CONTEMPORARY TRENDS IN VESSEL BOARDING: AN OVERVIEW

Tran Viet Ha

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Abstract

Under the freedom of the sea, ships ply the sea without interference from non-flag States save only in certain exceptions derived from customary law or treaties. Undoubtedly, the perceived need of a non-flag State to exercise its enforcement jurisdiction over foreign vessels is in tension with the principle of exclusive jurisdiction of the flag State.

The research paper will provide an overview of vessel boarding trends, in which provisions of the United Nations Convention on the Law of the Sea related to vessel boarding will be analyzed and vessel boarding practices in the context of current maritime threats will be discussed in detail.

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I. INTRODUCTION

The principle of freedom of the seas in general and the principle of freedom of navigation in particular are recognized by customary international law as well as by treaties. The firmly established "non-interference" principle, which is reflected in the freedom of navigation has dominated the law of the sea. Under the "freedom of the seas" principle, the boarding of vessels is generally considered to be the prerogative of the flag State in question, not of third party States patrolling the high seas.[1]

Today's interdependent global economy depends on free and uninterrupted use of the sea.[2] The "freedom of the seas" principle remains of critical importance to secure the interests of the global economy.

The adherence to the traditional paradigm of freedom of the high seas and exclusive flag State jurisdiction means that the boarding of foreign vessels is only permissible where there has been a specific boarding authority derived from customary law or treaties.[3] "There is no general power of police exercisable over foreign merchant ships, and the occasions on which ship can be visited and seized by warships in time of peace are limited".[4]

Under customary international law, States have the right to board foreign vessels on the high seas in certain exceptions e.g. in the case of self defense, stateless vessel, piracy, slave trade. Then customary norms have been codified in law making treaties e.g. the High Seas Convention, 1958, the Law of the Sea Convention, 1982 (UNCLOS).

Under the UNCLOS, a State is further accorded enforcement jurisdiction over foreign vessels in the exclusive economic zone in order to ensure compliance with the laws and regulations promulgated by the State with respect to the exploration, exploitation, conservation and management of living resources in the maritime zone, and enforce

[1] Thomas D.Lehrman, "Enhancing the Proliferation Security Initiative: the Case for a Decentralized Nonproliferation Architecture", Virginia Journal of International Law, (Fall 2004), at 229.
[2] National Research Council, Maritime Security Partnerships, at 2, available at http://www.nap.edu/cata;pg/12029.html, (last visited on 19 November 2010).
[3] Natalie Klein, "The right of visit and the 2005 Protocol on the Suppression of unlawful acts against the safety of the maritime navigation", Denver Journal of International Law and Policy Spring (2007), at 296
[4] Ian Brownlie, "Principles of Public of International Law" (5th edition), Oxford University Press, at 239.

generally accepted rules and standards as regarding pollution of the marine environment. Since the adoption of UNCLOS in December 1982, several international treaties have been concluded, which provide boarding provisions that would allow law enforcement officials to board foreign ships at sea to deal with a wide range of criminal activities i.e. the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances (1988), Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Convention on Conservation of Anadromous Stocks in the North Pacific Ocean (1992), Convention on the Conservation and Management of Pollock Resources in Central Bering Sea (1994), the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks etc.

After the traumatic event of Sep 11, countries pay more attention to maritime security issue. "The security and welfare of all nations are linked to a regime of law and order at sea that suppresses illicit activities such as drug smuggling and human trafficking and thwarts threats of piracy and terrorism."[5] As a consequence, the boarding of foreign vessel becomes indispensable and more necessary for law enforcement officials to take action against offenders in order to ensure public order in the oceans. UNCLOS and other existing applicable conventions become insufficient for law enforcement officials to cope with current maritime threats e.g. terrorist acts, transportation of weapons of mass destruction, piracy and armed robbery against ships. Therefore, many countries have to recourse to multilateral and bilateral agreements, UN resolutions to exercise enforcement jurisdiction over foreign vessels to suppress and punish the maritime crimes.

Recently, under the IMO cooperation framework, States have amended the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), in which an important innovation of the 2005 Protocol to SUA Convention is the new article 8bis covering co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of another State Party outside the territorial sea of any State to suppress offences related to terrorist acts.

[5] See National Research Council, Maritime Security Partnerships, at 2 available at http://www.nap.edu/cata;pg/12029.html, (last visited on 19 November 2010).

Although the interdiction of vessels is governed by customary international law and a number of treaties as above-mentioned, the boarding of foreign vessels at sea always raises many questions such as which offences trigger the right of boarding, which country has jurisdiction to board foreign vessels, how permission to board a foreign vessel is obtained, what actions can be taken during interdiction, compensation for wrongful interdiction etc. Undoubtedly, the perceived need of a non-flag State to exercise its enforcement jurisdiction over foreign vessels is in tension with the principle of exclusive jurisdiction of the flag State. Therefore, throughout the history of law of the sea, the boarding of foreign vessels has been the subject of protracted debate and it will continue to be a contentious issue in the coming years.

In the research paper, chapters 1 and 2 will focus on ship boarding aspects under the UNCLOS, which is regarded as constitution for the oceans. Then chapter 3 will touch upon State practices related to vessel boarding in the context of current maritime threats. Chapter 4 will deal with vessel boarding under purview of SUA Convention and its 2005 Protocol. In the final part of the research paper, several comments and recommendations on vessel boarding issue will be made.

II. VESSEL BOARDING UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982

During the third United Nations Law of the Sea Conference deliberations, a primary conflict involved the security interests of coastal States and the navigational interest of maritime States.[6] Therefore, drafters of the 1982 United Nations Convention on the Law of the Sea has attempted to strike a balance between the interests of coastal States and maritime States and achieved this to a certain degree by departing from rigid flag State jurisdiction and moving towards to restricted coastal State competence, as far as navigation and pollution issues were concerned.[7]

The adoption of the UNCLOS was a milestone in the history of the international law of the sea.

> On 10 December 1982, a new record in legal history was created, never in the annals of international law had a Convention been signed by 119 countries on the very first day on which it was opened for signature. Not only was the number of signatories a remarkable fact but just as important was the fact that the Convention had been signed by States from every region of the world, from the North and from the South, from the East and from the West, by coastal States as well as land-locked and geographically disadvantaged States.[8]

The convention entered into force on 16 November 1994. With respect to the important issue of navigational rights, the UNCLOS has established a delicate balance between the freedom of navigation of flag States on the one hand and the rights and jurisdiction of coastal States on the other.

Although the boarding or interdiction of foreign ships is a particular sensitive matter, it affects the right of freedom of navigation of ships, the exclusive jurisdiction of the flag State over its ships, however, UNCLOS features only a number of limited rules that speak

[6] George C. Kasoulide, Jurisdiction of the coastal State and regulation of shipping, Revue Hellenique de Droit International, Vol. 45 (1992), at 144.
[7] See id.
[8] See "A Constitution for the Oceans", Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, available at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf (last visited on 3 December 2010).

directly to issues of vessel boarding. In other words, UNCLOS does not make specific provisions on when a coastal State has the right to board a foreign vessel, reference to related provisions of UNCLOS is given to law enforcers in the process of taking enforcement jurisdiction over foreign vessels.

In the following two chapters, the enforcement competence over foreign vessels in varying degrees over the different zones of the seas will be analysed. The zones are: internal waters, territorial sea, contiguous zone, exclusive economic zone, and the high seas. The right of States to take actions decreases as the location of the vessel is further offshore.

Chapter 1: Vessel boarding in the internal waters, territorial sea, contiguous zone, and exclusive economic zone

1. Vessel boarding in the internal waters

In the UNCLOS, sole norm referring to regime of internal waters is Article 8.2, which governs the innocent passage in internal waters which previously were part of the territorial sea. Although there are no provisions on enforcement jurisdiction of coastal State over foreign vessels in internal waters, the boarding of a foreign vessel in the internal waters is not a problematic issue because internal waters are assimilated to the terrestrial territory and the coastal State can have full sovereignty over them.[9] "By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State."[10] The coastal State shall be entitled to enforce its laws and regulations against the ship and those on board while the ship was in its internal waters, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships.[11] Accordingly, the coastal State will have the right to board foreign ships at anytime in internal waters to take necessary actions in accordance with its laws and regulations, for example: boarding foreign vessels to perform function of port State control.

Nevertheless, jurisdiction over a ship has been connected with its nationality. Thus while in foreign ports, the ship will also be subject to laws and regulations of the flag State applicable to the ship and a system for the enforcement of its flag State laws and regulations through the power of the ship's master and the authority of the flag State's diplomatic and consul agencies. Furthermore, currently coastal States compete with each other to attract more foreign ships to call at their ports, therefore, the coastal States don't want to take unnecessary measures which may impede the legitimate activities of foreign ships in its internal waters. As a consequence, coastal States commonly enforce their laws and regulations only in cases where their interests are involved, when the offense adversely

[9] See UNCLOS, art. 8.
[10] R.R. Churchill and A.V.Lowe, the Law of the Sea (3rd ed., 1999), at 65.
[11] See id.

affects its peace and good order or when its security is at stake.[12] Matters relating solely to the "internal economy" of the ship shall not be interfered with by coastal States. In addition, coastal States will not exercise enforcement jurisdiction over foreign ships if they enter into internal waters because of force majeure or distress.[13]

It short, there is no doubt that coastal States are entitled to exercise enforcement jurisdiction over foreign vessels in their internal waters: "The boarding of foreign vessels that are in, bound for or departing from a port of the internal waters of the boarding State is relatively unproblematic."[14]

[12] Anne Bardin, "Coastal State's Jurisdiction Over Foreign Vessels", Pace Int'l L.Rev. (Vol. 14:27 -2002), at 31.
[13] R.R. Churchill and A.V.Lowe, supra note 10, at 68.
[14] Gunther Handl, "the International Legal Framework" (appendix C) - National Research Council, Maritime Security Partnerships (2008), at 183.

