provisions parochial to just the Convention and they apply to all parties and non-parties". See Statement by Leigh S. Ratiner, Deputy Chairman of the US delegation to the 11th Session of UNCLOS III in "U.S Foreign Policy and the Law of the Sea", *Hearing before the Committee on Foreign Affairs of the House of Representatives*, 97th Congress, 2nd sess., 17 June, 12 September 1982 (Washington D.C, 1982), pp. 193-95, 1011-12 as quoted in R.P.Anand, *Studies in International Law and History: An Asian Perspective* (Lancers Book: New Delhi, 2004), p. 189.

a) by undertaking effective measures, either alone or in concert with other states,[59] for interdicting the transfer or transport of WMD or related materials;
b) by adopting streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity;
c) by reviewing and working to strengthen the relevant national and international legal authorities where necessary to accomplish these objectives; and
d) by taking specific actions in support of interdiction efforts regarding cargoes of WMD and related materials.

U.S Undersecretary of State for Arms Control and International Security John Bolton described the long-term objective of the PSI as to create "a web of counter proliferation partnerships through which proliferators will have difficulty carrying out their trade in WMD and missile-related technology."[60]

The targets of this initiative, according to the SOPs, are "States and non-states actors of proliferation concern."[61] According to the SOPs, this term:

> *generally* refers to those countries or entities that the PSI participants involved establish, should be subject to interdiction activities because they are engaged in proliferation through: (a) efforts to develop or acquire chemical or biological, or nuclear weapons and associated delivery systems; or (b)transfers (either selling, receiving or facilitating) of WMD, their delivery systems, or related materials.[62]

This definition implies that the PSI participants themselves decide the targets of the initiative. Further, if the definition of non-state actors can be presumed as that which does not come within the purview of the traditional

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[59] The use of the words "either alone or in concert with other states" shows that the participating states do not intend the interdiction measure to be solely a multilateral or collective measure against the WMD proliferation. It provides scope for unilateral acts against suspected ships.

[60] Wade Boese and Miles Pomper, "The New Proliferation Security Initiative-An interview with John Bolton", *Arms Control Today*, 4 November 2003.

[61] See n. 54.

[62] See n. 54, SOPs, operative para 1.

definition of state,[63] the scope of the initiative regarding the potential targets seems to be all encompassing.[64]

2.2.1.2 Analysis of the PSI Interdiction Principles

A careful study of the SOPs reveals the following:

a) a study of the drafting background of the SOPs show that it was initiated to implement the UN Security Council Presidential Statement of January 1992,[65]which was delivered during a time of flux and change in the international system caused by the dissolution of the Soviet Union and the Iraq war.

b) An analysis of the definition given to the "states and non-state actors of proliferation concern" shows that the SOPs have been drafted to maximise the flexibiltity.

c) Moreover the SOPs uses the words "non-state actor" and "entity" as synonyms. This phraseology highlight the difficulty in assessing this initiative from the standpoint of international law.

d) The PSI member states can possibly make the list of suspected proliferators longer.

e) The initiative uses the description "weapons of mass destruction" interchangeably with the term "chemical, biological and nuclear weapons."[66]

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[63] According to Article 1 of the Montevideo Convention on the Rights and Duties of States (26 December 1933) state refers to an entity with a permanent population, a defined territory, government and capacity to enter into relations with other states. See Ian Brownlie, *Principles of Public International Law* (Clarendon Press : Oxford, 1973), p. 74

[64] A non-state actor would include all other entities from terrorist organisations to legitimate organisations and firms.

[65] United Nations Security Council "Note by President of the Security Council", UN Doc S/23500, 31 January 1992 in the context of the dissolution of the Soviet Union and ousting of Iraq from Kuwait with the authority of the UN. The Security Council established that proliferation of all weapons of mass destruction constitutes a threat to international peace and security and that the states are to resolve any of these matters threatening the maintenance of regional and global stability in a peaceful manner in accordance with the Charter principles.

[66] The term WMD is thought to have been first used in 1937, when the British newspapers referred to German bombers in action in Spain as "Weapons of Mass Destruction". The grouping together of various types of weapon systems under the broad definition of WMD is not proper since the

It is to be noted that neither treaty law nor customary law contains an authoritative definition of WMD. According to the Vienna Convention on the Law of the Treaties,1969, a treaty shall be "...interpreted ...in acordance with the ordinary meaning given to the terms...in their context and in the light of its object and purpose".[67]

f) There are difficulties in streamlining and coordinating intelligence procedures which is to form the basis of the interdiction in a given case.

g) The territorial application of the PSI seems to cover the various sea zones like the internal waters of the participant state, the territorial waters of the participant state, the contiguous zone of the participant state and the high seas. However, the big question is whether or not this initiative is applicable on the high seas? This issue would be addressed in the next chapter, which exclusively analyses the compatibility of this initiative with the existing international maritime security regime.

2.2.1.3 Interdictions

The success or failure of the PSI, however, is to be judged in terms of its effectiveness on the ground. One is therefore compelled to ask the following questions to decide on the efficacy of the initiative:

i. Has this initiative helped in stemming the flow of WMD and their delivery systems to those states and non-state actors, which have an ambition to procure illicit unconventional weapons?

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scale of death and destruction caused by each of the weapon system is different, nuclear weapon being most lethal and devastating. Martin Zuberi, "Terrorist Use of Chemical and Biological Weapons: An Assessment", *AAKROSH*, vol. 11, January (2005), p. 60; Nancy Turtle Schulte, "*Disarmament and Destruction of Chemical, Nuclear and Conventional Weapons* (NATO ASI Series: Kluwer Academic Publishers, 1996); Susan Wright, ed., *Biological Warfare and Disarmament: New Problems and New Perspectives* (Rowman and Littlefield Publishers: New York, 2002); Robert Hutchinson, *Weapons of Mass Destruction. The No-Nonsense Guide to Nuclear, Chemical And Biological Weapons Today* (Weidenfeld and Nicholson: London, 2003); Nadine Gurr and Benjamin Cole, *The New Face of Terrorism: Threats From Weapons of Mass Destruction* (I.B.Tauris Publishers: London, 2000).

[67] Article 31(1).

ii. Has it increased the political and economic costs of trafficking in WMD materials and their delivery systems?

iii. How far has this initiative been accepted by the members of the international community as legal within the contours of international maritime law?

It is submitted that a study of the interdictions before and after the announcement of PSI would throw light upon the present status of this initiative as well as answer the above questions.

Prior to the PSI, in 2001, the NATO forces discovered a suspected *al-Qaeda* terrorist nicknamed Container Bob[68] hiding in a shipping container in Gioia Tauro, Italy. This resulted in the initiation of NATO operation "Active Endeavour" in the Mediterranean. Later in July 2002, four NATO members intercepted a ship in the Gulf of Oman, which was transporting four suspected al-Qaeda terrorists.[69]

The most publicised ship interdiction preceding the PSI was the *So San* incident, which involved NATO forces not including US in the Arabian Sea. On 10 December 2002, Spanish naval vessels patrolling the Arabian Sea were alerted by the US intelligence to the presence of a suspicious cargo vessel in the Indian Ocean en route from North Korea. The ship displayed no flag and Spanish naval forces boarded the ship six hundred miles from the coast of Yemen. Upon searching the vessel, fifteen scud missiles hidden under sacks of cement were found, and the ship's manifest had listed only cement. Since the vessel was not flying its flag, the Spanish authorities acted lawfully under the UNCLOS in boarding the ship.[70] The ship was later determined to be one registered in Cambodia, as *So San*. On 11 December, however, the vessel was released with its cargo and allowed to continue to Yemen. The US Government acknowledged the

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[68] See Kelleher, n. 37.

[69] See Becker, n. 9, p. 152.

[70] UNCLOS, Article 110 (1) (d).

lack of "clear authority" for seizing the missiles since the sale between North Korea and Yemen was not prohibited under any international agreement. Furthermore, there is no provision in the UNCLOS or other sources of international law that explicitly prohibits the transport of ballistic missiles or WMD materials by sea.[71] Though the decision of the American authorities to release the ship is praised by some as demonstration of US willingness to respect international law under the present circumstances,[72] some argue that it might be a convenient byproduct of separate American objectives, rather than respect for international law in case of ship interdictions.[73]

The most publicised successful post-PSI interdiction is that of a German ship, *BBC China*, transporting thousands of gas centrifuge components from Dubai to Libya in October 2003. American and British intelligence learned of the suspected shipment and contacted the German government. The ship was diverted to the Italian waters and the suspected cargo was seized. This incident not only seemed to justify PSI but it also validated its ability to facilitate international cooperation and produce tangible results. This interdiction is believed to have led Libya to take decision to terminate its WMD programmes three months later.

In addition to the *BBC China* incident, a few other PSI-related interdictions are also reported. US Under-Secretary of State Bolton acknowledged that some interdictions have already taken place, but for operational reasons such interdictions are rarely announced or discussed in public.[74] It is expected that

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[71] See Inventory of International Non-Proliferation Organisations And Regimes, Center for Non-Proliferation Studies, Proliferation Security Initiative available at <http://cns.miis.edu/pubs/inven/pdfs/psi.pdf>; Frederick L.Kirgis, "Boarding of North Korean Vessel on the High Seas", *ASIL Insights*, available at <http://www.asil.org/insights/insigh94.htm>

[72] Michael Byers, "Policing the High Seas: Proliferation Security Initiative", *American Journal of International Law*, vol. 98 (2004), p. 527 describing the vessel's release as "reflective of the seriousness with which the high seas regime is taken by the United States". See also Becker, n. 9, p. 153.

[73] Becker, Ibid.

[74] John Bolton, "The New Proliferation Security Initiative", interview by Wade Boese and Miles Pomper, *Arms Control Today*, 4 November 2003, as cited in Presbo and Davis, n. 12, p. 102.

future interdiction activities will focus on key "choke" points, strategic passages and harbours on the busiest trade routes, although the geographical limitations of the current membership suggests that many sea routes between the countries of proliferation concern are not presently covered. But the PSI's greatest success till date is the boarding agreements the US was able to sign with the following three major ship registries and flags of convenience states of high strategic value: Liberia,[75] Marshall Islands[76] and Panama.[77]

[75] The Boarding Agreement between Liberia, world's second largest ship registry, and US was signed on 11 February 2004 (Liberia and Panama, together account for nearly fifteen percent of the roughly 50,000 large cargo ships in the world). Ibid.

[76] On 13 August 2004, Marshall Islands also signed the Boarding Agreement with US. Ibid.

[77] On 12 May 2004, the US signed Boarding Agreement with Panama, the world's largest ship registry, thus projecting that its ships would not be easily manipulated for improper purposes. See Becker, n. 9, p. 181.

Table of PSI-related Events[1]

	2003
May 31	PSI announced by US President Bush in Krakow, Poland
June 12	Madrid meeting of the 11 original members.
June 23	Sudan bound *Baltic Sky* intercepted by Greek authorities in the Greek waters discovering a large cache of explosives and detonators.
July 1	Spanish authorities seize ship carrying South Korean arms to Senegal.
July9-10	Brisbane Meet of the PSI participants creating information sharing plans and interdiction training plans.
Aug 8	North Korean freighter boarded by Taiwanese authorities on the ground of customs violation and discovered and seized 158 barrels of phosphorous pentasulphide.
Sep 3-4	PSI participants meet in Paris; Statement of Interdiction Principles issued.
Sep12-14	Australia leads "Operation Pacific Protector" training exercises in the Pacific.
October	Interception of *BBC China* transporting thousands of gas centrifuge components from Dubai to Libya. Reports indicate that more than fifty countries "express support" for the PSI; Spain hosts maritime interdiction exercise.
Oct 8-10	PSI participants meet in London but fail to agree on Model Boarding Agreements; London hosts first PSI air interdiction exercise.
Nov	China co- operates with US to block a chemical shipment set to leave China for North Korea.
Dec19	US authorities seize a boat carrying two tons of hashish in the Persian Gulf near the Strait of Hormuz.

[1] See Becker, n. 9, pp. 157-58.

	allegedly connected to al Qaeda.
	2004
January	US lead "Operation Sea Sabre" training exercise in the Arabian Sea.
February	Italy hosts "Exercise Air Brake 04"; Canada, Norway and Singapore become core PSI participants.
Feb 13	Ship Boarding Agreement between Liberia and US.
March	Germany hosts "Operation Hawkeye", an airport based interdiction exercise.
April 28	Adoption of UN Security Council Resolution 1540.
May 12	US-Panamanian Ship Boarding Agreement announced.
May 31	PSI anniversary meets in Krakow.
June 1	Russia becomes a core participant of PSI
Aug	Marshall Islands and US sign Ship Boarding Agreement.
October	Joint naval exercise hosted by Japan with PSI participant and non-participant states.

2.2.1.4 Inference

From the above instances, it could be safely inferred that the initiative has so far helped in procrastinating the transfer of WMD and their delivery systems to and from states and non-state actors of proliferation concern rather than curbing the illicit transport of unconventional weapons (except the case of Libya that abandoned WMD programme after *BBC China* incident). Nonetheless, it has increased the political and economic costs of trafficking in WMD materials and their delivery systems due to enhanced security measures. As regards the acceptance of this initiative, the table on PSI-related events proves that the current participants are mainly developed nations in the North. The PSI participants need to harness support from South and South East Asia, Middle East, Africa and South America. They may also need to consider offering economic and other security incentive in order to widen participation in the South. The thrust should be on deepening links between members in relation to law enforcement and intelligence cooperation.

As in any regime, getting the right balance between seeking to broaden and deepen the relationship is a difficult task. One way forward is to work with the IMO in amending the SUA Convention, to further develop the PSI and especially to seek the authority to engage in high seas interdictions.