2. Vessel boarding in the territorial sea

Under the UNCLOS, the coastal State exercises full competence in the territorial sea, however, the sovereignty over the territorial sea is exercised subject to this convention and other rules of international law.[15] The principal limitation on the sovereignty of a coastal State in the territorial sea is the right of innocent passage of foreign vessels. This customary principle is codified in Article 17 of the UNCLOS, it reads as follows: "ships of all States, whether coastal or land locked, enjoy the right of innocent passage through the territorial sea". Therefore, in principle, a coastal State will have the right to board a foreign vessel in their territorial sea save in the case when the foreign vessel is exercising innocent passage.

Although the right of innocent passage is recognized by customary international law, a coastal State is entitled to apply restrictions on the exercise of the innocent passage as permitted by Article 19 of UNCLOS. Even the innocent passage of foreign ships can be suspended by a coastal State in certain circumstances.[16] There is no doubt that innocent passage is the most restrictive of the passage regimes.

"At the Third United Nations Conference on the Law of the Sea, the right of innocent passage was a matter of particular interest. The maritime States, faced with expanding claims to territorial seas affecting many seaways, were concerned to provide firmer outlines for the right."[17] Consequently, Article 19 of UNCLOS indicates the following activities of a foreign vessel that are considered inconsistent with a right of innocent passage:

> 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

[15] See UNCLOS, art.2, paras. (1), (3).
[16] See UNCLOS, art. 25(3).
[17] Ian Brownlie, supra note 4, at 193.

(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of willful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; and
(l) any other activity not having a direct bearing on passage.

From the aforesaid open list of activities, it seems that "the UNCLOS permits a wider definition of 'security' than what might ordinarily be inferred from the word alone."[18] This broader definition of security is not appropriate in all contexts, however it has been used by coastal States to protect their interests.[19] In practice, it is difficult to determine which activity of a ship is prejudicial to the peace, good order or security of the coastal State, because when ships undertake passage in the territorial sea, there may be no external indication of such activity from the movements of the ship.[20] For example, the coastal State may suspect the ship collecting information or carrying out of a survey but it is difficult to prove this.

Article 18 of UNCLOS also stipulates that stopping and anchoring in the concept of passage in so far this is incidental to ordinary navigation or necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. However, the competent authority of a coastal State may board any vessel entering its territorial sea under a claim of force majeure for the purpose of verifying the claim.

If the ship is in innocent passage, it will not be subject to any boarding, inspection and other actions on the part of law enforcement authorities of coastal State.

[18] Stuart Kaye, "Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction" in "the Law of the Sea – Progress and Prospects" –Oxford University Press (2006), at 349.
[19] See id.
[20] See Sam Batema, "Security and the Law of the Sea in East Asia: Navigational Regime and EEZ" in "the Law of the Sea: Progress and Prospects"- Oxford University Press (2006), at 367.

Notwithstanding, when exercising the right of innocent passage through the territorial sea, foreign ships must comply with the laws and regulations of the coastal State relating to innocent passage, and also generally rules concerning the prevention of collision at sea provided that such laws and regulations must be duly published and not related to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.[21] Article 25 of UNCLOS allows a coastal State to take necessary steps to prevent passage in its territorial sea that is not innocent. It means that the law enforcement authority could board foreign vessels if the vessels violate the laws and regulations of coastal State related to innocent passage or if the activities of a foreign ship in its territorial sea do not have a direct bearing on passage.

Apart from the right to board a foreign ship if the ship's passage is not innocent, Article 27 also confers the boarding right to the coastal State in the territorial sea in case there is a crime committed related to a foreign ship. Under the UNCLOS, a coastal State will take enforcement jurisdiction over a crime committed related to a foreign ship in its territorial sea if:

(a) the consequences of the crime extend to the coastal State;

(b) the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

(c) 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) such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[22]

However, the coastal State may not exert enforcement jurisdiction over the ships traversing the territorial sea without entering internal waters to arrest any person or to

[21] See UNCLOS, art. 21.
[22] See UNCLOS, art. 27.

conduct any investigation in connection with any crime committed before the ship entered the territorial sea.[23]

According to Article 28, it is impermissible to stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board. The coastal State may levy execution against or arrest a foreign ship for the purpose of any civil proceeding only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the territorial sea, for example: obligations or liabilities arise from incidents related to collision, allision, or any acts affecting to living resources preservation, or submerged archaeological objects caused by the vessel during its voyage in territorial sea.

Apart from provisions in the Part II of UNCLOS, enforcement jurisdiction over foreign ships by coastal States in the territorial sea is also governed by Article 220 of UNCLOS, it reads as follows:

> Where a foreign vessel is suspected of having violated during its passage through the territorial sea the coastal State's anti-pollution or applicable international rules relating to pollution from ships, the coastal State may, without prejudice to its general enforcement competence in the territorial sea as set out in section 3 of Part II of UNCLOS, undertake physical inspections of vessel.

In conclusion, although coastal State has sovereignty in the territorial sea, enforcement jurisdiction is in practice only exerted in limited circumstances: primarily when the offence disturbs the peace, order and security of the coastal State or the consequences of the crime extend to the coastal State; where coastal State intervention is requested by the diplomatic or consul officials of the flag State; or where a specific law of coastal State applying to the conduct of the ship in customs, navigation, fishing, etc., is violated. Ship in innocent passage is not subject to boarding as well as other enforcement measures.

[23] See UNCLOS, art. 27 (5).

3. Vessel boarding in the contiguous zone

The contiguous zone is a zone of sea contiguous to and seaward of the territorial sea in which States have limited powers for the enforcement of their laws and regulations in four areas: customs, sanitary, immigration and taxes. "It has its origins in functional legislation such as the eighteenth century 'Hovering Acts' enacted by Great Britain against foreign smuggling ships hovering within distances of up to eight leagues (i.e. twenty four miles)."[24]

As a matter of general international law, a coastal State may take necessary measures to secure compliance with its laws and regulations in a prescribed zone. However, in the contiguous zone, "the power of coastal State is one of police and control, and transgressors cannot be visited with consequences amounting to reprisal or summary punishment."[25] "Forcible measures of self-help may not be resorted to as readily as in the case of trespass over a State frontier."[26]

In this respect, Article 33 of UNCLOS provides that a coastal State can exercise the control measures necessary to prevent and punish violations of its legislation concerning customs, taxes, immigration and sanitation within its territorial sea. The intention of this Article is to avoid such an offence being committed subsequently in the territorial sea (for in-coming ships) and to punish such an offence already committed when the vessel was in the territorial sea (for out-coming ships). Accordingly, enforcement jurisdiction of coastal State over foreign-flagged vessels in its contiguous zone is limited to preventing measures for in-coming ships and punishing measures for out-coming ships if the ships were in infringement of customs, fiscal, immigration or sanitary laws of coastal State.

In the case of in-coming vessels, what are the enforcement measures which the coastal State can take? Whether the coastal State can board, arrest the in-coming vessel and take other action in the contiguous zone? "So far as arrest, as such, is concerned, the

[24] R.R. Churchill and A.V.Lowe, supra note 10, at 132.
[25] Ian Brownlie, supra note 4, at 202.
[26] See id.

answer must be in the negative."[27] However, "within the contiguous zone, a coastal State will be authorized to board a foreign vessel as part of its right to prevent violations of its customs, fiscal, immigration, and sanitary laws and regulations."[28]

With regard to the out-coming vessel, definitely punishment including boarding, inspection and arrest can be applied to the offending vessel in the contiguous zone because the vessel was already in the territorial sea and came within the jurisdiction of the coastal State.

Furthermore, in the contiguous zone, with a view to controlling traffic in historical and archaeological objects, the coastal State may presume that the removal of such objects from the contiguous zone without its consent would violate the laws and regulations mentioned in Article 33, and the State may take necessary measures to prevent that illegal activity of a foreign vessel.[29]

In addition, because the contiguous zone is a part of the exclusive economic zone, a coastal State will also have all the rights and duties, without exception, that pertain to the EEZ. Therefore, in the contiguous zone, a coastal State can board, search and ultimately bring to port vessels violating its legislation related to EEZ regime in order to punish the wrongdoers. Nonetheless, with a view to avoiding unjustifiable interference with the freedom of navigation, these powers of coastal State are normally exercised on the basis of a perceptible threat to its public order and the coastal State must have reasonable doubts about illegal activities of the suspect vessel.

[27] See id.
[28] See Gunther Handl, supra note 14, at 185.
[29] See UNCLOS, art. 303 (2).

4. Vessel boarding in the exclusive economic zone

The exclusive economic zone (EEZ) is to extend no further than 200 nautical miles from the baseline.[30] At the third United Nations Conference on the Law of the Sea, there was widespread support for the establishment of a regime for the zone. Consequently, Part V of UNCLOS governs the rights and obligations of States in the EEZ. The allocation of the respective rights and duties of the coastal State and those of other States in the EEZ involves a delicate balancing process which is reflected in general terms in the provisions of the convention.

Within the EEZ, the coastal State enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and jurisdiction with regard to artificial islands, environmental protection, and maritime scientific research.[31] The rights of the coastal State in the EEZ are exclusive, no other State has the rights without the consent of the coastal State to conduct similar activities in the exclusive economic zone. However, in exercising its rights and jurisdiction in the EEZ, the coastal State must take due regard to the rights and duties of other States.[32]

It is noted that under the UNCLOS, the EEZ does not form part of the high seas,[33] and only some significant aspects of the regime of the high seas apply to the zone. All States shall enjoy in the EEZ the high seas freedoms of navigation, overflight, and the laying of submarine cables and pipelines although the exercise of these freedoms is limited.[34]

> The limitation that the enjoyment of the said freedoms within the EEZ is 'subject to the relevant provisions of this Convention' and that in their exercise, States must comply with the laws and regulations established by the coastal State in accordance with the provisions of this convention and other rule of international law in so far as they are not incompatible with the

[30] See UNCLOS, art.57.
[31] See UNCLOS, art.56.
[32] See UNCLOS, art.56(2).
[33] See UNCLOS. arts. 55, 86.
[34] See UNCLOS, art.58 (1), (3).

EEZ regime, suggest that the quality of the said freedoms in the zone is not necessarily the same as that on the high seas.[35]

Furthermore, under the UNCLOS, general provisions of high seas[36] will apply mutatis mutandis to the EEZ in so far as they are not contradictory with the EEZ regime.[37]

With regard to the enforcement jurisdiction of a coastal State over foreign vessels in the EEZ, the coastal State has the power to take reasonable measures of enforcement of its rights and jurisdiction within the zone in accordance with both the standards of general international law and, where applicable, the provisions of the UNCLOS.[38] The following discusses vessel boarding issue in the EEZ:

a. Vessel boarding with respect to violation of fishing regulations of coastal State

Within the EEZ, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the zone. The provision conveys the impression that living resources in the EEZ belong to a single coastal State. However, these rights are subject to a number of duties, for example, where the coastal State does not have the capacity to harvest the entire allowable catch in its EEZ, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch especially in relation to the developing States.[39]

Where the coastal State has already promulgated regulations in conformity with the convention for foreign vessels fishing in its EEZ, it may enforce them by measures including boarding, inspection, arrest and judicial proceeding.[40] Nonetheless, when coastal States exercise enforcement jurisdiction to secure compliance with their fisheries regulations, such

[35] David Joseph Attard, "The Exclusive Economic Zone in International Law", Clarendon Press – Oxford (1987), at 63.
[36] From art. 88 to art. 115
[37] See UNCLOS, art. 58 (2).
[38] See UNCLOS, art.73.
[39] See UNCLOS, art. 62 (2).
[40] See UNCLOS, art.73.

exercise cannot cause unjustifiable interference with freedom of navigation of foreign vessels.[41]

Besides, a safeguard is inserted in the UNCLOS against undue detention as arrested vessel and crews shall be promptly released if a reasonable bond or other security is posted,[42] in the meantime, provision is made for the prompt notification to the flag State in cases of arrest or detention of foreign vessels.[43] Furthermore, violations *may not be* punished by imprisonment, in the absence of contrary agreements, or any form of corporal punishment.[44] However, the phrase "may not be" of Article 73(3) is ambiguous and in practice, there are a number of countries still using imprisonment as a penalty for fishery offences in the EEZ.

Currently, many countries have been exercising their enforcement powers granted by the UNCLOS to board and arrest foreign fishing vessels suspected of violating fishing regulations in their EEZ. Obviously, the boarding and arrest of illegal fishing vessels in EEZ is of no contentious issue. However, following the arrest, the question of what is reasonable bond to be provided in return for release of vessel raises disputes between parties. If parties in question cannot agree on a reasonable bond, it is likely that the detaining ships will not be released. Recently, the International Tribunal for the Law of the Sea (ITLOS) has held several cases[45] related to prompt release of fishing vessels pursuant to Article 292 of UNCLOS.[46] The Monte Confurco case is an example .[47]

[41] David Joseph Attard, supra note 35, at 179.
[42] See UNCLOS, art. 73 (2).
[43] See UNCLOS, art.73 (4).
[44] See UNCLOS, art. 73(3).
[45] Recent cases held by ITLOS related to prompt release of fishing vessels: *Camouco* (Panama v. France), *Grand Prince* (Belize v. France) and in *Monte Confurco* (Seychelles v. France). Information of the cases are available at http://www.itlos.org.
[46] Article 292(1) stipulates: "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree".
[47] See judgment of the *Monte Confurco* case from website of ITLOS, available at http://www.itlos.org/start2_en.html.

This case concerned the vessel "Monte Confurco" registered in the Republic of the Seychelles and licensed by it to fish in international waters. The vessel was spotted by the French Frigate "Floréal", which apprehended the vessel for alleged illegal fishing and failure to announce its presence in the exclusive economic zone of the Kerguelen Islands.[48]

The Tribunal was requested on behalf of Seychelles to order the prompt release of the "Monte Confurco" and its Master. France requested the Tribunal to declare that the bond set by the competent French authorities was reasonable and that the Application was inadmissible.[49]

On 18 December 2000, the Tribunal delivered its judgment, ordering the prompt release of the vessel and its master by France, upon the furnishing of a security of 18 million French Francs (FF) by the Seychelles, the flag State of the "*Monte Confurco*". The Tribunal decided that the bond set by the national court in Réunion of 56.4 million FF for the release of the vessel and its Master was not reasonable.[50]

Apart from the issue of determining a reasonable bond, the "*Monte Confurco*" case also drew attention of the maritime community to a sensitive issue regarding "the applicability of the notification requirement".

> There is another trend in the application of the UNCLOS: some coastal States are demanding, in their domestic legislation, prior notification by vessels intending to enter their exclusive economic zones even if only for the purpose of transiting them in application of the freedom of navigation which is guaranteed by article 58, paragraph 1, of the United Nations Convention on the Law of the Sea.[51]

In the *Monte Confurco* case, the applicant State seeking release of the arrested vessel did not contend the applicability of the notification requirement. The Tribunal itself did not pronounce on the international permissibility of such legislation requiring

[48] See id.
[49] See id.
[50] See id.
[51] Declaration of Judge Kolodkin in the Juno Trader (Saint Vincent and the Grenadines v. Guinea – Bissau) case, available at http://www.itlos.org/case_documents/2004/document_en_250.pdf

notification, or the type of sanctions - spelled out in Article 2 of the French Statute[52] – for failure to notify. Facing with the trend, it would seem prudent to seek clarifications through consultations between UNCLOS contracting parties, as to whether a coastal State can require foreign fishing vessels to give prior notification before entering its exclusive economic zone. If not, in the EEZ of some countries, foreign fishing vessels may be interfered and boarded by the coastal States due to the reason that the vessels fail to announce their presence in the exclusive economic zone while in the EEZ of other countries, the vessels are not required to do so.

b. Vessel boarding with respect to pollution

UNCLOS provides for coastal State jurisdiction with regard to the preservation of the marine environment. "However to what extent a State would be able to exercise this jurisdiction was a matter of great controversy at UNCLOS III."[53] "The maritime States argued that any exercise of jurisdiction in this regard should be within internationally agreed pollution controls, if coastal States were allowed to impose their own rules as to shipping design and construction, freedom of navigation could be endangered."[54] At the end of the day, when the UNCLOS was adopted, its text reflected the view which advocated the exercise of enforcement jurisdiction over a foreign vessel if there is a violation of internationally agreed rules for the prevention of pollution caused by dumping and pollution from the vessel.

- Vessel boarding with respect to pollution by dumping

Article 210 (5) of UNCLOS provides that dumping within EEZ shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States

[52] French Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997, on fishing and the exploitation of marine products in the French Southern and Antarctic Territories, art. 2: "No one may fish and hunt marine animals, or engage in the exploitation of marine products, whether on land or from vessels, without having first obtained authorization. Any vessel entering the exclusive economic zone of the French Southern and Antarctic Territories shall be obliged to give notification of its presence and to declare the tonnage of fish held on board to the chief district administrator of the nearest archipelago."
[53] See David Joseph Attard, supra note 35, at 95.
[54] See id.

which by reason of their geographical situation may be adversely affected thereby. With regard to enforcement jurisdiction, Article 216 gives the coastal State the right to take action against ships violating its laws and regulations adopted in accordance with UNCLOS and *applicable* international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping. The effect of the phrase "*applicable* international rules and standards" may be that some coastal States take action to enforce the provisions of existing conventions to which they are not contracting parties, unless "applicable" is interpreted to refer to rules which are contained in a convention to which the coastal State is a party.

- *vessel boarding with respect to other forms of pollution from vessels*

Where there are clear grounds for believing that a vessel while navigating in the EEZ committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution form vessels or laws and regulation and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.[55] Apart from the right to request information, the coastal State has the right to board a foreign vessel and conduct physical inspection on board if the following conditions are satisfied:

(i) the foreign vessel refuses to give the requested information or the information supplied is clearly at a variance with the evident factual situation, and

(ii) the discharge is "substantial" and the pollution, it has caused, or is threatening to cause, is "significant".[56]

It is noted that the convention does not require that the discharge should result in any harmful effect or major damage before the physical inspection may take place.

[55] See UNCLOS, art. 220 (3).
[56] See UNCLOS, art. 220 (5).

Where the alleged violation in the EEZ results in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive zone, the coastal State may institute legal proceedings against it, including detention.[57]

It should be emphasized that the coastal State may exercise its enforcement power in its EEZ in respect of violations not only of "applicable international rules and standards" but also of its own pollution rules. However, the national pollution rules must "conform to and give effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference".[58] Additional laws and regulations relating to discharge standards may be enacted as authorized by the "competent international organization" but cannot require foreign vessels to observe CDEM standards[59] other than generally accepted international rules and standards.