2.2.2 ***Proposed Protocol to the SUA regime***

The SUA regime, which is considered one among the twelve[79] fundamental international instruments against terrorism, was introduced to

[79] Convention on Offences and Certain Other Acts Committed on Board Aircraft 1969; Convention for the Suppression of Unlawful Seizure of Aircraft 1971; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1973; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation 1988; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents1973; International Convention Against the Taking of Hostages1983; Convention on the Physical Protection of Nuclear Material 1980; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991; International

ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against passengers and crew, and the placing of explosive devices on board a ship.[80]

The regime provides for the obligation on the state parties either to extradite or prosecute alleged offenders, thereby ensuring that those responsible for perpetrating acts of violence are brought to justice.[81]

The IMO's Legal Committee has been reviewing[82] the SUA Convention and its related Protocol in the wake of 11 September 2001. The proposed amendments seek to significantly broaden the range of offences to include acts of terrorism which threaten the security of passengers and crews and the safety of ships. It includes expanding the extradition and prosecution obligations of Contracting Governments and provisions for boarding vessels suspected of being involved in terrorist activities.[83]

2.2.2.1 Review of the SUA Regime

In November 2001, the IMO Assembly adopted resolution A.924 (22)[84] calling for a review of measures and procedures to prevent acts of terrorism that

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Convention for the Suppression of Terrorist Bombings 1997; International Convention for the Suppression of the Financing of Terrorism 1999.

[80] Article 3 of SUA Convention provides for the "Offences". While the UNCLOS sets forth various normative provisions without specifying any act to be an "offence", the SUA Convention makes a person criminally responsible for violation of its Article 3. Thus, it shows an attempt on the part of IMO to curtail unlawful activities against the safety of maritime navigation even in 1988, though the word "terrorist" is not mentioned in the text of the convention. This is one of the main inadequacies in the present law regarding maritime security.

[81] Article 6 of the SUA Convention and Article 3 (4) of SUA-PROT.

[82] Article 20 of the Convention provides for the review or amendment of the Convention at the request of one third of State parties, or ten State Parties, whichever is higher.

[83] Review of the Legal Committee (LEG) 88th Session, of 19-23 April 2004 on the review of the SUA Convention and the SUA-PROT.

[84] IMO Assembly Resolution A.924 (22), titled "Prevention and Suppression of Acts of Terrorism Against Shipping", was adopted on 20 November 2001 in the aftermath of the terrorist attacks of 11 September, 2001. The Resolution instructed the Maritime Safety Committee and other relevant IMO organs to review the existing instruments. It specifically referred to the Assembly Resolution A.584 (14), the two circulars MSC/Circ.443 and MSC/Circ.754, and the SUA Convention 1988.

threaten the security of passengers and crews and the safety of ships. The IMO Legal Committee, which consists of all member states of the IMO, is in charge of the revision of the SUA Convention and its Protocol. The Legal Committee proposed amendments that seek to significantly broaden the range of offences to include acts of terrorism which threaten the security of the passengers and crews and the safety of ships; expand the extradition and prosecution obligations of the contracting governments; and introduce provisions for boarding of vessels suspected of being involved in terrorist activities

At its October 2002 meeting,[85] the Legal Committee discussed seven new proposed offences, four of which directly concerned with terrorist activities, while the other three were directly relevant to the PSI. One of the new offences concerned the presence of tools or substances not usually used on a ship but useful in making a WMD. Two other new proposed offences concerned the use of the ship for transport of substances to be used for mass destruction.

During its 89th session,[86] the Legal Committee continued revising the SUA Convention, taking into consideration other conventions and protocols related to terrorism. Most delegations expressed support for the revision and strengthening of the SUA Convention in order to provide a response to the increasing risks posed to maritime navigation by terrorism. Nevertheless, several delegations drew attention to the need to ensure that the prospective SUA Protocols did not jeopardize the principle of freedom of navigation and the right of innocent passage as prescribed in the UNCLOS nor the basic principles of international law and the operation of international commercial shipping.

The Legal Committee at its 2005[87] meeting finalized the Draft Protocol to the Convention, which is scheduled to come into force in October 2005. The Convention will come into force only if all the State parties to the Convention

[85] IMO, LEG 84th Session held on 22-26 April 2002.

[86] IMO, LEG 89th Session held between 25-29 October 2004.

[87] IMO, LEG 90th Session held between 18 and 19 April 2005.

agree to it. The Committee has proposed inclusion of the transport of nuclear material with the knowledge of its intended use in a nuclear explosive activity as an offence. The coming into effect of the Draft Protocol would result in legalising the boarding of ships suspected of carrying nuclear, chemical or biological weapons. The State parties need to be cautious in incorporating boarding provisions, since these provisions might possibly affect the dual use commerce, which are very important for developing countries like India. Once the Draft Protocol enters into force, all the parties to the Convention would be obligated to effectuate the provisions.

2.2.2.2 Analysis of the Proposed Draft Protocol

The ninetieth session of the Legal Committee seems to have finalised the Draft Protocol that seeks to incorporate the following:[88]

1. The broadening of the definition of offence by prescribing as illegal:
   a. the carriage of WMDs,
   b. the carriage by non-nuclear weapon states, of nuclear fissile and fusion able material, and
   c. the carriage by non-nuclear weapon states of dual-use technologies.
2. Defining the term 'transport' as means to initiate, arrange or exercise effective control, including decision making authority over the movement of a person or item so as to understand the implications of the offences categorized under a, b and c above.
3. Further, to prevent the above-mentioned offences categorized under the said articles in the proposed amendments to the SUA Convention and SUA-PROT, the parties to the SUA are obliged to undertake interdiction of the ships on high seas. The interdicting state needs to take the interdicted ship to the nearest port of call for boarding, search, seizure and detention of the ship.

[88] Ibid.

4. In addition to this, the proposed amendments also seek to incorporate various provisions pertaining to liability and compensation in case of damage to the ship while it is boarded and searched.

The states have reiterated their commitment towards UNCLOS provision regarding the boarding of ships on the high seas which mandates the consent of the flag state for the boarding of a ship in that maritime jurisdictional zone.[89] This provision is included impliedly in the SUA-PROT by making it obligatory on the part of the flag state to give consent within a reasonable time. Failure on the part of the flag state may result in its contempt by other states.

[89] Ibid.

Chapter III

Implications to the Existing Maritime Security Regime

Chapter III

IMPLICATIONS TO THE EXISTING MARITIME SECURITY REGIME

The two important conventions that play a salient role in the prevention of unlawful activities at sea are the UNCLOS 1982 and the SUA Convention 1988 as well as its related Protocol, SUA-PROT 1988. These legal instruments constitute the existing core maritime security regime as against the many conventions on maritime safety enacted by the IMO. [90]

3.1 UNCLOS

All PSI participants except Denmark, Turkey and the United States have signed and ratified the UNCLOS. The provisions contained in the UNCLOS are to a large extent a codification of the customary international law. All non-signatory nations especially US recognise the right to freedom of navigation and innocent passage and have proclaimed themselves bound by these principles under customary international law in many occasions.[91] Since each state enjoys civil and criminal jurisdiction over ships flying its own national flag, the PSI raises questions pertaining to the civil and criminal jurisdiction of foreign vessels in the different maritime zones. In 1927 the Permanent Court of International Justice (PCIJ) in the famous *S.S. Lotus Case* [92] decided that "vessels on the high

[90] International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F), 1995; International Convention on Maritime Search and Rescue, 1979; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978; International Convention for the Safety of Life at Sea (SOLAS), 1974; Convention on the International Maritime Satellite Organization, 1976; International Convention for Safe Containers, 1972 (CSC); Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs); The Torremolinos International Convention for the Safety of Fishing Vessels, 1977; Special Trade Passenger Ships Agreement, 1971& Protocol on Space Requirements for Special Trade Passenger Ships, 1973; and International Convention on Load Lines, 1966.

[91] See n. 2; n. 58.

[92] *S.S. Lotus Case*, No. 9, 1927, *PCIJ Series* A 10, Part IV.

seas are subject to no authority except that of the state whose flag they fly." Therefore, an interdiction would be legal only when carried out by the target ship's own Flag State. Most anticipated PSI operations on the high seas are likely to fail this test, since they will be undertaken by States other than the Flag State.

3.1.1 *The Sovereignty of Coastal States*

According to the UNCLOS, the sovereignty of a coastal State extends beyond its land territory and internal waters to an adjacent belt of the sea known as the territorial sea.[93] The territorial sea extends to a limit of 12 nautical miles, measured from the base lines, most commonly being the low-water line along the state's coast.[94] Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.[95]

Though the sovereignty over internal waters is not explicitly defined in the UNCLOS, it can be inferred that states have absolute sovereignty in their internal waters. Sovereignty over the territorial sea is subject to the limitation of the right of innocent passage, whereby "ships of all states enjoy the right of innocent passage through the territorial sea."[96] Passage is defined as innocent "so long as it is not prejudicial to the peace, good order or security of the coastal state."[97]

Outside the territorial sea is the contiguous zone, where a coastal state "... may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."[98]

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[93] UNCLOS, Article 2 (1).

[94] UNCLOS, Article 3 and 5.

[95] UNCLOS, Article 8 (1).

[96] UNCLOS, Article 17.

[97] UNCLOS, Article 19(1), 19(2) (a)-(i).

[98] UNCLOS, Article 33 (a) and (b).

The Exclusive Economic Zone (EEZ) lies outside the contiguous zone, where the sovereign rights granted to the coastal states are limited to those relating to the economic resources of the EEZ. Outside the EEZ lies the high seas where "no state may validly purport to subject any part of the high seas to its sovereignty."[99] The rights of the coastal states to stop and board vessels on the high seas are limited to those circumstances prescribed by UNCLOS Article 110, which provides that:

> ... a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity... is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
>
> (b) the ship is engaged in the slave trade;
>
> (c) the ship is engaged in unauthorised broadcasting and the flag state of the war ship has jurisdiction under Article 109;
>
> (d) the ship is without nationality;
>
> (e) or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

3.1.2 *Criminal Jurisdiction in Maritime Zones*

The architect of the PSI, the US Under Secretary of State, Bolton, stated at the 2003 Operational Meeting of the PSI that, "... we can find a variety of ways to interdict illegal shipments when the vessels carrying them come to port, given that sovereign power is at its greatest in national waters."[100] This statement shows that Bolton has clubbed the different UNCLOS maritime zones by using the term 'national waters', which in reality possess varied extend of legal jurisdiction for interdiction of shipping suspected of carrying WMD materials.

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[99] UNCLOS, Article 88.

[100] John Bolton, "Legitimacy in International Affairs: The American Perspective in Theory and Operation", Remarks to the Federalist Society, Washington D.C., 13 November 2003.

3.1.2.1 Internal Waters

In internal waters, the States enjoy full criminal jurisdiction over ships carrying illegal WMD and or associated delivery systems. They are free to board and search those vessels as long as they remain in the port area, which forms part of the coastal states' internal waters. They can also seize the cargo brought into the internal waters, if the transport of the goods in question is contrary to the national laws. An illustration of such a seizure in internal waters is the "*Ku Wol San*" incident.

On 25 June 1999, the "*Ku Wol San*", a 9600-ton steamer owned by a North Korean company docked in the Indian west coast port of Kandla and began unloading sugar taken abroad in Bangkok. The vessel's destination was Malta, and was scheduled to go there via the port of Karachi, in Pakistan. It later turned out that the recipient's addresses on the cargo manifesto was fabricated. When the Indian authorities boarded the vessel, they found missile production blueprints, drawings and instruction manuals in addition to the sizeable shipment of missile components and production materials with Chinese markings. Indian officials later held that carrying military cargo for a third country, after proper declaration, constituted no offence under the customs law, but that a faulty cargo manifesto certainly amounted to a criminal offence.[101] The cargo was confiscated and the ship's master and chief officer were arrested and held on remand, who were later released after nearly three months without pressing any charges.

Notwithstanding the outcome of the affair, it is important to note that no State, except North Korea, raised any objections to the Indian authorities handling of the incident, indicating that the approach was indeed permissible under international law.

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[101] D.V.Maheshwari, "North Korean Ship case gets Curiouser", *Financial Express*, 9 July 1999; See also Maheshwari, "'Scud case' is dud. Dropped without thud", *Financial Express*, 17 September 1999.

3.1.2.2 Territorial Waters

The rule under UNCLOS is that a foreign ship "passing through"[102] the territorial waters is not under the criminal jurisdiction of the coastal state.[103] It should also be noted that there is uncertainty on whether this principal rule is one of comity or of law.[104] In practice the common law countries seem to follow the rule as one of comity, whereas the civil law countries regard them as binding.[105] Therefore the common law PSI participants may accept to criminalise the proliferation of WMD and enact strict export controls consistent with international standards. This in turn would enable them to legitimise naval interdiction of foreign ships on their territorial waters in accordance with the assumption that coastal states have unlimited criminal jurisdiction within their own territorial waters. The attempt on the part of US to bring forth a UN Security Council Non-Proliferation Resolution succeeded with the adoption of Security Council Resolution 1540 of 28 April 2004.

According to the UNCLOS, the circumstances under which the coastal state has criminal jurisdiction are:[106]

(a) if the consequences of the crime extend to the coastal state;
(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state; or
(d) if such measures are necessary for the suppression of illegal traffic in narcotic drugs or psychotropic substances.

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[102] Note that the ship has to be passing through, if the ship is leaving a port of the coastal state and is steaming towards the high seas, the coastal state may still exercise jurisdiction over it under UNCLOS, Article 27 (3).

[103] UNCLOS, Article 27 (1).

[104] Persbo and Davis, n. 12, p. 48.

[105] Ibid.

[106] UNCLOS, Article 27 (1) (a) and (d).

PSI SOPs' operative paragraph 4(c) provides that the participating State should "seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD related cargoes (not defined in the interdiction principles) in such vessels that may be identified by such states". This could be considered analogous to the above paragraph (c) of Article 27 of the UNCLOS. Thus, if one PSI participant suspects a ship, transiting its territorial waters and flying the flag of another PSI participant of carrying WMD cargoes, it can ask for a diplomatic agent of the other state to request the other participating state's assistance. It is when the suspected ship belongs to a nation that refuses to provide consent for a boarding action that paragraph (a), (b) and (d) come into play.