With regard to safeguard provisions, in case a coastal State boards a foreign vessel for the reason of pollution from vessel or dumping, the State shall be liable for damage or loss attributable to them arising from measures taken when such measures are unlawful or exceed those reasonably required in the light of available information. States shall compensate for actions in respect of such damage of loss.[60]

c. Vessel boarding with respect to maritime scientific research

"The freedom to conduct scientific research in the EEZ was a matter of great controversy at UNCLOS III."[61] "The need for greater scientific knowledge of the sea clashed with the demands to control any activity related to resources within the zone."[62] Under the UNCLOS, coastal States have the exclusive right to regulate, authorize and conduct marine scientific research in their EEZ and on their continental shelf. The right to conduct marine scientific research is stipulated in Article 238. Accordingly, all States and competent organizations have the right to conduct marine scientific research subject to the rights and

[57] See UNCLOS, art. 220 (6).
[58] See UNCLOS, art. 211(5).
[59] CDME stands for construction, design, equipment and manning.
[60] See UNCLOS, art. 232.
[61] See David Joseph Attard, supra note 35, at 106.
[62] See id.

duties of other States as provided for in this convention. Furthermore, the conducting of marine scientific research must comply with the following principles:[63]

(a) marine scientific research shall be conducted exclusively for peaceful purposes;

(b) marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;

(c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses; and

(d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

The core provisions relating to the conduct of marine scientific research in the EEZ are stipulated in Article 246, which requires that "marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State". In other words, a foreign vessel cannot carry out a marine scientific research in the EEZ of other State if they don't have the consent of that State. "Nevertheless, the consent regime for research in an EEZ is controversial and unevenly interpreted by the international community."[64] "There has been some reluctance by researching States to resort to implied consent and go ahead with their research without the formal approval of the coastal State."[65] Recently, several disputes among countries related to the carrying out of marine scientific research have occurred due to several reasons. For instance: In 2004, Japan lodged a strong protest with China after spotting a Chinese maritime survey vessel in waters inside its exclusive economic zone around Japan's southern-most island in the Pacific.[66] The vessel was detected as it apparently engaged in a maritime research off Okinotorishima island.[67] According to the Japanese side, "the incident is the 21st case this

[63] See UNCLOS, art. 240.
[64] See Sam Batema, supra note 20, at 381.
[65] See id.
[66] Kyodo News, "Another Chinese vessel seen in EEZ; govt lodges protest", the Daily Yomiuri 9.12.04, p-3.
[67] See id.

year in which Japan has spotted a Chinese survey vessel without receiving prior notice."[68] The Government of Japan demanded China to halt its activities.[69] In response, the Chinese side was of the view that "the waters surrounding the island as open sea - it is just a pile or rocks."[70] "Before the incident, Tokyo has repeatedly lodged protests with China after spotting similar vessels without prior notice."[71]

Under the UNCLOS, if the research activities are not being conducted in line with the requirements as stipulated in its Articles 248, 249, the coastal State shall have the right to require suspension or cessation of the project.[72] In particular, suspension can be required if:

(i) the project is not in line with the information provided under Article 248 before consent was given,

(ii) the rights of the coastal State established under Article 249 are not respected;[73]

cessation can be required if:

(i) there is any non-compliance with the provisions in Article 248 which amounts to a major change in the research programme,[74] and

(ii) following suspension as mentioned above no rectification takes place within a reasonable period of time.[75]

The above-mentioned provisions clearly defines the enforcement jurisdiction of the coastal State over marine scientific research. However "in ensuring that the researching State does not violate its rights, it may suspend or cease the project but cannot, for example, arrest the researching vessel."[76]

[68] See id.
[69] See id.
[70] See id.
[71] See id.
[72] See UNCLOS, art. 253.
[73] See UNCLOS, art.253 (1)(b).
[74] See UNCLOS, art.253 (2).
[75] See UNCLOS, art. 253 (3).
[76] See David Joseph Attard, supra note 35, at 117.

d. Vessel boarding with respect to hydrographic survey

In the UNCLOS, there is no specific provision referring to hydrographic surveying. Some coastal States require consent with respect to hydrographic surveying, while it is the opinion of other States that hydrographic surveys can be conducted freely in the EEZ because the States are of the view that hydrographic survey is directly or principally related to navigation, ergo subject to the "freedom of navigation" rules.[77] Due to the fact that different opinions exist as to whether coastal State jurisdiction extends to hydrographic surveying or collection of other marine environmental data activities in the EEZ, the contention between countries about the issue cannot be avoided. In 2002, China complained about U.S. Surveillance Ship operating in its exclusive zone.[78] The Chinese side said "the United States naval ship Bowditch was operating in China's exclusive zone in contravention of the international law of the sea."[79] However, the United States side responded that "the Bowditch is a Navy ship staffed by civilians and was conducting military oceanographic surveillance. That is accepted practice within 200-mile economic zone off China's coast."[80] "In the American view, only commercial activities – e.g. mining or fishing – would be controlled within the economic zone; transit and surveillance are allowed."[81] In 2009, China also accused the United States of illegal intrusion into its exclusive economic zone.[82] A foreign ministry spokesman of China said "the United States navy surveillance ship Impeccable had moved about in China's EEZ in the South China Sea without approval from China."[83] The accusation came in response to a complaint by the United States that Chinese coastguard vessels, fishing trawlers and naval vessels had harassed the Impeccable 75 miles south of the Chinese island of Hainan, in international waters.[84] "Similarly in March 2001, India lodged protests with US and the UK over violation of its EEZ by military survey ships – the ships involved were the Bowditch and HMS Scott."[85]

[77] See Sam Batema, supra note 20, at 382.
[78] Erik Eckholm, "China Complains about U.S. Surveillance Ship", New York Times, 27.9.02, A7.
[79] See id.
[80] See id.
[81] See id.
[82] Kathrin Hille, "China hits out at US "illegal" intrusion", Financial Times 11.3.09, p.5.
[83] See id.
[84] See id.
[85] See Sam Batema, supra note 20, at 383.

From the aforesaid State practices, we can see that China, India, the United States and the United Kingdom have different views on the issue of conducting hydrographic survey in the EEZ of other countries. While the United States and the United Kingdom take the position that hydrographic surveying is not within the jurisdiction of the coastal States, other States including Australia and Canada clearly do not share this position.[86] However, with respect to a hydrographic survey, undoubtedly the coastal State will not have the right to board and arrest a foreign vessel conducting hydrographic survey in EEZ, the coastal State may have the right to require cessation, but it is also a contentious issue.

[86] See Sam Batema, "Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research", Marine Policy 29 (2005), at 170.

Chapter 2. Vessel boarding on the high seas

> For do not the ocean navigable in every direction with which God has encompassed all the earth, and the regular and occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples?[87]
>
> *Hugo Grotius*

In the seventeenth century, the Dutch legal scholar Hugo Grotius persuasively introduced the doctrine of freedom of the seas, which significantly contributed to a rapid expansion in international trade. Today, "the modern law governing the high seas has its foundation in the rule that the high seas are not open to acquisition by occupation on the part of States individually or collectively: it is *res extra commercium."*[88]

"At UNCLOS III, there was no controversy over providing that in areas conceded to be high seas there should be freedom of navigation, overflight, and laying of cables and pipeline."[89] However, in the course of negotiation, countries had arguments about the two following matters: "The first referred to whether the enumeration of these freedoms should be exhaustive or open-ended. The second related to whether the freedoms should apply to the area covered by EEZ."[90] The solutions adopted by UNCLOS are found in Part VII on the high seas and Part V on the EEZ, which advocated a non-exhaustive list of high seas freedoms and the application of some of significant aspects of the regime of the high seas in the exclusive economic zone.

Article 87 of UNCLOS provides for "freedom of navigation," "freedom of overflight," "freedom to lay submarine cables and pipelines," "freedom to construct artificial islands and

[87] Hugo Grotius, "the Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East India Trade" - James Brown Scott ed., Ralph Van Deman Magoffin, trans., Oxford Univ. Press 1916, at 8.
[88] Ian Brownlie, supra note 4, at 230.
[89] David Joseph Attard, supra note 35, at 71.
[90] See id.

other installations permitted under international law," "freedom of fishing," and "freedom of scientific research". The UNCLOS recognizes the high seas as equivalent to an open commons,[91] therefore, any State including land-locked States shall have the right to exercise high seas freedoms.

The customary international law on navigational freedom is codified in the UNCLOS, which sets forth the principles governing flag State jurisdiction on the high seas. According to Article 92(1), apart from exceptional cases provided for in international treaties or in this convention, a ship is subject to the exclusive jurisdiction of flag State on the high seas. The principle of exclusive jurisdiction of the flag State is rooted in the fact that a ship is to sail under the flag of one State. Each State shall fix its own conditions for the granting of its nationality to ships, and for the right to fly its flag.[92] In conferring the right to fly its flag, there must be a genuine link between the State and the ship.[93] Nevertheless, UNCLOS does not specify "genuine link" in its text,[94] therefore, in practice many States have been operating open registry systems,[95] this causes certain problems for management of ships. Furthermore, the exclusive control of flag State over its vessel is reflected by the regulation that a ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry, thereby ensuring that the nationality of the vessel remains constant while the vessel is at sea.[96]

In short, under the freedom of the seas principle, on the high seas, the boarding of vessel is considered to be the prerogative of the flag State, there are only several exceptions

[91] See UNCLOS, art. 89.
[92] See UNCLOS, art. 91 (1).
[93] See id.
[94] For example, UNCLOS does not specify bond requirements between the flag State, the ship and its owner(s) such as participation by nationals in the ownership and/or manning of ships.
[95] According to the Report of the Committee of Inquiry into Shipping, chaired by Lord Rochdale (London, May 1970), open registries generally present the following attributes:

(i) allowing ownership and/or control of their flag ships by non-citizens;
(ii) permitting access to and unrestricted transfer of ship registration;
(iii) levy no or low local taxes on income;
(iv) operated usually by small countries that depend on registration and annual tonnage fees for a substantial portion of their national incomes;
(v) permitting manning of their flag ships by non-nationals; and
(vi) having neither the power nor the administrative machinery to effectively impose any government or international regulation or to control the shipping companies.

See further: Phang, Sock-Yong, "Quasi-flag of convenience shipping: the wave of the future", Transportation Journal (22 December 1993), available at http://www.allbusiness.com/operations/shipping/416713-1.html
[96] See UNCLOS, art. 92 (1).

provided that a State can board foreign vessels on the high seas, namely the right of visit and hot pursuit.

1. Vessel boarding with respect to the right of visit

The right of visit granted under UNCLOS is expressly for the enforcement of the designated prescriptions included in the convention with respect to foreign vessels.[97] However, there are certain restrictions for the exercise of the right of visit.

According to Article 110 of UNCLOS, a warship can exercise the right of visit against foreign vessels in four cases, namely: piracy, slave trade, unlawful broadcasting, and where suspicions as to the nationality of the vessel arise. "These exceptions to flag State authority and the freedom of the high seas have resulted from globally-shared needs and troubles, especially in modern times."[98]

It is noted that the right of visit is composed of two distinct operations and the right of visit must be carried out by a warship or military aircraft or other duly authorized ships or aircraft clearly marked and identifiable as being on government service.[99] When boarding is justified, the warship may visit the vessel to investigate her right to fly her flag (first phase), only if suspicion remains after the documents have been checked, it may proceed to an inspection of the ship (second phase), which must be carried out with all possible consideration.[100]

The act of boarding, even there is a "reasonable suspicion" for boarding, is a right, which can be exercised by a warship, however if the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them and the flag State of the warship must compensate for "any loss or damage" that the boarded ship may have sustained.[101] "The International Law Commission was of the view that the severe penalty

[97] Natalie Klein, supra note 3, at 297.
[98] See id.
[99] See UNCLOS, art. 110 (4-5).
[100] See UNCLOS art. 110 (2), see further: Robert C.F. Reuland, "Interference with non-national ships on the high seas: peacetime exceptions to the exclusive rule of flag State jurisdiction", Vanderbilt Journal of Transnational Law, 1989, at 1171.
[101] See UNCLOS, arts. 110 (3).

seems justified in order to prevent the right of visit being abused."[102]

The following describes the four instances where a warship may exercise the right of visit to board a foreign vessel on the high seas:

a. Vessel boarding with respect to piracy

Piracy is an international crime. From ancient times, those who have undertaken depredations upon the high seas have been subject to the universal condemnations of States. Anyone engaged in piracy is deemed an enemy of all humanity. The customary norm has been codified into the UNCLOS.

Article 101 of UNCLOS defines piracy as follows:

> a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
> i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> b) act of voluntary participation in the operation of a ship or of an aircraft with knowledge of the facts making it a pirate ship or aircraft;
> c) any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).

Two features of the definition of piracy should be given attention: firstly, the illegal act committed for private ends. Secondly, the act committed on the high seas or in any "other place outside the jurisdiction of any State". "The latter phrase refers primarily to an island constituting *terra nullius* or the shore of an unoccupied territory."[103]

When the piratical act occurs, customary international law has provided that any State may assert jurisdiction over piracy. This long-standing norm is codified in the UNCLOS, with Article 100 requiring all States to cooperate to the fullest possible extent in the

[102] See Ian Brownlie, supra note 4, at 241.
[103] See ibid, at 236.

repression of piracy on the high seas or in any other place outside the jurisdiction of any State. Besides, according to Article 105 of the UNCLOS, on the high seas, every State has the right to board, search and seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. In other words, universal jurisdiction exists with respect to a piracy.

b. Vessel boarding with respect to slave trade

Together with piracy, slave trade is another persistent problem in the world's maritime history. The first shipload of African captives destined for North America arrived at Jamestown, Virginia, in August 1619.[104] During the seventeenth and eighteenth centuries, the slave trade operated without restriction throughout the Atlantic. By the nineteenth century, many countries had restricted the slave trade. The United States Congress passed legislation banning the slave trade in 1807 to take effect on 1 January 1808.[105] The British Parliament officially outlawed the slave trade in 1807, and then in 1833 abolished slavery entirely throughout the British Empire.[106] The slave trade was largely extinguished by the 1870s. Nowadays, the provision on banning slave trade has been codified in the UNCLOS.

Under the UNCLOS, Contracting Parties are obliged to

> take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.[107]

Article 110 of UNCLOS recognizes that a warship may visit and board a foreign vessel on the high seas when it is reasonably suspected that the foreign vessel "is engaged in the slave trade".[108] However, it is noted that following a boarding of a foreign vessel involved in slave trade, the warship does not have the right to arrest the vessel or offenders on board, alternatively they can seek consent of flag State for further action. In this regards, "a

[104] See "Congress abolishes the African slave trade", available at http://www.history.com/this-day-in-history/congress-abolishes-the-african-slave-trade, (last visited on 3 December 2010).
[105] See id.
[106] See Thomas, D. Lehrman, "Enhancing the Proliferation Security Initiative: the Case for a Decentralized Nonproliferation Architecture", Virginia Journal of International Law (2004-2005), at 235.
[107] See UNCLOS, art. 99.
[108] See id, art. 110 (1) b.

distinction is drawn between the right to board and the right to seize the vessel and arrest the crew."[109]

c. Vessel boarding with respect to unauthorized broadcasting

Other exception to the exclusiveness of flag State jurisdiction concerns unauthorized broadcasting[110] on the high seas. Under the UNCLOS, the warship entitled to exercise the right of visit must have jurisdiction over the unauthorized broadcasting based on the offending vessel or installation being of the same flag or registry, the nationality of the offenders, or the warship is flagged to the State where the transmissions can be received or where authorized radio communication is suffering interference.[111] In other words, the warship must have an established basis of jurisdiction as listed in paragraph 3 of Article 109 of UNCLOS in order to subject a foreign vessel to a boarding and to seize the suspected vessel or installation, or arrest and prosecute those on board.

d. Vessel boarding with respect to a stateless ship

"The concept of vessel nationality has evolved concurrently with the political sovereignty of nation-States."[112] As a result, all vessels must have nationality. The rationale for this requirement is to ensure that each vessel will be subject to the effective control and system of laws of a State. The State granting nationality to the vessel shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[113] Consequently, "a stateless vessel is viewed as anathema by the community of nations."[114]

According to Article 110(1), on the high seas, a warship can board a vessel if "the

[109] See Natalia Klein, supra note 3, at 299
[110] "Unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls"; see UNCLOS, art 109 (2).
[111] See UNCLOS, art.109 para. (3) (4).
[112] See H. Edwin Anderson, "the Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives", Tulane Maritime Law Journal Winter 1996, at 141.
[113] UNCLOS, art. 94 (1).
[114] See H. Edwin Anderson, supra note 112, at 141.

ship is without nationality; or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship". The UNCLOS also assimilates a vessel sailing under the flags of two or more States, using them according to convenience, to a ship without nationality.[115] Ship without nationality can be boarded at anytime by warships of any State. Although any State can have the right to board a stateless vessel to check nationality, further actions can only be taken with the consent of flag State. In other words, the flag State still maintains its control power over the vessel.

"In practice, States in general may not be willing to authorize their warships or law enforcement vessels to board a foreign-flag vessel on the high seas simply to verify the vessel's identity."[116] This may be due to the concern that the boarding for verification of ship's identity may impede the right of freedom of navigation of ship at sea and its legitimate merchant shipping activities, consequently the boarding State may have to compensate for any loss or damage resulting from the boarding.[117] Therefore some countries are of the view that boarding for verification of vessel's identity should be preceded by an attempt to contact the alleged flag State to obtain its consent.[118]

2. Vessel boarding with respect to hot pursuit

Hot pursuit has long been recognized under customary international law. "A State may, as a general proposition, pursue and seize a foreign vessel suspected of having committed an offence within the State's maritime jurisdictional zones where the vessel flees to the high seas to avoid arrest".[119] Together with the right of visit, the right of hot pursuit is an exception to the general rule that a ship on the high seas is subject only to the exclusive jurisdiction of the flag State. The right of hot pursuit is codified into the UNCLOS and the Convention on the High Seas (1958) as well.[120]

a. Conditions for a valid exercise of right of hot pursuit

[115] See UNCLOS, art. 92, para.2.
[116] See Gunther Handl, supra note 14, at 190.
[117] See id.
[118] See id.
[119] See Robert C.Reuland, "the Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of Law of the Sea Convention", Virginia Journal of International Law, Spring, 1993, at 557.
[120] Convention on the High Seas (1958), art. 23

According to Article 111(1) of UNCLOS, the right of hot pursuit is given to a State having good reason to believe that the pursued vessel has violated its laws and regulations in its maritime zones. The right of hot pursuit shall be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on Government service and authorized to that. [121]

With a view to preventing unreasonable interference with the navigation of ships, Article 111 provides strict requirements for the legitimate exercise of hot pursuit. The conditions for the exercise of this right are that:

- Such a pursuit must be commenced when the foreign vessel is "within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing State," and the pursuit must not be interrupted.[122] Article 111(2) allows the right of hot pursuit can apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations of laws and regulations of the coastal State applicable to this zone under UNCLOS.[123] Therefore, before exercising the right of hot pursuit to board a foreign vessel, the warship must ascertain whether the offending ship is indeed within a maritime zone over which the State may exercise the enforcement jurisdiction.