In terms of WMDs, most PSI participating States already have criminal laws governing the transfer of such weapons.[107] India has enacted a criminal legislation, The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005, which govern the transfer of WMDs and their delivery systems.[108]

The "*Baltic Sky*" incident is an example of interdiction in the territorial waters which proved that the coastal state can exercise criminal jurisdiction after the diplomatic agent or the consular officer of the flag state is notified.[109]

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[107] In the United Kingdom, participation in the transfer of nuclear weapons already constitutes an offence according to the 2000 Anti-Terrorism, Crime and Security Act, participation in the transfer of biological weapons constitutes an offence under the Biological Weapons Act 1974 and participation in the transfer of chemical weapons under the Chemical Weapons Act 1996. In Australia, according to the Australian Weapons of Mass Destruction (Prevention of Proliferation) Act of 1995, any services rendered that may assist a WMD-programme, may under certain circumstances, be an offence.

[108] For the text of the Act, see Appendix II.

[109] The "*Baltic Sky*" was a ship previously registered under the name "*Sea Runner*" in Cambodia. On the detention and eventual release by the British authorities on the ground of insufficient documentation and poor sea going quality, it set sail under a new name and a new flag. The "*Baltic Sky*" was spotted in the Greek territorial waters on 23 June 2003 sailing under the flag of convenience from Comoros, with large amount of explosives and detonators on board bound for Sudan. The ship was detained; the Greek authorities remanded the captain and crew for illegally transporting explosives and failing to declare that in the cargo manifest. See Becker, n. 9, p. 157.

3.1.2.3 Contiguous Zone

The contiguous zone is described as the belt of water adjacent to the territorial waters, which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[110] In the contiguous zone the coastal state may only exercise control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.[111]

In essence, the jurisdiction of the coastal state diminishes substantially in the contiguous zone. In order to intercept a ship carrying WMD components in these waters, the state must have enacted laws making an unauthorised cargo an infringement of its customs laws. In addition, the cargo needs to be heading towards the mainland or must have originated on the mainland heading towards international waters. In *The M/V Saiga*, the International Tribunal for the Law of the Sea held that neither the ships loitering in the contiguous zone without entering territorial waters nor ships merely passing through the contiguous zone may be intercepted on the basis of national customs laws.[112]

3.1.2.4 Exclusive Economic Zone (EEZ)

The EEZ is an area, which is 200 nautical miles from the baselines from which the territorial sea is measured.[113] In the EEZ the coastal state may exercise jurisdiction only relating to:

(i) the establishment and use of artificial islands, installations and structures;

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[110] UNCLOS, Article 33(2).

[111] UNCLOS, Article 33(1) (a)-(b).

[112] International Tribunal for the Law of the Sea, "*The M/V Saiga (No.2) Case*" (Saint Vincent and the Grenadines v. Guinea), Case No. 2, 1 July 1999.

[113] UNCLOS, Article 57.

(ii) marine scientific research,

(iii) the protection and preservation of the marine environment.[114]

Thus, in particular an EEZ is designed to protect the economic benefits that a country can gain from its adjoining oceans; particularly those linked to fishing and mining. As regards the interdiction of a ship carrying WMDs and related materials, the EEZ is to be regarded as the international waters and only with great difficulty could a State argue that an interdiction is necessary for the protection and preservation of its marine environment. [115]

3.1.2.5 International Waters

International waters or 'high seas' embody all waters that are not part of a nation's territorial waters, contiguous zones or EEZ. The law of the sea severely restricts the coastal state's option to enforce its laws on these waters. Ordinarily, on the high seas, a ship is under the "exclusive jurisdiction" of the state whose flag it flies.[116]

The PCIJ confirmed this in 1927 in the famous *S.S.Lotus Case* [117] where it held:

> It is certainly true that apart from certain special cases which are defined by international law, vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.[118]

The PCIJ also held, however, that this in no way exclude the jurisdiction of other nations:

> ...it follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship

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[114] UNCLOS, Article 56 (1) (b) (i)-(iii)

[115] Persbo and Davis, n. 12, p. 52.

[116] UNCLOS, Article 92.

[117] See n. 92.

[118] Ibid.

flies. If, therefore, a guilty act committed on the high seas produces its effects... in foreign territory, the same principles must be applied as if the territories of two different States were concerned...[119]

And the PCIJ concluded that:

"... there is no rule in international law prohibiting the state to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent. This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above...In the Court's opinion, the existence of such a rule has not been conclusively proved."[120]

In the context of the PSI, this ruling suggests that even where a state "X" may consider the WMD trafficking as likely to have an impact on its own territory, if the alleged offence is being committed on a foreign ship on the high seas, State "X" is not authorised to interdict and convict the WMD traffickers while the ship remains on the high seas. This is because the legal basis for interdicting or interfering with ships on the high seas is severely restricted and is only permissible in a few cases.

There is only one exception to this non-interventionist rule that is a warship can be attacked during times of war. In regards to merchant shipping, a few justified interdiction situations have materialised over the years. They are:

(a) stateless ship can be interdicted;[121]

(b) a naval vessel can interdict a ship to ascertain its nationality;[122]

(c) a naval vessel can exercise the right of "hot pursuit";[123]

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[119] Ibid.

[120] Ibid.

[121] UNCLOS, Article 110 (1) (d).

[122] UNCLOS, Article 110 (1) (e).

[123] UNCLOS, Article 111.

(d) a right to interdict a merchant vessel on the basis of a bilateral or multilateral treaty.[124]

A recent example of an interdiction in the high seas involved a Cambodian registered ship, the *So San* as described in the preceding Chapter 2. This incident raised the important question of permissible seizure from the boarded vessel and shows that, in practice, the US and other Western naval power may use this to harass 'legitimate' shipping by boarding vessels like *So San* even if the cargo cannot be confiscated. Any act that affects legitimate shipping would challenge two key principles of the UNCLOS: right of innocent passage and freedom of navigation.

All these guiding principles in UNCLOS have acquired customary international law status. So, any new maritime order that is attempted to be effectuated needs to be tested on the touchstone of this basic and established international maritime legal system.

3.2 UNCLOS and PSI

The above study of the provisions of the UNCLOS and the interdiction principles envisaged in the PSI evinces the incompatibility between the treaty law and the new initiative which is speculated to form the preliminary basis for the emergence of a new maritime order.

3.2.1 *Right of Innocent Passage*

The existence of the right of innocent passage within the territorial waters of a foreign state is not questioned under international law.[125] The

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[124] UNCLOS, Article 110 (1).

[125] The law relating to the right of innocent passage to foreign ships through the territorial waters developed over a century with the conclusion of several agreements by maritime powers to regulate the passage through specific straits and on the emergence of general expectation that for merchant shipping innocent passage through straits is open to all on the basis of equality. For a comprehensive study of the growth of the concept of innocent passage, see McDougal and Burke, n.7; P. Sreenivasa Rao, *The Public Order of the Ocean Resources: A Critique of the Contemporary Law of the Sea* (The M.I.T. Press: The Cambridge, 1975); C.J. Colombos,

customary status of the right of innocent passage was affirmed by the International Court of Justice in the *Corfu Channel* Case[126] (1949) in a dispute between Albania and the United Kingdom where the court held that the coastal state has no competence arbitrarily to prohibit foreign warships and merchant shipping from enjoying access to straits under its exclusive control. Further, it is the 'motive' rather than the 'manner' of passage that is crucial in the determination of its innocence.[127]

According to the UNCLOS, the Ships of all states, whether coastal or land-locked enjoy the right of innocent passage through the territorial sea.[128] For the purposes of the UNCLOS, the right of innocent passage is defined as "continuous and expeditious' navigation through the territorial sea for the purpose of either traversing that sea without entering internal waters or proceeding to or from internal waters.[129] The passage is considered non-innocent if it is prejudicial to the peace, good order or security of the coastal state. The convention enumerates which activities are regarded as non-innocent. This enumeration has been interpreted in a joint statement issued by the United States and the Soviet Union, in which the parties held that the enumeration is exhaustive list of

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International Law of the Sea (Longmans: London, 1967); see Rao, "Legal Regulation of Maritime Military Uses", *Indian Journal of International Law*, vol. 13 (1973), p. 425.

[126] See, Great Britain v. Albania, *ICJ Reports* 1949, p. 28; Nicaragua v. United States of America, *ICJ Reports* 1986, p. 111 where the court observed that UNCLOS Innocent Passage regime 'does no more than codify customary international law on this point'. See O'Connell, n. 6, p. 265; Churchill and Lowe, n. 6, p. 87; Shekhar Ghosh, "The Legal Regime of Innocent Passage Through Territorial Sea", *Indian Journal Of International Law*, vol. 20 (1980), p. 216.

[127] Thomas A. Clingan, *The Law of the Sea: Ocean Law and Policy* (Austin and Winfield: London, 1994), p. 99. He observes that by looking behind a particular situation the motive of the vessel in the territorial sea can be assessed. Bernard H. Oxman, "The Regime of Warships under the United Nations Convention on the Law of the Sea", *Virginia Journal of Transnational Law*, vol. 24 (1984), p. 850 opines that 'the test for innocence is linked to the activities while in the territorial sea, rather than passage itself'.

[128] See Rodger Wolfrum, "The Legal Order for Seas and Oceans", in Myron H. Norquist and John Norton Moore, ed., *Entry into Force of the Law of the Sea Convention* (Martinus Nijhoff Publishers: The Hague, 1995), p. 169.

[129] UNCLOS, Article 17.

activities that would render passage not innocent.[130] The United States has never challenged the validity of this statement since it was adopted in 1989 and has also been authoritatively quoted in international legal literature.[131]

Article 19 (2) of the UNCLOS lists the non-innocent activities as follows:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal state;

(d) any act of propaganda aimed at affecting the defence or security of the coastal state;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;

(h) any act of willful and serious pollution contrary to the convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.[132]

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[130] See Persbo and Davis, n. 12, p. 55.

[131] Ian Brownlie, *Principles of Public International Law* (Oxford University Press: London, 2003), p. 226.

[132] UNCLOS, Article 19(2) (a)-(i).

This definition shows that mere passage of a warship, nuclear powered ship or ship carrying nuclear or other inherently dangerous or noxious substances is not included in the list of activities contained in Article 19 (2). This conclusion seems to reflect the standpoint of the US also.[133]

When a ship carrying nuclear or other inherently dangerous or noxious substances passes through states' territorial waters while exercising its right of innocent passage, it is required to "carry documents and observe special precautionary measures established for such ships by international agreements".[134] However, it is to be noted that the right of innocent passage when it involves nuclear or other inherently dangerous or noxious substances was questioned by many states:

> Whether Article 23 authorises the coastal State to insist on prior permission as an aspect of its regulatory competence, or whether such 'permission' is determined by the uncertain rules of customary international law, was a matter of major concern to subsequent State practice and a key item in the Third United Nations Conference on the Law of the Sea.[135]

The attempts by some of the states to push for a clearer wording of Article 23 at the Third United Nations Conference on the Law of the Sea failed since they did not get required majority vote at the conference. Indeed, over twenty four states have since voiced opposition to or taken action against to prevent high level nuclear waste shipments from passing through their territorial waters and/or EEZ.[136] In fact some coastal states have even argued that passage of hazardous

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[133] US telegram "*Concerning Certain Provisions of Maldives Law in Conformity with International Law as Reflected in the 1982 United Nations Convention on the Law of the Sea*", 21 June 2001as cited in Persbo and Davis, n. 8, p. 100

[134] UNCLOS, Article 23.

[135] F. Ngantcha, "The Right of Innocent Passage and the Evolution of the International Law of the Sea", p.142 as cited in Andreas Persbo and Ian Davis, n. 8, p. 100

[136] According to Greenpeace International, the states, which have voiced opposition to shipments, are: Uruguay, Colombia, Argentina, Brazil, Indonesia, Portugal, Ecuador, Fiji, Dutch Antilles, Jamaica, Philippines, Spain, Chile, Puerto Rico, Martinique, Common Wealth of Dominica, Dominican Republic, Federated States of Micronesia, British and US Virgin Islands, Honduras,

radioactive cargo is in fact prejudicial to the security of the coastal state, thus rendering the passage non-innocent.[137]

3.2.1.1 PSI and Right of Innocent Passage

Though the issue of transporting radioactive materials through territorial waters and EEZ remains unresolved, what the PSI aims to achieve is to restrict the right of innocent passage guaranteed under the UNCLOS which has been accepted as a customary principle of international law. The Unites States, which has accepted the customary nature of this rule, is violating an explicit provision of the UNCLOS. Further, what it tries to achieve is unjust as it denies equal rights to all sovereign states as envisaged in the UN Charter through its attempt to restrict the shipments of WMDs and related materials of the non-nuclear weapon states while maintaining the right of nuclear weapon states to nuclear passage. This also affects the relationship between members of the international community as it shakes the underlying principle of good faith[138] that guides the peaceful co-existence of nations.

3.2.2 *Freedom of Navigation*

The UNCLOS guarantees 'freedom of navigation' through the high seas,[139] EEZ,[140] straits used for international navigation,[141] and archipelagic sea-

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Aruba, Hawaii, Ethiopia, South Africa, Republic of Nauru, Mauritius, Antigua and Barbuda. See Persbo and Davis, n. 12, p. 100.

[137] The Commonwealth Caribbean High Commissioners have said that shipments of nuclear waste are threat to the "safety of Caribbean people, the fragility of the coral ecosystems and the economy of the Caribbean countries", Statement by His Excellency Ronald Michael Sanders, High Commissioner for the Antigua and Barbuda High Commission on 30 January 1998; and The Canadian Arctic Waters Pollution Prevention Act 1970 containing restrictions on the transport citing right of self-defence of coastal states to protect themselves against the grave threat to their environment. Ibid.

[138] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations, see Annex to General Assembly Resolution 2625(XXV) of 24 October 1970.

[139]UNCLOS, Article 87.