- Before a hot pursuit commences, a visual or auditory signal to stop must be provided at a distance which enables it to be seen or heard by the foreign ship. If the vessel refuses to comply, it shall become subject to pursuit.[124]

- One of the fundamental requirements of hot pursuit is that the pursuit must be "hot". The term "hot" refers to the element of immediacy of the commencement of pursuit and indicates that the pursuit must quickly follow the committed infringement by the

[121] See UNCLOS, art. 111(5).
[122] See UNCLOS, art. 111(1).
[123] See UNCLOS, art. 111(2).
[124] See UNCLOS, art. 111 (4).

foreign vessel.[125] Once pursuit is underway, it must be continued if the pursuit has not been interrupted. If the pursuit is interrupted at anytime, the right to pursue is lost and pursuit may not be resumed. The right of hot pursuit, however, ceases as soon as the pursued vessel enters the territorial sea of its own State or that of another State.[126] It seems that the UNCLOS disallows resumption of the hot pursuit if the pursued vessel re-enters the high seas. Nonetheless, the release of a vessel, arrested pursuant to Article 111 of UNCLOS and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the EEZ or the high seas.[127]

Although conditions for the exercise of the right of hot pursuit are clearly defined in the UNCLOS, in practice the application of the provisions on hot pursuit causes disputes. In many cases, claims of lawful exercise of hot pursuit by boarding State were denied by court. For example, in the M/V *Saiga* case No 2,[128] ITLOS considered the conditions to be satisfied for a valid hot pursuit and ruled that a number of conditions had not been met by the Guinean patrol boat. The factual background of the case is as follows:

On October 27, 1997, the M/V *Saiga*, an oil tanker for the bunkering of vessels at sea under the flag of St. Vincent and the Grenadines, entered the EEZ of Guinea with the objective of supplying three fishing vessels with fuel. This point was approximately 22 nautical miles from Guinea's island of Alcatraz (contiguous zone). The *Saiga* then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. According to its log book, at 8:00 hours on 28 October 1997, the *Saiga*, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 4:20 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the EEZ of Guinea. At about 9:00 hours the *Saiga* was attacked by a Guinean patrol boat (P35). Officers

[125] See VasiliosTasikas, "Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: a New Era of Coast Guard Maritime Law Enforcement Operations", Tulane Maritime Law Journal (Winter 2004), at 78.
[126] See UNCLOS, art. 111(3).
[127] See UNCLOS. art. 111(7).
[128] See judgment of M/V Saiga case No 2 at ITLOS website, available at http://www.itlos.org/start2_en.html.

from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it.[129]

> Guinea argued that the *Saiga* had been involved in smuggling, punishable under Guinea's laws, and as to the detention outside its EEZ—that Guinea had exercised its right of hot pursuit in accordance with Article 111 of the 1982 Convention. However, Saint Vincent and the Grenadines contends that, in arresting the *Saiga*, Guinea did not lawfully exercise the right of hot pursuit under article 111 of the Convention.[130]

In the course of the hearing, the Tribunal noted that:

> the conditions for the exercise of the right of hot pursuit under article 111 of the UNCLOS are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention.

In this case, the Tribunal found that several of these conditions were not fulfilled. The following briefs the assessment of the Tribunal:

With regard to the condition "good reason to believe that the pursued vessel has violated the laws and regulations":

The Tribunal was of the view that

> at the time the Order for the Joint Mission of the Customs and Navy of Guinea was issued, the authorities of Guinea, on the basis of information available to them, could have had no more than a suspicion that a tanker had violated the laws of Guinea in the exclusive economic zone.

The Tribunal has also concluded that no laws or regulations of Guinea applicable in accordance with UNCLOS were violated by the *Saiga.*[131] Therefore, there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

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[129] See Judgment of the M/V Saiga case, para 33.

[130] Saint Vincent and the Grenadines asserts that, even if the *Saiga* violated the laws and regulations of Guinea as claimed, its arrest on 28 October 1997 did not satisfy the other conditions for hot pursuit under article 111 of UNCLOS. It notes that the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea. The *Saiga* was first detected (by radar) on the morning of 28 October 1997 when the ship was either outside the EEZ of Guinea or about to leave that zone. The arrest took place after the ship had crossed the southern border of the EEZ of Guinea. Saint Vincent and the Grenadines further asserts that, wherever and whenever the pursuit was commenced, it was interrupted. It also contends that no visual and auditory signals were given to the ship prior to the commencement of the pursuit, as required by article 111 of UNCLOS.

[131] See Judgment of the M/V Saiga case, para. 149.

With regard to the condition "giving direction to come to stop by visual or auditory signal before a hot pursuit":

The Tribunal noted that:

> in the circumstances, no visual or auditory signals to stop could have been given to the *Saiga*. Although Guinea claims that the small patrol boat (P35) sounded its siren and turned on its blue revolving light signals when it came within visual and hearing range of the *Saiga*, both the Master who was on the bridge at the time and Mr. Niasse who was on the deck, categorically denied that any such signals were given. In any case, any signals given at the time claimed by Guinea cannot be said to have been given at the commencement of the alleged pursuit.[132]

As far as the pursuit alleged to have commenced on 28 October 1998 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the *Saiga* prior to the commencement of the alleged pursuit, as required by article 111 (4), of UNCLOS.

With regard to condition "the pursuit must not be interrupted":

The Tribunal was of the view that

> according to the evidence given by Guinea, the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the *Saiga* was recalled when information was received that the *Saiga* had changed course. This recall constituted a clear interruption of any pursuit, whatever legal basis might have existed for its commencement in the first place.[133]

For the aforesaid reasons, the Tribunal found that Guinea stopped and arrested the *Saiga* on 28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention and thereby violated the rights of Saint Vincent and the Grenadines. The *Saiga* case is a good example to prove that a ship can only be pursued by a non-flag State if all the conditions for a valid hot pursuit are satisfied.

[132] See id, para. 148.
[133] See id, para. 147.

b. Constructive presence

Under the doctrine of constructive presence, a ship can be pursued onto the high seas if any of her boats working as a team is reasonably suspected of having committed an offence within the marginal seas of the littoral State, even if the ship herself is not actually within such marginal seas.[134] The ship in this case is deemed constructively present in the maritime zones of the coastal State within which her ships are operating. This principle is codified in the UNCLOS, which stipulates that "hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or *one of its boats or other craft working as a team and using the ship pursued as a mother ship* is within the marginal seas of the pursuing State".[135]

The case "*R .v. Mills and others*" is an example of the application of the doctrine of constructive presence in the exercise of the right of hot pursuit. In this case, 5.25 tons of cannabis was shipped from Morocco to the United Kingdom on the diving support vessel *MV Poseidon*.[136] On 10 November 1993, at a position some 100 miles west of Scillies and 100 miles south of Ireland in international waters, the *Poseidon* and the *Delvan* had rendezvoued.[137] During the rendezvous some 3.25 tons of cannabis were transferred to the *Delvan*. Shortly thereafter, the *Delvan* entered British territorial waters, however, the competent authority of UK waited until the *Delvan* landed in the UK to arrest the vessel and shore party.[138] After that, the customs officer in charge of the operation requested that the Ministry of Defense order the task force to stop and arrest the *Poseidon*. Then the boarding was carried out and the members of the crew were arrested and along with the *Poseidon*, brought to Portsmouth and charged with conspiracy to import cannabis.[139]

[134] See Robert C.Reuland, supra note 119, at 587.
[135] See UNCLOS, art. 111 (4).
[136] See William C.Gilmore, "Current Developments: Public International Law, International and Comparative Law Quarterly Vol.44 October 1995), at 951.
[137] See id, at 951.
[138] See id, at 951.
[139] See id, at 952-953.

In the spring of 1995, the case came before Judge Devonshire at Croydon Crown Court. Defendant contended that they were before the court as a direct consequence of an arrest which had taken place on the high seas in violation of international law. Following extensive argument, the judge issued a ruling in which he held that "the *Poseidon* was properly arrested in international waters under the terms of the Geneva convention[140] and in accordance with international law of the sea".[141] In arriving at his ruling on the abuse of process application, the judge commented extensively on the right of hot pursuit and the associated doctrine of constructive presence.[142] Although there are some comments proposing that the ruling of the court[143] is "in favor the policy goal of the effective enforcement of the criminal law"[144], there is no doubt that the doctrine of constructive presence has been wisely applied by the competent authorities of the UK to board and arrest the mother ship.

c. Safeguards provision

In order to prevent the abuse of the right of hot pursuit, the UNCLOS stipulates that the flag State of the warship is liable to pay compensation to the suspect ship for any damage she may suffer as the result of a wrongful pursuit onto the high seas.[145] However, it should be noted that compensation shall be made only in circumstances which do not justify the exercise of the right of hot pursuit.[146] The pursuing State will not need to compensate when the circumstances are sufficiently suspicious to justify hot pursuit – even if the suspicions later prove unjustified.[147]

[140] Text of Article 23 (3) of the High Sea Convention 1958 is repeated verbatim in Article 111(4) of the 1982 United Nations Convention on the Law of the Sea.
[141] See William C.Gilmore, supra note 136, at 953.
[142] See id.
[143] Related to the explanation of the court, which supports the interpretation that "the use of VHF radio to issue the signal to stop was sufficient when used in conjunction with a hovering helicopter".
[144] See id, at 957-958.
[145] See UNCLOS, art. 111 (8).
[146] See Robert C.Reuland, supra note 119, at 587.
[147] See id.

3. Vessel boarding with respect to illicit trafficking in drugs

The problem of illicit drug trafficking by sea also receives attention of international community. There are two articles under the UNCLOS[148] which deal with the issue of illicit trafficking in drugs. Article 108 (1) of the UNCLOS requires contracting parties to cooperate in their efforts to suppress the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas. Paragraph 2 of this article provides that "if a State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic".[149] Article 27 (1d) of the UNCLOS confers the right upon coastal States to take necessary measures and exercise criminal jurisdiction over a foreign ship in their territorial sea if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

However, there is no specific right granted to warships in the UNCLOS to board a foreign vessel on the high seas although there is a reasonable suspicion that the vessel is engaged in the illicit traffic in drugs. In other words, the boarding of foreign vessel suspected of illicit traffic in drugs on the high seas is only permissible with the authorization of the flag State.

In conclusion, the high seas may not be a safe haven for those who act contrary to the international order, under the UNCLOS, the offending ships can be boarded on the high seas under certain exceptions namely right of visit and hot pursuit. Other boardings on the high seas are permissible where there has been a specific boarding authority derived from agreements between States in question or from consent of flag State.

[148] See UNCLOS, arts. 108 and 27(1d).
[149] See id. art. 108 (2).