[140]UNCLOS, Article 58 (1).

lanes,[142] while it permits the exercise of innocent passage through the territorial waters,[143] and archipelagic waters.[144] The breaking of this 'freedom of navigation' by way of boarding or interdiction of a suspect ship is only permitted if the Flag State undertakes the interdiction. It is worth noting that the UNCLOS contains no definition of 'navigation', but it is reasonable to assume that the motions and presence of ships traversing the high seas is considered as 'navigation'.[145] It is also reasonable to assume that this definition does not take into account factors such as the type of the ship or the content of its cargo, nor the activities in which the ship is engaged or intends to be engaged in.[146]

As noted above, three PSI participants are not parties to the UNCLOS. However, it is widely accepted that the principal provisions of the Convention are already customary international law. While the US position regarding the UNCLOS initially was that the treaty was "fatally flawed and cannot be cured", it later held that early "adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the seas... Maintenance of such stability is vital to U.S national security and economic strength".[147] The US Secretary of Defence in his Annual Report to the President and Congress in 2001 maintained that:

> For over twenty years, the United States has reaffirmed its long standing policy of exercising and asserting its freedom of navigation and over flight rights on a world wide basis. Such assertions by the U.S. preserve

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[141] UNCLOS, Article 45.

[142]UNCLOS, Article 53.

[143] UNCLOS, Articles 17-19.

[144] UNCLOS, Article 52.

[145] UNCLOS, Article 18.

[146] Rene Jean Dupuy and D.Vignes, *A Handbook of the New Law of the Sea* (Kluwer Academic Publishers: Netherlands, 1991), p. 845.

[147] Congressional Record, 103rd Congress, 2nd Session, 1994, p. 14475, 6 October 1994.

navigational freedoms for all nations, ensure open access to the world's oceans for international trade, and preserve global mobility of U.S armed forces.[148] Thus it could be seen that the US government has always maintained its right to navigate freely on the high seas.[149]

The freedom of navigation is also upheld by the Security Council resolution,[150] which was passed in the context of the closure of Suez Canal by Egypt in 1951. In that resolution, the Council held:

> ".... that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas and to trade freely with one another.."

The ICJ has also upheld the freedom of navigation in the *Nicaragua case*, where it stated that the mining of coastal states' territorial waters endangers the customary right of freedom of navigation and the subsequent right of access to the port.[151] Nevertheless, it is noteworthy to mention that the US has not accepted this decision of the court.

3.2.2.1 PSI and Freedom of Navigation

It could be seen that freedom of navigation is a basic principle of the law of sea, which has guaranteed unimpeded international trade in yester years. The provision for interdiction in the PSI is greatly a limitation and a threat to this tenet of international maritime law. The *Corfu Channel* case stands as a strong precedent that maritime navigational freedoms cannot be interfered with, even to

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[148] US Secretary of Defence, *Annual Report to the President and the Congress*, Appendix H, Washington D.C. 2001.

[149] President Reagan, in 1983 while issuing the US Ocean Policy Statement declared that the United States would follow the non- sea bed mining provisions of the convention as they reflected "Traditional Uses of the Oceans". See 'Statement by the President dated 10 March 1983', *DOALOS*, Office of Legal Affairs, United Nations, New York as cited Persbo and Davis, n. 12, p. 100.

[150] Security Council Resolution 95 of 1 September 1951.

[151] Nicaragua v. United States of America, *ICJ Reports* 1986, paras. 174, 214.

serve the security concerns of other nations, and that compensation must be paid when injuries to persons and property occur.[152]

The UNCLOS provides for options to limit the freedom of navigation, through agreement with one another, without jeoparadising the legal regimes governing the use of territorial waters. States can also agree upon specific actions to be taken by the interdicting party, in circumstances where WMD and its related materials are found. However, confiscation of cargo is generally not allowed unless a state of war exists between the interdicting state and the Flag State. Another option is to seek the assent of the master of the target vessel itself or the government of the Flag State. A successful illustration of this modus operandi is the case of *BBC China*, where the German shipper carrying centrifuge parts bound for Libya was interdicted with the cooperation of the PSI participating states namely US, UK, Greece and Italy.

Other than the option mentioned above, the PSI participating states can legalise their proposed interdiction only through;

(i) a Security Council Resolution,

(ii) by adoption of a new convention criminalising the transport of WMDs, their delivery systems and their related materials per se or through,

(iii) amendment to the SUA Convention and SUA-PROT, the existing treaty regime that explicitly makes unlawful activities committed at sea an offence.

Understanding the difficulties and question of feasibility involved in an attempt to adopt a new international convention, the participating states of the PSI especially the UK and the US initiated steps to effectuate the other two options via United Nations Security Council Resolution (UNSCR) and amendment to the SUA regime.

The Security Council unanimously adopted Resolution 1540 on 28 April 2004,[153] on preventing proliferation of WMDs. Acting under Chapter VII of the

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[152] John M. Van Dyke, Darwood Zaelke and Grant Hewison, ed., *Freedom for the Seas in the 21st Century* (Island Press: Washington, 1993), p. 458.

[153] For the text of the Resolution, see Strategic Digest, vol. 34 (2004), p. 676.

UN Charter,[154] the SCR is legally binding and all states are obliged to comply with its obligations.[155] As of now, this SCR is the only claimed legal support by the proponents of PSI for their interdictions. Thus, a legal study of the congruity of SCR 1540 and the UNCLOS becomes pertinent for a clear understanding of the legality of the PSI.

3.3 UNCLOS and SECURITY COUNCIL RESOLUTIONS

Within the United Nations system, the chief responsibility for maintaining international peace and security falls upon the Security Council.[156] The Charter envisions two main functions to the council: settlement of disputes peacefully[157] and meeting of threats to or breaches of the peace with concerted action by the organization.[158] In carrying out these functions, the Security Council is empowered with the authority to make decisions binding on the entire UN membership. This means that certain SCRs are binding on all members of the UN, specifically those resolutions that contain action statements averring, "Security Council decides that..." Such resolutions are considered Security Council fiats, endowed with the binding force of legal obligation.[159]

Security Council resolutions that relate to the threats to the peace, breaches of peace, or acts of aggression are often prescriptive and often carry the force of law. The scope of SCR has been dramatised since 1990 by several sanction measures, which have come to be viewed as more humane than military

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[154] Chapter VII of the Charter deals with "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," (Articles 39-51).

[155] Article 25 of the Charter.

[156] Article 21(1) of the Charter.

[157] Chapter VI of the Charter provides for the Pacific Settlement of Disputes, (Articles 33-38).

[158] See n. 154.

[159] Christopher C. Joyner, *International Law in the 21st Century* (Rowman & Littlefield Publishers: New York, 2005), p. 94.

action, but punitive in nature. Throughout its history, the Security Council invoked collective actions as enforcement actions under Chapter VII, only in fourteen cases.[160] From its first meeting in 1945, the Security Council has adopted more than seven hundred resolutions that qualify as binding law for the international community. Though the Security Council resolutions are deemed compulsory under international law and as possessing the authority to create international law, the governments sometimes fails to comply with those obligations.[161] On several occasions, the Security Council categorised the proliferation of missiles and WMDs as threat to international peace and security.[162]

The most recent instance where the Security Council discussed the threat posed by the proliferation of WMDs explicitly is UNCSR 1540.[163] As the decisions taken by it under Chapter VII are legally binding, it could potentially go further and authorise the use of force, to maintain that security by curbing the trade in WMD materials.

The Security Council has decided on the use of force by member states on several occasions in the past. For instance, on 25 June 1950, it considered the rapidly escalating war on the Korean peninsula. It determined that the armed attack on the Republic of Korea by North Korean forces constituted a breach of

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[160] Southern Rhodesia (1966), South Africa (1977), Iraq (1990), Somalia (1992), Liberia (1992), Libya (1992), Angola (1993), Haiti (1993), Rwanda (1993), Former Yugoslavia (1992), Sudan (1996), Sierra Leone (1997), Afghanistan (1999), Ethiopia and Eritrea (2000).

[161] The reasons for non-compliance may be adverse international political pressure, domestic economic considerations, social and cultural inhibitions.

[162] In SCR 687 of 1991, it stated that WMDs posed a threat to "peace and security" in the Middle East; In SCR 1172 of 1998, it condemned nuclear tests conducted by India and Pakistan and affirmed that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security. In the aftermath of terrorist attacks on the World Trade Center, it passed Resolution 1373, 2001 in which the Council noted with concern the close connection between international terrorism, *interalia*, the "illegal movement of nuclear, biological, chemical and other potentially deadly materials" and categorised this connection as "threat to international security."

[163] See n. 143.

the peace and called for immediate cessation of hostilities.[164] Another Resolution that accompanied on 27 June 1950[165] recommended that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area.

In case of Iraq invasion of Kuwait in 1990, the Security Council on 25 November 1990 passed a resolution authorising the use of force to oust the Iraqi forces occupying Kuwait:[166]

> The Security Council.... acting under Chapter VII of the Charter... authorises Member States...to use all necessary means to uphold and implement resolution 660 (1990)[167] and all subsequent relevant resolutions and to restore international peace and security in the area...

Though these resolutions focus on the use of force, the decision of the council to establish international tribunals for Former Yugoslavia and Rwanda by invoking Chapter VII,[168] and the exemption of certain peacekeepers of certain nationalities from the jurisdiction of the International Criminal Court through its resolution,[169] makes it perspicuous that the Security Council has adopted a broad interpretation of the notion of "threat to the peace".[170]

US President Bush drew on this broad interpretation in his 2003 address to the General Assembly:

> "I ask the UN Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the UN to

[164] UNSC Resolution 82 adopted on 25 June 1950.

[165] UNSC Resolution 83 adopted on 27 June 1950.

[166] UNSC Resolution 678 adopted on 25 November 1990.

[167] UNSC Resolution 660 adopted on 2 August 1990 demanded that "Iraq withdraw immediately and unconditionally all its forces."

[168] UNSC Resolution 808 adopted on 22 February1993.

[169] UNSC Resolution 1422 adopted on 12 July 2002.

[170] See Persbo and Davis, n. 12, p. 74.

> criminalise the proliferation of weapons-Weapons of Mass of Destruction, to enact strict export controls consistent with international standards, and to secure any sensitive materials with their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement."[171]

The UN Security Council adopted unanimously on 28 April 2004 the draft 'counter-proliferation resolution' submitted by the UK and the US.[172] While the resolution was adopted unanimously, there is considerable criticism that the US and other nuclear weapon states were increasingly pro-active regarding the proliferation of WMDs while doing little to implement obligations to eliminate their own stockpiles.[173]

3.3.1 *Salient Provisions of UNSCR 1540*

Resolution 1540 urges all member states to take strong action to stop WMD proliferation, particularly for terrorist purposes. It calls on all states to establish domestic controls to prevent the proliferation of such weapons, including new legislation, enhanced export controls, new enforcement procedures and international cooperation.

The resolution also establishes a special committee of the UNSC to oversee the implementation of the resolution.[174] The PSI would gain more legitimacy if the participating states decide to establish an interdiction committee

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[171] President Bush Address to the UN General Assembly, New York, 23 September 2003, available at<http://www.whitehouse.gov/news/release/2003/09/20030923-4.html>

[172] The uncovering of nuclear supermarket operated by Pakistani scientist, A.Q.Khan acted as an impetus for the adoption of this resolution.

[173] Ronaldo Mota Sardenberg, the Ambassador of Brazil to the UN, said that while Brazil supported the resolution, "limiting the resolution to the question of non-proliferation as the overriding threat was inadequate. At the same time, disarmament must be pursued in good faith. Without such a comprehensive approach, all efforts to make the world safer were bound to fall short". See UNSC Debate on the Draft Resolution on Non- Proliferation, 4950th Meeting, 22 April 2004 printed in *Strategic Digest*, vol. 34 (2004), p. 682.

[174] The UNSC has also established a Counter-Terrorism Committee under Resolution 1373 of 28 September 2001.

under a UNSC resolution. The resolution affirms explicitly that it is complimentary to existing non-proliferation treaties and their implementing organizations, and calls on all states to "develop appropriate ways to work with industry and the public regarding their obligations under such laws".

The resolution by explicitly elevating "means of delivery" to the same level as nuclear, chemical and biological weapons, seems to have accorded greater attention to the control of missile technology which is not banned by any international treaty, but only restricted by an agreement among nuclear supplier states.

However, the resolution does not introduce any new groundbreaking ideas in the field of counter proliferation or enforcement of existing treaties. As mentioned earlier most countries have already criminalised the use, possession or transfer of WMD materials. Resolution 1540 certainly does not give authority for PSI countries to seize WMD cargoes on the high seas, although it might make such interdictions easier in certain circumstances by reinforcing the message that WMD trafficking is illegal.

3.3.2 *Analysis of UNSCR 1540*

A study of Resolution 1540 reveals that all references to the word "interdiction" are carefully avoided and it is not targeted at any specific states. By focussing on illicit activities by non-state actors,[175] the resolution also avoids controversy. Further, the resolution merely "calls upon the states"[176] again in accordance with national and international law, to "take co-operative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means

[175] See n. 143, operative para 12 defines Non-state actor as "individual or entity, not acting under the lawful authority of any state in conducting activities, which come within the scope of the resolution".

[176] Ibid, operative para 8.

of delivery,[177] and related materials."[178] The recommendatory nature of the latter provision indicates, together with the references to international law, an absence of any authorisation to exceed the existing rules. Therefore, legally SCR1540 does not seem to violate any of the provisions of the UNCLOS.

3.4 UNCLOS and STATE PRACTICE

Customary international law allows for high seas interdiction in case a vessel poses to the interdicting state or a third state an imminent threat. It is widely considered that the customary international law right of individual or collective self-defence, as referred to in Article 51 of the UN Charter, extends to preemptive action if there is a "necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[179] But in not immediate threatening circumstances, apart from the absence of any such right among the interdiction rights codified in Article 110 of UNCLOS, the state practice seems to be inconclusive.[180]

For instance, in 1873, the *Virginius*, a US flag vessel was seized on the high seas by the Spanish navy while carrying weapons, along with British and U.S nationals, to Cuba in support of an insurrection against Spain. Spain's claim of self- defence was accepted by Britain but rejected by the US.[181]

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[177] Ibid, operative para 12 defines Means of delivery as "missiles, rockets and other unmanned systems capable of delivering nuclear, chemical or biological weapons, that are specifically designed for such use".