III. CONTEMPORARY TRENDS IN VESSEL BOARDING

Chapter 3. Vessel boarding trends in the context of current threats to maritime security

1. Piracy and armed robbery against ships

The problem of piracy is as old as shipping itself. "The outbreak of piracy and the increasing threat to commerce, to security, and perhaps most importantly, to the principle of freedom of navigation of the seas is one that should concern every nation-State."[150] Currently, piracy and armed robbery at sea have once again drawn special attention of international community.

According to the International Maritime Bureau, in 2008 there was a worldwide total of 293 incidents of piracy against ships, which is up more than 11% from 2007 when there were 263 incidents reported.[151] In 2008, 49 vessels were hijacked, 889 crew taken hostage and a further 46 vessels reported being fired upon. A total of 32 crew members were injured, 11 killed and 21 missing – presumed dead. Guns were used in 139 incidents, up from 72 in 2007.[152] In 2009, maritime piracy reached its highest level since the IMB's Piracy Reporting Center began tracking piracy incidents in 1992, surpassing levels from 2008, which was the previous record year. The 2009 annual piracy report States that worldwide in 2009, 153 vessels were boarded, 49 vessels were hijacked, 84 attempted attacks and 120 vessels fired upon – compared to 46 ships fired upon in 2008.[153] A total of 1,052 crew were taken hostage. Sixty eight crew were injured in the various incidents and eight crew killed. The level of violence towards the crew has increased along with the number of crew injuries.

[150] See Condoleeza Rice, Former U.S. Secretary of State, Combating the Scourge of Piracy (16 Dec 2008), available at http://2001-2009.State.gov/secretary/rm/2008/12/113269.htm.
[151] See IMB Annual Piracy Report for 2008, available at http://www.noonsite.com/Members/sue/R2009-01-22-3, (last visited on 3 December 2010).
[152] See id.
[153] See 2009 Worldwide piracy figures surpass 400, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51, (last visited on 3 December 2010).

The total number of incidents attributed to the Somali pirates stands at 217 with 47 vessels hijacked and 867 crewmembers taken hostage. Somalia accounts for more than half of the 2009 figures, with the attacks continuing to remain opportunistic in nature.[154]

With the recent dramatic increase of piracy and armed robber attack, the Somali piracy crisis has drawn special attention from the international community. As of 26 August 2010, at least 22 foreign vessels plus one barge are still held in Somali hands against the will of their owners.[155]

So far, there is no common estimate on the total cost of global piracy. Estimates are different because of the disagreement over whether insurance premiums, freight rates, and the cost of rerouting should be considered together with the cost of ransom (Somali pirates now tend to ask ransom in exchange for the release of the crew, ship and its cargo).[156] However, there is no doubt that the cost for prevention and suppression of piracy and armed robbery against ships is immense. For example:

In January 2009, CMA CGM, the world's third largest shipping firm began charging a "piracy tax" on all containers carried on its ships that passes through the Gulf of Aden. The surcharge is $23 per container. In 24 Nov 2009, CMA CGM even increased its surcharge to $41 per TEU (namely Aden Gulf Surcharge), which is effective from 15 December 2009 because:

> The transit of container ships through the Gulf of Aden in both directions is subject to high costs caused by the prevailing risks of piracy in the area, CMA CGM continues to ensure the safety and the security of the cargos carried by its vessels through the Gulf of Aden. As the ships cross at increased speed, apply a route deviation and whenever available join convoys protected by coalition warships under the Atalanta scheme. This surcharge comes in

[154] See id.
[155] See Status of seized vessels and crews in Somalia, the Gulf of Aden and the Indian Ocean – Ecoterra, as of 26 August 2010, available at http://international.to/index.php?option=com_content&view=article&id=645:status-of-seized-vessels-and-crews-in-somalia-the-gulf-of-aden-and-the-indian-ocean-ecoterra-26-august-2010&catid=36:news&Itemid=74.
[156] Stephanie Hanson, "Combating Maritime Piracy", Council on Foreign Relations, 7 January 2010, available at http://www.cfr.org/publication/18376/combating_maritime_piracy.html.

addition to any rate agreement, short term or long term, already concluded with customers or to be concluded.[157]

For a container-ship of 10,000 TEU, when the surcharge at $41 per TEU, it could reach extra cost of $410,000 for a single transit, impacting the delivery cost of cargo, and at the end of the day consumers have to pay for the extra cost, it means that not only seafarers, shipowners, everyone will be adversely affected by the crime. Therefore, there is no choice for countries but cooperate to fight against piracy and armed robbery.

Currently countries are actively taking measures to prevent and suppress piracy and armed robbery against ships to ensure safe maritime navigation passing several hot spots of piracy and armed robbery against ship. "The hot spots of piracy and armed robbery are generally located in four major geographical areas: the Gulf of Aden and off the coast of Somalia; the Gulf of Guinea near Nigeria and the Niger River Delta; the Malacca Strait; and the Indian subcontinent particularly between India and Sri Lanka."[158] Recently piracy and armed robbery against ships in Gulf of Aden[159] is most serious due to the two main reasons: (i) the crisis situation in Somalia [160] and (ii) the key position of the Gulf in international maritime routes. The Transitional Federal Government of Somalia lacks capacity to interdict pirates, therefore, currently it is impossible for Somalia to respond to pirate attacks, or patrol its offshore waters to suppress such attacks both in international sea lanes off Somalia and Somalia's territorial sea. After many piratical attacks targeting ships navigating in the area happened in the year 2007-2008, in 2008 the United Nations passed four resolutions on the issue of Somali piracy and armed robbery against ships,[161] and by early 2009, more than a dozen countries had deployed to the Gulf on counter piracy operations. Furthermore, the European Union is conducting military operation EUNAVFOR Somalia (operation "Atalanta"), in support of UN Security Council Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1897 (2009), to protect vessels of the WFP (World

[157] CMA-CGM, Press Release, Aden Gulf Surcharge, 17 Dec 2008, available at http://www.cma-cgm.com/AboutUs/PressRoom/Press-Release_Aden-Gulf-Surcharge_8546.aspx, (last visited on 3 December 2010).

[158] Stephanie Hanson, "Combating Maritime Piracy", Council on Foreign Relations, Jan.7, 2010, available at http://www.cfr.org/publication/18376/combating_maritime _piracy.htlm (last visited on 29 November 2010)

[159] The Gulf of Aden is a vital trade route providing access to the Suez Canal. This trade route provides the most direct route linking the Indian Ocean with the Mediterranean Sea and North Atlantic.

[160] See Resolution 1816 - The situation in Somalia.

[161] Resolution 1816, Resolution 1838, Resolution 1846 and Resolution 1851.

Food Programme) and vulnerable vessels cruising off the Somali coast, as well as to prevent and repress acts of piracy and armed robbery off the Somali coast.[162]

In Somalia, illegal acts against ships spreads from territorial sea, EEZ to the high seas, of which many attacks have occurred in EEZ, then attacked ships forcibly taken into Somali waters.[163] Nowadays, it is more common for piratical attacks to occur closer to shore because of the concentration of merchant vessels near to ports, and also easier for pirates to escape after attacking. Besides, illegal acts against ships are currently conducted in many forms. Thus, the definition of piracy as defined in Article 101[164] of UNCLOS is narrow to include some of modern day piratical acts in Somalia.

Recently, the case "*United States of America v. Mohamed Ali Said et al*", the United States district Court gave an interesting interpretation of the definition of piracy, that apparently means that unless pirates take or make an attempt to take something of value by force or threat of force, they cannot be charged with piracy under US law. The case is summarized as follows:

On April 10, 2010, around 5:00 a.m., defendants approached the *USS Ashland* in a small skiff in the Gulf of Aden. As defendants' skiff became even with the *USS Ashland*, at least one person on defendants' skiff raised and shot a firearm at the *USS Ashland*. The *USS Ashland* responded by returning fire, destroying the skiff. At no time did defendants board or attempt to board the *USS Ashland*. The *USS Ashland* crew members observed in the

[162] See Eunavfor Somalia, available at http://www.consilium.europa.eu/showpage.aspx?id=1518&lang=EN (last visited on 22 November 2010).

[163] For examples: on June 1st, 2007, Somali pirates hijacked the Danish-flagged Danica White off the coast of Somalia while the ship was en route from Sharjah United Arab Emirates to Mogadishu. Armed pirates in three boats boarded and took control of the ship. These pirates then sailed the Danica White into Somali coastal waters. The five crew members aboard the Danica White were held hostage by the pirates, who demanded ransom for their safe return. The attack on the Danica White occurred while the ship and its crew were an estimated 178 nautical miles off the Somali coast, then the ship was maneuvered into Somali waters.
On September 25th, 2008, the Belize-flagged, Ukrainian owned arms freighter, Faina, came under attack off Somalia's eastern coast. Armed Somali pirates boarded and hijacked the vessel. The attack on the Faina and its crew was also perpetrated in Somalia's EEZ. After seizing control, the pirates anchored the Faina off the Somali coast, and held its twenty-one crew members (primarily Ukrainians) hostage for more than four months, until the ship's owner agreed to pay several million dollars in ransom.

[164] The definition of piracy under UNCLOS requires four requirements: illegal act involving violence, detention or depredation; committed for private ends; involving two ships; committed on the high seas.

burning skiff, then took defendants into custody. A hearing was held on 29 July 2010 and judgment was made on 17 August 2010.[165]

In this case, Justice Jackson struck out the charges of piracy against them. The decision finds that the alleged facts, which involve drawing alongside another vessel and starting a fire-fight with it, it means that the defendants did not board, take control or otherwise rob the *USS Ashland*, therefore, under no set of facts did defendants commit the offense of "piracy' as defined by the United States Supreme Court in the classic case *United States v. Smith*.[166] The court also concludes that the definition of piracy in the international community is unclear and not consistent with Congress' understanding of 18 U.S.C. § 1651 as recognized by the Supreme Court.