[178] Ibid, Related materials are defined as "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical or biological weapons and their means of delivery".

[179] R.Y. Jennings, The Caroline and Mc Leod Cases, *American Journal of International Law*, vol.32 (1938), pp. 82-92 as cited in Byers, n. 72, p. 532.

[180] Ibid.

[181] R.R. Churchill and A.V Lowe, *The Law of the Sea* (1999) as cited in Byers, n. 72, p. 533. The dispute was eventually settled by U.S-Spain Agreement to Resolve Claims in the Case of The Steamer "Virginius", 27 February 1875, see Byers, Ibid.

During the late 1950s and the early 1960s, France's action of stopping and searching vessels suspected of carrying weapons to Algeria was strongly opposed by many of the states whose ships were affected. Though the colonial context might have affected the international reaction, the state practice and *opinio juris* generated by opposition to the French policy would still seem to militate against the existence of any extended right of self-defence against weapons shipments on the high-seas.[182] This conclusion is supported by the British practice during the Falklands war, when London expressed the view that the right of self-defence did not extend to the interception of a French vessel carrying weapons to Argentina.[183]

During the 1962 Cuban missile crisis, the US asserted the right to stop and search vessels bound for that island nation to determine if they were carrying "offensive military equipment." But it justified this action on the basis of chapter VIII of the UN Charter as regional peace keeping.[184]

Finally, there is Israeli practice concerning high seas interdiction of weapon-laden vessels, most notably the January 2002 seizure of *Karin A*, an Iraqi flagged ship in the Red Sea for finding fifty tons of weaponry. It is noteworthy that there was little by way of international comment.

The advent of the PSI has introduced more state practice with respect to the issue of high seas interdiction through the conclusion of bilateral treaties. Since the principle of exclusive flag state jurisdiction is one that is well rooted in state practice and *opinio juris*, a legal change is possible only through a treaty or amendment to an existing treaty to encompass the exception to an established

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[182] Robert C.F. Reuland, "Interference with Non-Navigational Ships on the High Seas: Peace Time Exceptions to the Exclusivity Rule of Flag State Jurisdiction", *Vanderbilt Journal of Transnational Law*, vol. 22 (1989), p. 1218.

[183] Geoffrey Marston, ed., "United Kingdom Materials on International Law", *British Yearbook of International Law*, vol. 53 (1982), p. 469.

[184] See Abram Chayes, "Law and the Quarantine of Cuba", *Foreign Affairs* (1963), p. 554; Richard N. Gardner, "Neither Bush nor the Jurisprudes", *American Journal of International Law*, vol. 97 (2003), p. 585.

customary rule. The attempts to review the SUA Convention and its Protocol are the apparent actions taken in this regard.

3.5 IMPLICATIONS OF THE DRAFT PROTOCOL ON THE SUA REGIME

A preliminary study of the proposed amendments to the SUA regime through its review as described in Chapter II reveals the following:

The draft Protocol has a

(a) direct reference to *terrorist* activities against the ship, passengers and crew,

(b) reference to WMDs as well as nuclear, chemical and biological weapons, and mention that its transport is illegal,

(c) thereby it indirectly prohibits WMDs,

(d) specific reference to boarding provisions thereby making it legal as against the UNCLOS,

(e) provides for liability and compensation provisions in case of wrong boarding of ships,

(f) indirect adverse effect on the dual-use commerce which mainly would affect the non-nuclear weapon states especially developing countries like India, and

(g) IMO's creeping interference into the non-proliferation issues, which could be deemed as *ultravires* of its powers.

However, the significant point to remember is that the proposed review would come into force only when all the parties agree to it. As consensus is very difficult, there is great possibility for compromises, which may result in certain provisions that might jeopardize the navigational freedoms of developing countries.

3. 6. SCOPE OF SETTLEMENT OF MARITIME SECURITY DISPUTES

The law of the sea is replete with provisions relating to the peaceful resolution of disputes, which are only of recommendatory in nature. The

compulsory procedures envisaged in the UNCLOS under Article 287[185] has a limitation[186] of optional exception, which gives the State parties to the convention, the right to accept any one or more of the compulsory procedures through a declaration of writing.[187] This provision is applicable with respect to three categories of disputes; (a) disputes concerning military activity, (b) disputes concerning sea boundary limitation and (c) disputes in respect of which the Security Council of the United Nations is exercising its functions.

Since the disputes concerning the military activities may be excluded from international adjudication, the scope for imposition of legal liability on interdicting parties in case of wrongful PSI interdictions seems subliminal. This exception based on the principle of sovereign act seems to provide a legal excuse

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[185] Article 287, Choice of procedure:
1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.
6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.
8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

[186] For a detailed analysis of compulsory procedures, see Yogesh K. Tyagi, "The System of Settlement of Disputes under the Law of the Sea Convention: An Overview," *Indian Journal of International Law*, vol. 25 (1985), pp. 191-209.

[187] UNCLOS, Article 298.

to the countries like the US to perpetuate their interests.[188] This is exactly what has happened in the case of the PSI. The two instances in the past, the *Corfu Channel* and the *Gulf of Sidra* are glaring examples of the dispute-turned-conflicts, which prove the lacunae in the system of dispute settlement as regards security disputes.

The targets of the PSI operation therefore do not seem to have any mechanism to pursue their claims for compensation and liability. The option for seeking redressal in any national courts which would likely have jurisdiction is also not realistic in case of the PSI because of the problems inherent in foreign court litigation and the potential difficulty of getting PSI defendants into court and surmounting sovereign immunity obstacles.

Where the United States has entered into boarding agreements, like the case of Marshall Islands, provisions for dispute resolution seems to have been provided.[189] But the available PSI statements and documents do not refer to dispute resolution and compensation procedures. This entails the probability for naval interdictions by the proponents of PSI and their chances of escaping any international liability if some alternative multilateral ad hoc or arbitral institution is not specifically incorporated in PSI. Nevertheless, the status quo provides meager scope for maritime security disputes resolution.

Maritime security hence can be assured through confidence-building measures at sea. This could be materialized through naval cooperation, information and data exchange, joint naval exercises, exchange of naval personnel for training, etc. The cooperation in these fields could act as bolster for deciding of strategic issues like maritime security.[190]

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[188] See Tyagi, n. 186, p. 206.

[189] Articles 13 and 14 of the Marshall Islands Agreement with the United States, 13 August 2004.

[190]See Maria Saifuddin Effendi, "Maritime CBMs Between India & Pakistan: Explorable Areas of Cooperation", *Regional Studies*, vol. XXIII (2005), pp. 58-87; Goldblat., n.13; James Macintosh, "Extending the Confidence Building Approach to the Maritime Context", in *Naval Confidence Building Measures Disarmament Topical Papers* 4, New York, 1990, p. 184; Zhigua Gao, "The

Chapter IV

Maritime Security in India

Chapter IV

MARITIME SECURITY IN INDIA

The maritime traditions of India may be traced back to the proto-historic period (2500BC to about 500BC) according to the archaeological evidence from Lothal and Gujarat.[191] Trade and culture travelled along the silk route to Europe and across South East Asia to China and Japan. According to Kavalam Madhavan Panickkar, the Indian Ocean is "the vital sea" to India. He opines,

> While to other countries, the Indian Ocean is only one of the important oceanic areas, to India it is the vital sea. Her lives are concentrated in this area. Her freedom is dependant on that vast water surface. No industrial development, no stable political structure is possible for her unless the Indian Ocean is free and her own shores fully protected.[192]

The available data from the International Maritime Bureau depicts the continuing attacks and threats faced by India in its maritime front via Indian Ocean, Bay of Bengal Region and Arabian Sea. Thus, in judging the desirability of honouring or rejecting the claims made by PSI participant states, one needs to consider briefly India's maritime interests and the growing significance of Indian Ocean. It is also imperative to study the existing maritime security framework of India to analyse the legal feasibility of new maritime security measures mentioned in the previous chapters.

Scope and Principles of Maritime Cooperation in Asia and the Pacific", *Ocean Year Book*, vol. 16 (2002), pp. 533-540.

[191] See Murkot Ramunny, *Ezhimala: The Abode of Naval Academy* (Northern Book Centre: New Delhi, 1993), p. 5.

[192] As cited by Satish Chandra, in Sardar Patel Memorial Lecture, 1 November 2004 , *Journal of Indian Ocean Studies*, vol.12 (2004), p. 187.

4.1 MARITIME INTEREST AREAS OF INDIA

India's maritime interest areas are wide ranging. It has 7,517 kilometres coastline and 2.01 million square kilometres of EEZ. The maritime perimeter of India is likely to expand by another million square kilometres approximately with the Legal Continental Shelf regime (350nm) expected to be in place by 2005.[193] The maritime zones of India comprise of 598 islands near the shore, 572 islands in the Andaman Nicobar group and 27 islands in the Lakshadweep. Additionally, under the International Sea Bed Authority, India has been allocated an area of 1,50,000 square miles sea bed mining block in the Indian Ocean around 13 degrees south latitude.

India has seven maritime neighbours to which Sultanate of Oman be also added if the legal continental shelf regime[194] is accepted and brought into force. India's coastal areas have been major trading points for centuries through many ports such as Dwarka, Surat, Mumbai, Goa, Honavar, Kaveripoompattinam, Chennai, Hoogly, etc. The Arabian Sea, the Bay of Bengal and North Indian Ocean are home to major sea lines of communications (SLOC).[195] It is estimated that around 800 ships transit the Indian Search and Rescue Region each day. Over 500 merchant vessels of different types are registered in India and plying the seas around our continent, nearly half of which are involved in overseas trade.

4.1.1 *Significance of Indian Ocean*

The Indian Ocean is of special significance because of its strategic, economic and ecological value for India. It has become all the more important in the free market world as the new route from the Persian Gulf to the Sea of Japan

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[193] R. Prasannan, "Policing the Blue Waters", *The Week*, 14 September 2003; see n.16, p. 15.

[194] According to the UNCLOS, the legal continental shelf regime is to come into force in 2005 for India that would add one million square kilometer to the existing hydrospace of India.

[195] A SLOC is a short, safe and economical route taken by a ship to transit from point A to B. see Vijay Sakhuja, "Indian Ocean and the Safety of Sea Lanes of Communication", *Strategic Analysis*, 2001, p. 690.

passes through it.[196] The Indian Ocean is also home to important SLOCs and maritime choke points. A large bulk of international long haul maritime cargo from the Persian Gulf, Africa and Europe transits through this ocean. Shipping traffic through the South East Asian Malacca Strait is several times greater than the traffic either through the Suez Canal or through the Panama Canal. The shipping lane transiting the Indian Ocean and entering South East Asia has great geo-strategic importance to the United States, China, Japan, Korea, and other South East Asian countries.

The significance of Indian Ocean was recognised as early as 1890 by the noted academician Alfred T. Mahan who said,

> ".... Whoever controls the Indian Ocean will dominate Asia... in the 21st century, the destiny of the world would be decided on its waters."[197]

The Indian Ocean holds 65 per cent of strategic raw minerals and 31 per cent of gas, comprises 30 per cent of the world population and is characterised by fast growing economies which necessitates for collective security and stability in the region.[198] The Indian Ocean and its contiguous waters present a plethora of security issues.[199]

4.1.2 *Threats to Indian Ocean*

The threats to freedom of navigation in the Indian Ocean from non-state actors have become real and more consequential, than threats from

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[196] See Mathur, n.17, p. 556; C. Uday Bhaskar, "India and the World Policy at Sea in the Indian Ocean", *The Times of India*, New Delhi, 29 December 1995; Bhaskar, "Regional Naval Cooperation", *Strategic Analysis*, vol.15 (1992), p. 736.

[197] See Mahan, n. 7, p. 23.

[198] Gurpreet S. Khurana, "Maritime Security in the Indian Ocean: Convergence Plus Cooperation Equals Resonance", *Strategic Analysis*, vol. 28 (2004), p. 411.

[199] The Indian Ocean is located at the crossroads of terrorism originating from its West and East that are hot beds of Islamic fundamentalism, thus making it a de-facto target of Jihadi terrorists-Free Aceh Movement, Abbu Sayyaf, the Moro Islamic Liberation Front and al-Qaeda. See Vijay Sakujha, "Maritime Terrorism: India Must be Prepared", *Faultlines*, vol. 12 (2002), available at http://www.satp.org/satporgtp/publication/faultlines/volume12/index.html.

inter-state conflicts and natural causes.[200] Lately a high degree of threat is predicted from maritime terrorism to sea lines and ports within the Hormuz and straits of South East Asia.[201] The attacks on *USS Coleman* in October 2000 at Aden and the French super tanker, *MT Limburg* off the coast of Yemen in October 2002 opened the eyes of the international community to the realities of such a threat.

The Indian Ocean also is a victim of pirate attacks and armed robbery due to the weak marine policies and dense shipping through this route. According to the statistics released by the International Maritime Bureau in 2004, while the pirate attacks declined worldwide by 22 per cent, the instances of such attacks increased by 33 per cent in Malacca Straits. The links between various unlawful activities at sea like age-old piracy, terrorism and WMD proliferation is not difficult to comprehend, knowing instances like *Dewi Madrim*, 2003 [202] where the ship was seized by terrorists to learn how to steer it. As mentioned in the earlier chapters, the threats are compounded by the containerisation of sea-borne trade, resort to FOC shipping by non-state actors and effectiveness of sea trade in terms of costs, bulk and time.

The Indian Ocean that is booming with maritime activity is vulnerable to the transnational threats affecting both security and economic interests. Moreover as the mercantile traffic transiting the Malacca Strait passes close to the area of India's maritime interest, India has the responsibility to preserve order at sea in case of any contingency. The duty relating to maritime security including

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[200] See Aditya Bakshi, *Terror on the High Seas* (Manak Publications: New Delhi, 2004), p. 92; Dipanker Banerjee, *Security in South Asia* (Manak Publications: New Delhi, 1999), p. 20.

[201] Andrew Holt, "Plugging the Holes in Maritime Security", *Terrorism Monitor*, 6 May 2004, p. 9.

[202] In case of the hijacking of Indonesian tanker, *Dewi Madrim*, in March 2003 off Indonesia, the terrorists were found to have seized the tanker for learning how to steer it. Other reasons like obtaining of funds have also come to light. This could be juxtaposed with the proof of terrorists having had taken flying lessons from Florida flight school preceding the 9/11 attacks.

humanitarian aspects rests with the Indian Coast Guard according to the Coast Guard Act, 1978.

4.2 RESPONSIBILITY TO PREVENT MARITIME TERRORISM

The threat to state security from terrorist acts at sea could be dealt with effectively only through a comprehensive multilateral approach owing to the very nature of sea trade. This need for international cooperation raises the question of the individual state responsibility and duty to prevent maritime terrorism.[203] The positive duty to prevent terrorism is emphasised through various instruments of the UN [204] and has thus acquired the status of customary international law. The duty owed by the states in respect of prevention of terrorism is not an absolute duty, but one that is defined by the exercise of due diligence.[205]

The SUA Convention and the SUA-PROT, which deal explicitly with unlawful activities at sea, are included among the 12 fundamental legal instruments against terrorism. India as a party to these instruments as well as UNSCR 1540, which explicitly reiterates the duty of states to take necessary domestic action to stymie the proliferation of WMDs and related materials at sea. Thus, India is under an international legal obligation to take necessary steps in this regard.

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[203] See UN General Assembly Resolution, 56th Session, U.N.Doc.A/56/10/2001 (hereinafter Draft Articles). The Draft Articles on Responsibility for Internationally Wrongful Acts stipulate that an omission by a state attracts liability under international law by maintaining that:
"there is an internationally wrongful act of a state when conduct consisting of an action or omission; (a) is attributable to the sate under international law, and (b) constitutes a breach of international obligation of the state".

[204] See n. 79; *UN General Assembly Resolutions on Measures to Eliminate International Terrorism*, U.N.Doc.A/Res/60/49/1994; U.N.Doc.A/Res/51/210/1997; *UN Security Council Resolution* 1373, U.N.Doc.S/Res/1373/2001; *Corfu Channel Case* (UK v. Albania) *ICJ Reports*, 1949, p. 4.

[205] See Mellor, n. 10, p. 374; Sharon A. Williams, "International Law and Terrorism: Age-Old Problems, Different Targets", *Canadian Yearbook of International Law*, vol. 87 (1988), p. 100.

4.3 THE INDIAN COAST GUARD

The Indian Coast Guard that was created in 1978 to protect the national interests of India in its maritime zones is presently the nodal agency that maintains law and order at sea. The Act in its section 14 provides for duties and functions of the Indian Coast Guard. It includes:

a) safety and protection of artificial islands, offshore oil terminals and devices,
b) protection of Indian Fishermen,
c) assistance to fisherman in distress at sea,
d) preservation and protection of marine environment,
e) prevention and control of marine pollution,
f) assisting the customs and other authorities in anti-smuggling operations,
g) enforcement of maritime laws in force,
h) safety of life and property at sea,
i) collection of scientific data and
j) other duties as when prescribed by the government of India.

The mission statement of the Coast Guard proves its duty relating to maritime security including offshore security, marine environment security, maritime zones security, marine safety, scientific assistance and national defence.[206] The powers currently vested in the Coast Guard come from various national legislation such as The Criminal Procedure Code 1973, The Customs Act 1962, The Maritime Zones of India Act 1981, The Merchant Shipping Act 1958, The Territorial waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976, and The Maritime Zone of India (Regulation of Fishing by Foreign Vessels) Act 1981.

The enormity of tasks' vested on the Coast Guard undermines the capability of this institution to fulfil its duty as regards security of maritime

[206] See n. 16.

shipping, which has acquired much significance in the changing conceptions of security.

4.4 EXPORT CONTROL REGIME IN INDIA

Apart from the Indian Coast Guard Act, there are few statutes, which are relevant to different aspects of PSI like Foreign Trade (Development and Regulation) Act 1992 and The Atomic Energy Act 1962. The Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005[207] is the latest attempt on the part of the Government of India to prohibit unlawful activities in relation to WMD and their delivery systems.

4.4.1 *Foreign Trade (Development and Regulation) Act, 1992*

The export control regime in India is based on the Foreign Trade (Development and Regulation) Act, 1992. Section 3(2) of the Act empowers the Central Government to make provisions for prohibiting, restricting or otherwise regulating the import or export of goods. The definition of "goods" is broad to subsume any illegal consignment and thus facilitate national export controls and enforcement measures.

Though India remains outside the framework of multilateral export control regime, it is a signatory to the Chemical Weapons Convention, and the Biological Weapons Convention and an Observer in Australia Group. One of the institutional bases for export controls on WMD technology is the Indian Export- Import Policy. The controls on exports and imports are regulated via three "Negative lists".[208] In 2003 India created a single unified control list of all dual use items, whose

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[207] Act No.21 of 2005 published in the Official Gazette (Extraordinary). See Appendix II for the Act.

[208] 1. *Prohibited List*: it currently has 10 entries, exports of which are not permitted due to religious and environmental considerations.

2. *Restricted List*: it has 32 entries and 26 sub-entries, exports of which are allowed against license. Chemicals included in Schedules 2 & 3 to the CWC and "Special materials, Equipment and Technologies" have been added to this list. Further, a range of minerals and their compounds, e.g., uranium, thorium, beryllium, plutonium and zirconium have been deleted from this list.

regulation through interdiction, are one of the main concern and a point of discussion in PSI, to countries like India. This list called as the SCOMET List, specified by the Directorate General of Foreign Trade, subsumes items like special chemicals, organisms, materials, equipment and technologies. These items are included in eight categories, the export of which are either prohibited or permitted under license.

4.4.2 *The Atomic Energy Act, 1962*

Certain provisions in the Atomic Energy Act 1962 would also be applicable in certain situations in the context of PSI. For instance, the Preamble to the Act affirms its resolve for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes. The Act empowers the Central Government to obtain information regarding materials, plants and processes[209] and gives authority to enter and inspect too.[210] The Government is also invested with the authority to prohibit the manufacture, possession, use, and transfer by sale or otherwise, export and import and in an emergency transport, and disposal of radioactive substances.[211]

4.4.3 *The Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005*

The WMD Act, 2005, could be considered as an overarching and integrated legislation to prohibit unlawful activities in relation to weapons of mass destruction and their means of delivery. It is meant to supplement the regulatory

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3. *Canalized List*: it has 6 entries and 17 sub-entries, exports of which are permitted through designated canalizing agencies.

[209] Section 7.

[210] Section 8.

[211] Section 14.

framework related to controls over the export of WMD materials and related items, especially in view of India's status as a Nuclear Weapon State.[212]

The rationale of the Act is the safeguarding of the nation's security[213] and the deepening of its autonomous scientific and technical capability for meeting the security imperatives and developmental goals and to the objective of global peace and security.[214] The controls over the export of WMD goods and technologies, especially prohibitions relating to non-State actors through this legislation, fulfil the obligation of India under UNSCR 1540.

It is pertinent to note that the preamble to the Act specifically mentions the commitment to prevent a non-State actor *and* a terrorist from acquiring "weapons of mass destruction and their delivery systems". The weapons of mass destruction are defined as any biological, chemical or nuclear weapons. However the Act does not define the *delivery systems*. Section 8 of the Act prohibits the unlawful manufacture, acquisition, possession, transfer or transport of weapons of mass destruction. The proviso to Section 9, which prohibits transfer of weapons of mass destruction to non-State actors *or* terrorists, excludes the transfer made to "any person acting under lawful authority of India." Again, Section 21 of the Act limits the cognizance of offences under this Act by providing that a court shall not take cognizance without the previous sanction of the Central Government. These are the two most significant lacunas in the Act that could probably be misused.

It is high time that India recognised its inadequacy due to shortage of trained personnel and equipment, obsolescence of national legislation's and weak law enforcement mechanisms to ensure maritime security. The constitution of a separate marine police force with the specific duty to ensure maritime security in its waters with a comprehensive national legislation on maritime security would be a timely response. It would only serve the strategic interest of a maritime big

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[212] Section 5.

[213] See Preamble to the Act.

[214] See Statement by the External Affairs Minister Shri Natwar Singh in Rajya Sabha as reprinted in Documentation, *Proliferation & Arms Control*, vol. II (2005), p. 15.

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[212] Section 5.

[213] See Preamble to the Act.

[214] See Statement by the External Affairs Minister Shri Natwar Singh in Rajya Sabha as reprinted in Documentation, *Proliferation & Arms Control*, vol. II (2005), p. 15.

power like India to take pro-active role in initiating multilateral regional co-operation and arrangements to deter the threats posed by the terrorist acts against maritime shipping.

4.5 INDIA'S STAND ON THE PSI

In March 2004, during U.S Secretary of State Colin Powell's visit, the US had put forth the proposal that India should join the PSI in the light of the bilateral naval cooperation between the two countries. The two sides also agreed to recommence joint operations to include search and rescue exercises to help vessels in distress in the Indian Ocean, Bay of Bengal and Arabian Sea. India has still stayed away from any active participation in the PSI because of many important issues relating to this initiative.[215] India seems to be concerned about the legality of the initiative as it skirts international law and the United Nations. Further, questions like those of legitimacy of international trade in weapons as regards states that have not signed NPT and the violation of the basic freedoms of the seas also contribute to India's present stance in this matter. Moreover, politically, India does not want to be a part of an anti-Iranian strategic initiative led by the US.

Though India has not formally supported the PSI, it has enacted the WMD Act in compliance with UNSCR 1540.[216] However, the policy statements and opinions of government officials as well as naval officers seem to voice India's concern regarding the legal validity of such a coalition initiative. An appraisal of the national legal framework is needed to evaluate its efficiency. A cursory analysis of the Indian legal system shows that there exists no domestic law hurdles. But the pertinent question remains whether the PSI as an initiative is

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[215] Vijay Sakhuja, Research Fellow at the Observor Research Foundation, who also has written many articles on the PSI opines that India being part of Visit, Board, Search and Seizure (VBSS) programme with US has already become part of PSI indirectly.

[216] See The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005, n. 198.

legally acceptable as a long-term policy of the government since it skirts established principles of international law.

4.5.1 *Relevant Domestic Laws*

The relevant domestic law and its provisions that allow India, if it wants, to accept the PSI are:

a) The Constitution of India 1950 – The Constitution of India subsumes various provisions that could be used as enabling mechanism for the use of legal framework under established domestic law and its translation into a bold and legally sustainable use to deal with proliferation as envisaged in the PSI SOPs. Article 51 (a) of the Constitution envisages promotion of international peace and security as a fundamental duty of the state.[217]

b) Article 253 relates to the legislation giving effect to international agreements.[218]

As India is geographically placed in proliferation pathways, a decision to join such an initiative would warrant a careful examination of the stand taken by some other countries.

4.5.2 *PSI and Some Other Countries*

a.) **China**: China is the only member of the Security Council, which has not formally accepted the PSI. It has taken a negative stand on the PSI on the ground that it is inconsistent with the existing tenets of international maritime law and that it violates the customary principles of maritime law as embodied in the UNCLOS. In this regard, the strong

[217] UNSCR 1540 as well as SOPs, views proliferation of all WMDs as a threat to international peace and security.

[218] The legislative competence of the Indian Parliament emanates from a combined mandate of entries to List I of the Seventh Schedule of the Constitution. See Nilendra Kumar, "Legal Issues: Proliferation Security Initiative (PSI) and Regional Maritime Security Initiative (RMSI)", *United Services of India Journal*, vol. xxxiv (2004), p. 534.

demand made by the Chinese government for an apology and compensation on the US interdiction of its ship *yinhe* in 1993 is worth recalling, though PSI was not in existence at that time. The ship was interdicted on the ground of suspicion that it was carrying chemicals, which could be used for making chemical weapons. The inspection proved the suspicion to be wrong, but the US did not provide apology or compensation for its act. China still remains outside the PSI favouring amicable and peaceful settlement of the issue through diplomatic channel and treaty law rather than enforcement of non-proliferation through an initiative of coalition.[219]

b.) **North Korea**: A brief note on the stand of this country apropos PSI is pertinent since it is listed in "axis of evil" by the US, and is specific target of PSI in its action against curbing of the WMD. North Korea has repeatedly declared that it would regard any attempt to intercept its ships as an act of war and take retaliatory action. North Korea has repeatedly offered to negotiate an end to its nuclear programs with Washington in return for a non-aggression pact guaranteeing the country's security. This shows the North Korean fear of being attacked by the U.S and its allies, which has compelled that State to take a firm stand against the non-proliferation attempts in the multilateral level.

c.) **Other Countries**: Japan is the only East Asian country involved in the PSI. South Korea has also declined to become a PSI member on the

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[219] J. Madhan Mohan, "China's Ambivalence on PSI", *Proliferation & Arms Control*, vol. II (January 2005), p. 1; Persbo and Davis, "The Proliferation Security Initiative : Dead in the Water or Steaming Ahead?", BASIC Notes, 12 December 2003 available at http://www.basicint.org; see also the Statement made by Chinese foreign ministry spokeswoman Zhang Qiyue at a press conference on 12 February 2004 cited in "Proliferation Security Initiative Advances but Russia and China Keep their Distance", *Arms Control Today*, March 2004, available at <http://armscontrol.org/act/2004_03/PSI.asp. >.

ground that it does not have legality in international law. Pakistan and Brazil are also of the view that the US seeks to use PSI as an instrument of strengthening its supremacy in the production of cutting- edge nuclear, ballistic, biological and chemical technology to control global transportation routes.[220]

4.5.3 *Inference*

As the PSI lacks transparency and definiteness apropos definition of "WMD and its related materials" and the targets of its action, it seems to raise suspicion among the PSI non-participating members as to its fairness and sincerity. The police officer's role on the high seas envisaged in the PSI would be acceptable only if it is consistent with both domestic and relevant international laws. Further, the search and seizure operations envisaged in the PSI lacks effective safeguards and appeal provisions. Restricting the transit of WMD would be a positive step in development in furthering arms control and stemming proliferation, if such norms were carefully developed by the international community and applied uniformly. International law, however, cannot be hoped to maintain its integrity if applied whimsically or discriminately, as defined by a "coalition of the willing". As a member of international community India should not allow the erosion of the law of the sea to suite the policy goals of the sole existing Super Power.

4.6 SEA- BLINDNESS IN INDIA

A study of the domestic legislation regulating shipping in India extrapolates the scant attention given to the security aspect of shipping in the country. When a few seafaring countries have already enacted specific domestic

[220] Peter Symonds, "A Provocative Step towards a US led Military Blockade of North Korea", World Socialist Web Site available at < http://www.wsws.org/articles/2003/jul2003/kore-j19.shtm>.

legislation on maritime transportation and security,[221] India which is considered to be in the seventeenth position in the world maritime trade have failed to enact a similar legislation. This is most likely to jeopardise India's national security as well as that of its ships, passengers, and its goods against the terrorists' activities as evident from the *Alondra Rainbow* incident of 1999.[222]

As mentioned in chapter II, the threats faced by India at its maritime front are also real and multi-pronged. The incidents of piracy, drug trafficking and gun running run unabated in spite of the various measures taken up at the governmental, bilateral and multilateral level. When an issue like piracy, which the UNCLOS directly addresses[223]remains to be uncontrolled, the consequences of the threat of proliferation of WMDs that is not addressed presently anywhere directly in the existing international maritime law does not need elaboration. Nevertheless, the main question here is whether the PSI is the correct legal solution to this problem. Because of the incongruity of the PSI to the established principles of international maritime law and general principles of international law, as well as its exclusion of the world body of nations, PSI does not seem to be the best option for curbing the proliferation of WMDs and its related materials.

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[221] US Maritime Transportation and Security Act, 2002; Maritime Security Act, 2004 (Ireland).

[222] In November 1999, in the Arabian Sea, Indian maritime forces rescued the hijacked MV *Alondra Rainbow*, a 7000-ton Panama registered vessel, belonging to Japanese owners. The vessel was en route from Kuala Tanjung, Indonesia to, Milke in Japan. The Piracy Reporting Center of the IMB had announced through a worldwide broadcast that pirates had captured the vessel. According to the Center the crews of the vessel were found safe in Thailand and the vessel was expected to turn up in any Indian port to discharge cargo. What followed was a drama on the high seas leading to the arrest of pirates but who had to be released later because of India's weak domestic law. See Bakshi, n. 191, p. 28.

[223] Article 101-107. Piracy is considered an international crime, with universal jurisdiction. Pirates are considered as *hostis humanis generis* or enemies of humanity under the rules of customary international law. See Dissenting opinion of J. Moore in *S. S. Lotus Case, PCIJ*, Ser. A, no.10 (1927), p. 70

Chapter V

Conclusions and Suggestions

Chapter V

CONCLUSIONS AND SUGGESTIONS

This study has attempted to assess the legality of PSI through the depiction of the complex structure of jurisdictional models that form the contemporary law of the sea. The PSI could be on a stronger legal footing if the UN Security Council adopts an additional resolution that explicitly authorises the interdictions anywhere on the sea for the purpose of preventing the proliferation of WMDs and related materials. Although SCR 1540 is an important instrument in the context of curbing of WMD proliferation and building of a strong international consensus, its focus is not on the maritime security and transfers of WMDs and related materials between states. A more specific Security Council resolution under Chapter VII to authorise the PSI might also prove elusive sometimes because China remains a non-participant within the framework of the PSI. Therefore, other legal strategies like boarding agreements and enactment of proposed amendments to the SUA Convention might help better in advancing PSI objectives.

The study has endeavoured to substantiate the unlawfulness of high sea interdiction and thereby bring in the pertinent question as to what risks and consequences are entailed in changing the prevailing international maritime legal system to make lawful what is otherwise unlawful. The selective non-proliferation measures that are ought to be effectuated through PSI interdictions, if brought into force in exchange of the existing maritime order, would in the long term restrict the freedom of navigation rights world-wide. This trade off of non-interference principle would result in the rise of unilateral claims to intercept and harass ships engaged in lawful activities, thus jeopardising the rights of all humankind to use the resources of the oceans freely, and would reinforce discriminatory non-proliferation policies.

Though justification for the PSI agenda is WMD proliferation, which is a real and palpable threat, the wider debate is that of unilateralism. The legal analysis of the PSI in Chapter II of this study attempts to show that the PSI is an instrument initiated to facilitate effective unilateral action. The individual states particularly the US is attempting to make lawful the claims of one state upon the vessels of another, behind a veil of multilateral cooperation.

Many authors like Mc Dougal and Burke[224] and Dubner[225] have noted the value and necessity of unilateral state action for the development of new international norms in order to achieve national and international congruity. Nevertheless, the PSI could only be viewed as an instance of deliberate attempt to break the law in order to change the system in the light of its efforts to police the high seas and circumvent the exclusive jurisdiction of the Flag State.

The following are the reasons for considering the PSI as outside the framework of the existing international law:

a.) it neither has UN authorisation nor a multilateral institutional framework;

b.) the Statement of Interdiction Principles agreed upon by the participating states are not universally accepted, therefore problems of norm creation;

c.) it establishes a framework for the forcible boarding, inspection and potential seizure of suspected cargo in ships which runs afoul of the long-established international law on the inviolability of international waters and right of ships to innocent passage within other nation's territorial waters;

d.) it does not define and codify a threshold of probable cause or a burden of proof for suspicions of weapons trafficking;

e.) the selective focus of the PSI on shipments "to and from sates and non state actors of proliferation concern" is inherently discriminatory;

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[224] See McDougal and Burke, n. 6, p.1047.

[225] Barry Hart Dubner, "On the Interplay of the International Law of the Sea and the Prevention of Maritime Pollution-How Far Can a State Proceed in Protecting Itself from Conflicting Norms in International Law", *Georgia International Environmental Law Review*, vol. 11 (1998), p. 137.

f.) absence of any mention about the legal rights of the flag state to appropriate compensation for interdiction undertaken on the basis of faulty intelligence or incorrect application of legal authorities.

None of the provisions in the UNCLOS explicitly prohibits the transit of weapons of mass destruction or gives States the right to interdict such transit. The UNCLOS would in fact outlaw the PSI or significantly constrain its execution by referencing Article 110, which provides that suspicions of terrorism or proliferation are not grounds for boarding of vessels on the high seas. The *Corfu Channel* case stands as a strong precedent that maritime navigational freedoms cannot be interfered with, even to serve the security concerns of other nations.

An interdiction outside those explicitly allowed in the existing international law of the sea regime would therefore clearly violate the freedom of navigation on the high seas and the right of innocent passage through territorial waters. India being a significant maritime country may exercise its power to influence other countries, which are presently outside the PSI, to thwart any attempt on the part of the US to effectuate its hegemonic interest.[226] The attempt on the part of the US administration to stretch the definition and application of the doctrine of necessity under Article 51 of the UN Charter and the so-called Pre emptive self -defence to justify the PSI can be viewed only with scepticism.

As agreed to by Oscar Schachter and John Alex Romano,[227] the conditions that need to be fulfilled for using force against terrorists and WMD threat are;

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[226] For a detailed study of the influence of the US in shaping the international legal system, Michael Byers and George Nolte, ed., United States Hegemony and the Foundations of International Law (Cambridge University Press: London, 2003).

[227] For a detailed study on the doctrine of necessity and its use against terrorists WMDs, see Alex Romano, "Combating Terrorism and Weapons of Mass Destruction: Revising the Doctrine of State Necessity", *Georgia Law Journal*, vol.87 (1999), pp. 1023-25; Oscar Schachter, *International Law in Theory and Practice* (1991), pp.162-73 as quoted in Romano, Ibid; Michael Bothe, "Terrorism and the Legality of the Pre-emptive Use of Force", *European Journal of International Law*, vol. 14 (2003), pp. 227-32.

i. the existence of real and immediate threat of WMD deployment,

ii. establishing of that threat "at the relevant point in time." [228]

A juxtaposition of the reasoning, justifications and conditionalities laid down in PSI shows that though the first condition as mentioned above could be considered satisfied, the second condition as to the establishment of the threat at the relevant instance is not satisfied since the PSI and the SOPs do not provide for a comprehensive yardstick for establishing the same. The PSI envisages high seas interdiction based on intelligence sharing and suspicion, which seems to be subliminal ground while taking the interdiction on a case by case basis.

Restricting the transit of WMDs is a positive development in furthering arms control and stemming proliferation, knowing the effects of their use. But for the new norms to be an efficient enforcement mechanism, it needs to be applied uniformly. Moreover, the nuclear weapon States need to renounce their weapons and work towards the goal of a nuclear-free world, as stressed by both the Brazilian and Chilean statements accompanying UNSCR 1540.[229] International law cannot maintain its integrity if applied whimsically or discriminately or if defined by a small "coalition of the willing."[230] If members of the international community begin to allow the erosion of the law of the sea to suit the policy goals of the big powers, they should not expect that such concessions would be easily reversed.

This study has also attempted to understand the amendments proposed to the SUA Convention through the Draft Protocol that has been finalised by the LEG 90th of the IMO. The initiative taken by the PSI participating states like the

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[228] See Gabcikovo-Nagymaros Case (Hungary v. Slovakia) *ICJ Reports*, 1997, p. 7, 42, 454.

[229] The Brazilian representative to the UNSC Debate on the Draft Resolution on Non-Proliferation, Mr.Sardenberg expressed the need for commitment by all Member States to create a safer world without any weapons. Mr.Munoz of Chile also reiterated the need for the prohibition of nuclear,chemical and biological weapons. For the text of the Debate on 22 April 2004, see Strategic *Digest*, vol. 34 (2004), pp. 679-723.

[230] Davon Chaffe, "Freedom or Force on the High Seas? Arms Interdiction and International Law", available at http://www.wagingpeace.org

UK and the US to secure legality of the PSI by making the transport of WMDs and their related materials on commercial vessels an internationally recognised offence through amendment to the Convention is noteworthy. The Protocol seeks to broaden the scope of offences in the Convention and provides the authority for the boarding of vessels in case of transport of nuclear material with the knowledge of its intended use in a nuclear explosive activity.

The analysis of the proposed amendments to the Convention in Chapter III reveals that the proposed Protocol to the SUA Convention does not extend to the elimination of WMD, therefore it is not directly targeting the main issue. Further the amendments to the SUA Convention suggesting the curtailment of only the rights of a non-state party to the NPT to pursue peaceful uses of nuclear energy are discriminatory.

For a large and growing economy like India, the nuclear power as a source of safe and secure energy is indispensable for meeting its developmental needs. Therefore the proposed provision in the Protocol curtailing the right of transport of nuclear fissile and fusionable material needs to be considered carefully before accepting the same.

However, it is submitted that the positive steps taken by the IMO in the direction of declaring the transport of nuclear materials as illegal thereby creating a new international criminal offence and legalising the boarding of ships is a laudable effort on the part of the international community to curb the WMDs proliferation through a multilateral effort. It is also submitted that a country like India should therefore opt for a legal and enforceable mechanism under the aegis of the legitimate framework of the UN than accepting the PSI, which does not have the legitimacy of the UN and international law. In this context, it is pertinent to remember the essential principle that a legitimate goal can be achieved only through legitimate means.

Since the Draft Protocol to the SUA Convention has been finalized, which is due to come into effect by the end of 2005, a legal basis for interdiction of ships on high seas is anticipated to come into being. Some of the measures that could be undertaken to improve the efficacy of the new law are:

i. development of an international maritime tracking system with global coverage;

ii. negotiation of rules to place a legal responsibility on flag states, shippers and masters of ships to ensure that their cargo is clear of WMDs, within the framework of SOLAS Convention along with the liability rules in the proposed SUA regime;

iii. promotion of technical cooperation and assistance especially to developing countries for training and the improvement of their maritime security infrastructure as part of the IMO's existing Integrated Technical Coordination Programme;

iv. establishment of a UN interdiction committee in line of the Counter-Terrorism Committee created under UNSCR 1373 of 2001, and

v. expansion of bilateral and multilateral boarding agreements to bolster the public support for curbing of WMD proliferation through interdiction.

Appendix-1
Statement of Interdiction Principles

APPENDIX I

PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

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

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

3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.

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

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

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

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

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

of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (1) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

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

Appendix-2
WMD Act, 2005

रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—05 REGISTERED NO. DL—(N)04/0007/2003—05

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The Gazette of India

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No. 24] NEW DELHI, TUESDAY, JUNE 7, 2005 / JYAISTHA 17, 1927

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 7th June, 2005/Jyaistha 17, 1927 (Saka)

The following Act of Parliament received the assent of the President on 6th June, 2005, and is hereby published for general information:—

THE WEAPONS OF MASS DESTRUCTION AND THEIR DELIVERY SYSTEMS (PROHIBITION OF UNLAWFUL ACTIVITIES) ACT, 2005

No. 21 OF 2005

[*6th June*, 2005.]

An Act to prohibit unlawful activities, in relation to weapons of mass destruction and their delivery systems and for matters connected therewith or incidental thereto.

WHEREAS India is determined to safeguard its national security as a Nuclear Weapon State;

AND WHEREAS India is committed not to transfer nuclear weapons or other nuclear explosive devices, or to transfer control over such weapons or explosive devices, and not in any way to assist, encourage, or induce any other country to manufacture nuclear weapons or other nuclear explosive devices;

AND WHEREAS India is committed to prevent a non-State actor and a terrorist from acquiring weapons of mass destruction and their delivery systems;

AND WHEREAS India is committed to the objective of global nuclear disarmament;

AND WHEREAS India is committed to its obligations as a State Party to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;

AND WHEREAS India is exercising controls over the export of chemicals, organisms, materials, equipment and technologies in relation to weapons of mass destruction and their delivery systems under other relevant Acts;

AND WHEREAS it is considered necessary to provide for integrated legal measures to exercise controls over the export of materials, equipment and technologies and to prohibit unlawful activities in relation to weapons of mass destruction and their means of delivery.

BE it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:—

Short title and commencement.

1. (*1*) This Act may be called the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Act in addition to other laws.

2. Save as otherwise expressly provided in this Act, the provisions of this Act shall be in addition to any other relevant Act for the time being in force in relation to any matter covered under this Act.

Extent and application

3. (*1*) It extends to the whole of India including its Exclusive Economic Zone.

(*2*) Every person shall be liable to punishment under this Act for every act or omission contrary to the provisions thereof, of which he is held guilty in India.

(*3*) Any person who commits an offence beyond India, which is punishable under this Act, shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India.

(*4*) The provisions of this Act shall also apply to —

(*a*) citizens of India outside India;

(*b*) companies or bodies corporate, registered or incorporated in India or having their associates, branches or subsidiaries, outside India;

(*c*) any ship, aircraft or other means of transport registered in India or outside India, wherever it may be;

(*d*) foreigners while in India;

(*e*) persons in the service of the Government of India, within and beyond India.

(*5*) Notwithstanding the applicability of the provisions of any other Central Act relating to any activity provided herein, the provisions of this Act shall apply to export, transfer, re-transfer, transit and trans-shipment of material, equipment or technology of any description as are identified, designated, categorised or considered necessary by the Central Government, as pertinent or relevant to India as a Nuclear Weapon State, or to the national security of India, or to the furtherance of its foreign policy or its international obligations under any bilateral, multilateral or international treaty, Covenant, Convention or arrangement relating to weapons of mass destruction or their means of delivery, to which India is a Party.

Definitions.

4. In this Act, unless the context otherwise requires,—

(*a*) "biological weapons" are—

(*i*) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; and

(*ii*) weapons, equipment or delivery systems specially designed to use such agents or toxins for hostile purposes or in armed conflict;

(*b*) "brought in transit" means to bring goods from any country into India by land, air, or amphibious means of transportation, where the goods are to be taken out from India on the same conveyance on which they are brought into India without any landing in India, but does not include a conveyance in innocent passage through Indian territory, Indian territorial waters or Indian airspace of a foreign conveyance carrying goods.

Explanation I.—A conveyance is a foreign conveyance if it is not registered in India.

Explanation II.—A conveyance is in "innocent passage" if it is not engaged in relevant activity and passes through or above Indian territorial waters or airspace without stopping or anchoring in India;

(*c*) "chemical weapons" means,—

(*i*) the toxic chemicals and their precursors, except where intended for—

(*a*) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(*b*) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(*c*) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

(*d*) law enforcement including domestic riot control purposes;

as long as the types and quantities are consistent with such purposes;

(*ii*) the munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in sub-clause (*i*), which would be released as a result of the employment of such munitions and devices; and

(*iii*) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in sub-clause (*ii*),

together or separately;

(*d*) "export" shall have the meaning assigned to this expression in the Foreign Trade (Development and Regulation) Act, 1992; 22 of 1992.

(*e*) "fissile material" and "radioactive material" shall have the meanings assigned to these expressions in the Atomic Energy Act, 1962; 33 of 1962.

(*f*) "item" means materials, equipment, and technology, of any description, notified under this Act or any other Act related to relevant activity;

(*g*) "non-State actor" is a person or entity not acting under the lawful authority of any country;

(*h*) "nuclear weapon or other nuclear explosive device" means any nuclear weapon or other nuclear explosive device as may be determined by the Central Government, whose determination in the matter shall be final;

(*i*) "public domain" means domain that has no restrictions upon dissemination of information within or from it; the existence of any legal rights to intellectual property in that information does not remove such information from being in public domain;

(*j*) "relevant activity" means,—

(*i*) the development, production, handling, operation, maintenance, storage or dissemination of a nuclear, chemical or biological weapon; or

(*ii*) the development, production, maintenance, storage or dissemination of missiles specially designed for delivering any such weapon;

(*k*) "re-transfer" means transfer of any item notified under this Act from any country or entity to which it has been exported from India, to yet another country or entity;

(*l*) "technology" means any information (including information embodied in software) other than information in the public domain, that is capable of being used in—

(*i*) the development, production or use of any goods or software;

(*ii*) the development of, or the carrying out of, an industrial or commercial activity or the provision of a service of any kind.

Explanation.—When technology is described wholly or partly by reference to the uses to which it (or the goods to which it relates) may be put, it shall include services which are provided or used, or which are capable of being used, in the development, production or use of such technology or goods;

(*m*) "terrorist" shall have the meaning assigned to this expression in the Unlawful Activities (Prevention) Act, 1967; 37 of 1967.

(*n*) "trans-shipment" means to remove goods from the conveyance on which they were brought into India and to place the goods on the same or another conveyance for the purpose of taking them out of India, where these acts are carried out on a "through bill of lading", "through airway bill" or "through manifest".

Explanation.—"through bill of lading", "through airway bill" and "through manifest" means respectively a bill of lading, airway bill and manifest, for the consignment of goods from a place outside India to a destination which is also outside India without a consignee in India;

(*o*) "unlawful" means without the authority of the Central Government and the expression "unlawfully" shall be construed accordingly;

(*p*) "weapons of mass destruction" means any biological, chemical or nuclear weapons.

Power to identify, designate, categorise or regulate certain activities.

5. (*1*) The Central Government may identify, designate, categorise or regulate, the export, transfer, re-transfer, trans-shipment, or transit of any item related to relevant activity in such manner as may be prescribed.

(*2*) The Central Government may, by order published in the Official Gazette, designate or notify any item related to relevant activity for the purposes of this Act.

Power to appoint Advisory Committees.

6. For the purposes of this Act, the Central Government may appoint such Advisory Committees as it deems fit, and may appoint to them persons to exercise such powers and perform such duties as the Central Government may, by rules, prescribe.

Delegation of powers.

7. (*1*) Subject to the provisions of this Act and any other law for the time being in force, related to relevant activity, the Central Government shall have the power to direct or assign to any authority, in such manner as it may deem appropriate, such powers as may be necessary to implement the provisions of this Act.

(*2*) The Central Government may appoint a Licensing Authority and an Appellate Authority and make provisions relating to such authority and for licensing in such manner and in such form, as the Central Government may, by rules, prescribe.

(*3*) Without prejudice to the generality of the provisions contained in this Act, the authorities and mechanisms provided under other relevant Acts shall continue to deal with matters covered under those Acts:

Provided that in case of any doubt as to whether a matter falls within the scope of such relevant Acts or under this Act, the decision of the Central Government thereon shall be final.

Prohibition relating to weapons of mass destruction.

8. (*1*) No person shall unlawfully manufacture, acquire, possess, develop or transport a nuclear weapon or other nuclear explosive device and their means of delivery.

(*2*) No person shall unlawfully transfer, directly or indirectly, to any one a nuclear weapon or other nuclear explosive device, or transfer control over such a weapon, knowing it to be a nuclear weapon or other nuclear explosive device.

(*3*) No person shall unlawfully manufacture, acquire, possess, develop or transport a biological or chemical weapon or their means of delivery.

(*4*) No person shall unlawfully transfer, directly or indirectly, to any one biological or chemical weapons.

(*5*) No person shall unlawfully transfer, directly or indirectly, to any one missiles specially designed for the delivery of weapons of mass destruction.

Prohibition relating to non-State actor or terrorist

9. No person shall, directly or indirectly, transfer to a non-State actor or terrorist, any material, equipment and technology notified under this Act or any other Act related to relevant activity:

Provided that such transfer made to a non-State actor shall not include a transfer made as such to any person acting under lawful authority in India.

Prohibition as regards intimidating acts.

10. No person shall transfer, acquire, possess, or transport fissile or radioactive material, which is intended to be used to cause, or in a threat to cause, death or serious injury or damage to property for the purpose of intimidating people or a section of the people in India or in any foreign country, or compelling the Government of India or the Government of a foreign country or an international organisation or any other person to do so or abstain from doing any act.

Prohibition on export.

11. No person shall export any material, equipment or technology knowing that such material, equipment or technology is intended to be used in the design or manufacture of a biological weapon, chemical weapon, nuclear weapon or other nuclear explosive device, or in their missile delivery systems.

Prohibition on brokering.

12. No person who is a resident in India shall, for a consideration under the terms of an actual or implied contract, knowingly facilitate the execution of any transaction which is prohibited or regulated under this Act:

Provided that a mere carriage, without knowledge, of persons, goods or technology, or provision of services, including by a public or private carrier of goods, courier, telecommunication, postal service provider or financial service provider, shall not be an offence for the purposes of this section.

Regulation of export, transfer, re-transfer, transit and trans-shipment.

13. (*1*) No item notified under this Act shall be exported, transferred, re-transferred, brought in transit or transhipped except in accordance with the provisions of this Act or any other relevant Act.

(*2*) Any transfer of technology of an item whose export is prohibited under this Act or any other relevant Act relating to relevant activity shall be prohibited.

(*3*) When any technology is notified under this Act or any other relevant Act, as being subject to transfer controls, the transfer of such technology shall be restricted to the extent notified thereunder.

Explanation.—The transfer of technology may take place through either or both of the following modes of transfer, namely:—

(*a*) by a person or from a place within India to a person or place outside India;

(*b*) by a person or from a place outside India to a person, or a place, which is also outside India (but only where the transfer is by, or within the control of, person, who is a citizen of India, or any person who is a resident in India).

(*4*) The Central Government may notify any item as being subject to the provisions of this Act, whether or not it is covered under any other relevant Act; and when such item is exhibited, sold, supplied or transferred to any foreign entity or a foreigner who is resident, operating, visiting, studying, or conducting research or business within the territorial limits of India, or in its airspace or Exclusive Economic Zone, it shall constitute an offence.

Offences and penalties.

14. Any person who contravenes, or attempts to contravene or abets, the provisions of section 8 or section 10 of this Act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

Punishment for aiding non-State actor or terrorist.

15. (*1*) Any person who, with intent to aid any non-State actor or terrorist, contravenes the provisions of section 9 of this Act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

(*2*) Any person who, with intent to aid any non-State actor or terrorist, attempts to contravene or abets, or does any act preparatory to contravention of sub-section (*1*), shall be deemed to have contravened that provision and the provision of sub-section (*1*) shall apply subject to the modification that the reference to "imprisonment for life" therein shall be construed as a reference to "imprisonment for ten years".

(*3*) While determining the punishment under this section, the court shall take into consideration whether the accused had the knowledge about the transferee being a non-State actor or not.

Punishment for unauthorised export.

16. (*1*) Any person who knowingly contravenes, abets or attempts to contravene, the provisions of sub-section (*4*) of section 13 of this Act, shall be punishable with fine which shall not be less than three lakh rupees and which may extend to twenty lakh rupees.

(*2*) If any person is again convicted of the same offence under sub-section (*1*), then he shall be punishable for the second and every subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine.

Punishment for violation of other provisions of the Act.

17. (*1*) Where any person contravenes, or abets or attempts to contravene, any provision of this Act other than the provisions under sections 8, 9, 10 and sub-section (*4*) of section 13 of this Act, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine.

(*2*) If any person is again convicted of the same offence under sub-section (*1*), then he shall be punishable for the second and every subsequent offence with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine.

Penalty for using false or making forged documents, etc

18. Where any person signs or uses, or causes to be signed or used, any declaration, statement or document submitted to the competent authority knowing or having reason to believe that such declaration, statement or document is forged or tampered with or is false in any material particular, and relates to items notified under this Act or any other relevant Act, including those related to relevant activity, he shall be punishable with fine which shall not be less than five lakh rupees or five times the value of the materials, equipment, technology or services, whichever is more.

Punishment for offences with respect to which no provision has been made.

19. Whoever contravenes any other provision of this Act or any rule or order made thereunder for which no specific punishment is provided, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Offences by companies.

20. (*1*) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(*2*) Notwithstanding anything contained in sub-section (*1*), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(*a*) "company" means any body corporate and includes a firm and other association of individuals; and

(*b*) "director", in relation to a firm, means a partner in the firm.

Cognizance of offences.

21. No Court shall take cognizance of any offence under this Act without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf.

Bar of jurisdiction of civil courts.

22. No action or proceedings taken under section 5 and sub-sections (*1*) and (*2*) of section 7 of this Act by the Central Government or any officer authorised by it in this behalf shall be called in question in any civil court in any suit or application or by way of appeal or revision, and no injunction shall be granted by any civil court or other authority in respect of any action taken or to be taken in pursuance of any power conferred under those provisions.

Effect of other laws.

23. (*1*) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any other instrument having effect by virtue of any enactment other than this Act.

(*2*) Where any act or omission constitutes an offence punishable under this Act and also under any other relevant Act, then the offender found guilty of such offence shall be liable to be punished under that Act which imposes a greater punishment.

Protection of action taken in good faith.

24. No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer or authority of the Central Government or any other authority on whom powers have been conferred pursuant to this Act, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder.

Special provisions as to Central Government.

25. Nothing in this Act shall affect the activities of the Central Government in the discharge of its functions relating to the security or the defence of India.

Power to make rules.

26. (*1*) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) manner of regulating any item related to relevant activity under sub-section (*1*) of section 5;

(*b*) appointment of Advisory Committees, their powers and duties under section 6;

(*c*) appointment of Licensing and Appellate Authority and the manner of licensing under sub-section (*2*) of section 7; and

(*d*) any other matter which has to be, or may be, prescribed.

(*3*) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Power to remove difficulties.

27. (*1*) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of the period of two years from the date of commencement of this Act.

(*2*) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

T.K. VISWANATHAN,
Secy. to the Govt. of India

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