Although there are some debates about the interpretation of definition of piracy, there is no doubt that every country has the right to take actions against the piratical attacks in the high seas and EEZ. For attacks occurring in the EEZ, States will also have universal jurisdiction against the offending vessels, because the term "high seas" has traditionally encompassed all parts of the sea that are not included in the territorial sea or in the internal waters of a State,[167] besides, under the UNCLOS, with respect to navigational freedom, the EEZ is treated as the high seas[168]; piracy against ships means the right of freedom of navigation of the ship is impeded. In addition, Article 58 (2) of UNCLOS also stipulates that "Article 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with this Part". It means that all provisions regarding piracy in part VII of UNCLOS can apply mutatis mutandis to "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft occurring in EEZ". Thus, any State will have the right to board offending vessels to suppress piratical acts in the areas of 200 nautical miles from the baselines except territorial sea and internal waters of the coastal State.

[165] See factual and procedural history of the United States v. Mohamed Ali Said case, available at http://graphics8.nytimes.com/packages/pdf/national/18pirate-opinion.pdf (last visited on 10 November 2010).
[166] The classic case U.S. v. Smith remains the governing authority and it held piracy to be "robbery at sea".
[167] See Convention on the High Seas (1958).
[168] See UNCLOS, art. 58 (1).

However, as noted above, Somali pirates attack foreign vessels in the EEZ or on the high seas, and then they always forcefully bring these vessels into Somalia's territorial sea. The Somali pirates are well aware of the fact that when hiding in their territorial sea, they will be out of reach of foreign warships because under the UNCLOS and customary law, the right of hot pursuit ends when the offending vessel enters another State's territorial waters. The boarding of offending vessels in the territorial sea is the exclusive right of the coastal State, while presently, the Transitional Federal Government of Somalia lacks effective enforcement law agencies to arrest them.

Given the aforesaid situation, the international community was of the view that it was necessary to have an exceptional measure to deal with piracy and armed robbery in Somalia and considered the possibility of continuing their effort to patrol Somali territorial waters in response to the high degree of practical activity in these, and the frequent inability of Somalia to respond to pirates in their territorial sea under existing international law. Therefore, in 2008, the UN Security Council adopted Resolution 1816 on "the situation in Somalia".

By the terms of resolution 1816, the Council decided that the States cooperating with the country's Transitional Government would be allowed, for a period of six months, to enter the territorial waters of Somalia and use "all necessary means" to repress acts of piracy and armed robbery at sea, in a manner consistent with relevant provisions of international law.[169] The period has been renewed for a period of twelve months more by Resolution 1846 of 2 December 2008.[170] The UN Resolution has given right to States cooperating with the Transitional Government of Somalia to board offending vessel and vessels taken by and under the control of pirates or persons who have committed armed robbery against ships in the territorial sea of Somalia. The UN Resolution 1816 has created an exception to existing international law to combat piracy and armed robbery against ships in Somalia.

[169] See paragraph 7 of the UN Resolution 1816 (2008) adopted by the Security Council at its 5902nd meeting on 2 June 2008.
[170] See paragraph 10 of the UN Resolution 1846 (2008) adopted by the Security Council at its 6026th meeting on 2 December 2008.

Speaking before the vote of UN Resolution 1816, Indonesia's representative emphasized that:

> in drafting a positive response to Somalia's request, Indonesia had been guided by the need for the draft to be consistent with international law, particularly the 1982 United Nations Convention on the Law of the Sea, and to avoid creating a basis for customary international law for the repression of piracy and armed robbery at sea. Actions envisaged in the resolution should only apply to the territorial waters of Somalia, based upon that country's prior consent. The resolution addressed solely the specific situation off the coast of Somalia, as requested by the Government.[171]

Speaking after the vote, Viet Nam's representative said:

> the resolution should not be interpreted as allowing any actions in the maritime areas other than Somalia's or under conditions contrary to international law and the Law of the Sea Convention.[172]

South Africa's representative said that:

> it was necessary to be clear that it was the situation in Somalia that constituted a threat to international peace and security and not sea piracy in itself. Furthermore, the resolution must respect the Law of the Sea Convention, which remained the basis for cooperation among States on the issue of piracy. The Council should not lose focus on the larger situation in the country, most importantly the need to address the political, security and humanitarian situation on the ground.[173]

China stated that:

> the Council's actions should facilitate international assistance in combating piracy and avoid negative consequences. Such assistance should be based on the wishes of the Government and be applied only to the territorial waters of Somalia. It must comply with the Law of the Sea Convention and must not constitute conflict with existing international legislation. The resolution adopted today responded to those requirements to the greatest extent possible.[174]

From the aforesaid statements, it is clear that many countries would like to emphasize that the Resolution 1816 is only applied to Somalia's territorial waters and

[171] See Statements in the UN Resolution 1816 (2008), available at http://www.un.org/News/Press/docs/2008/sc9344.doc.htm.
[172] See id.
[173] See id.
[174] See id.

should not be created as a basis for customary international law for suppression of piracy and armed robbery in the territorial sea of a foreign State.

Not only facing with difficulties in the prevention and arrest of Somali pirates in Gulf of Eden as mentioned above, currently countries also face practical problems when dealing with prosecution of Somali pirates. There is no doubt that any country can arrest pirates and prosecute them in its own court. Nevertheless, when it comes to putting pirates on trial, there are some practical complications, in particular difficulties related to incurring the cost for trials of Somali pirates. In light of those problems, most nations have been hesitant to undertake piracy trials.[175] Recently, the United States, Britain and European Union have signed agreements with Kenya, accordingly Kenya has promised to try piracy suspects apprehended by foreign navies in return the countries have agreed to improve Kenya's antiquated courts.[176] "Western diplomats are hoping that this courtroom effort, coupled with a reinvigorated military response involving warships from more than a dozen nations, will put a dent in Somalia's stubborn piracy problem."[177]

Other area in the world suffering from the eminent threat of piracy and armed robbery is the South East Asia waters, especially in Malacca Strait. The Strait is used for international navigation, as defined in the UNCLOS.[178] The Malacca Strait can be considered as the gateway to Asia, conduit of a third of world commerce, annually about 50,000 ships transit this narrow channel.[179] Unfortunately, piracy has adversely affected the navigation of ships in the Strait for many years. Two reasons account for this situation:

(i) the complicated topography provides shelter for pirates after they attack (the overwhelming majority of the Malacca Strait waterway is within the territorial control of the coastal States,[180] and

[175] Jeffrey Gettleman, "The West Turns to Kenya as Piracy Criminal Court", The New York Times, 4.24.2009, at A8, available at http://www.nytimes.com/2009/04/24/world/africa/24kenya.html (last visited on 3 December 2010).
[176] See id.
[177] See id.
[178] See UNCLOS, art. 37.
[179] Asia Pacific Economic Cooperation Currents Newsletter, Sept 2006, available at http://www.apec.org.au/docs/currents0906/currents0906.html#StoryFour (last visited on 30 October 2010)
[180] Kevin X.Li and Jin Cheng, supra note 181, at 577.

(ii) the important strategic and economic position of the Malacca Strait.[181]

In the past, when dealing with the piracy issue, Malaysia, Indonesia and Singapore have patrolled their own territorial waters independently,[182] they can not enter the territorial seas of neighboring countries to suppress pirates. The lack of coordination among the countries forms a potential cause for confusion, inefficiency, and the misallocation of resources.[183] As a result, the Malacca Strait was known to be an ideal place for pirates because they can easily escape into a neighboring State's territorial sea.

With a view to enhancing the security of the Strait, recently Singapore, Malaysia and Indonesia have strengthened cooperation in the fight against piracy and armed robbery. In 2004, Singapore, Malaysia and Indonesia launched a coordinated patrol scheme involving the navies of three countries (MALSINDO),[184] a joint special task force by the littoral States to safeguard the Strait and provide effective policing along the waterway. "In this new scheme, seventeen ships from the three countries patrol their respective waters in the 500-mile Strait and coordinate their moves via a new 24-hour communications link."[185] This initiative has remarkably improved the coordination and collaboration in patrolling and suppressing piracy. "For the first time, warships from the three countries will be allowed into one another's waters when pursuing pirates."[186]

At the regional level, Asian countries also concluded the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) in 2004. The Agreement entered into force on 4 September 2006.

Under the ReCAAP, the definition of piracy is similar to the definition of piracy codified by UNCLOS.[187] ReCAAP also includes a definition on "armed robbery against

[181] Kevin X.Li and Jin Cheng, "Maritime law and policy for energy security in Asia: A Chinese perspective", Journal of Maritime Law and Commerce (2006), at 571.
[182] See id, at 577.
[183] See id.
[184] Nazery Khalid, "Security in the Strait of Malacca", available at (http://www.japanfocus.org/-Nazery Khalid/2042).
[185] See Kevin X.Li and Jin Cheng, supra note 181, at 577.
[186] See id.
[187] See ReCAAP, art.1 (1).

ships",[188] which reads as follows:

> armed robbery against ships" means any of the following acts:
> (a) any Illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on boar such ship, in a place within a Contracting Party's jurisdiction over such offences;
> (b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships; and
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b). [189]

The term "armed robbery against ships" is defined in this Agreement using the same terms as the UNCLOS definition of piracy, but applies to acts occurring within each State's jurisdiction. It means that the term includes piratical attacks occurring in territorial waters or internal waters of a coastal State. In other words, "the ReCAAP offence can be described as the UNCLOS definition of piracy, without the high seas limitation".[190]

It should be noted that the agreement focuses mainly on mechanisms for co-operation and information sharing between member States to combat piracy and armed robbery at sea. An Information Sharing Center was established under this agreement. During the process of preparation of the draft agreement, several countries expressed their desires to be the host State for the Center. Finally, Singapore was chosen to be the venue for the Center. The Center plays an important role in enhancing regional co-operation in the fight against piracy and armed robbery, avoiding the previous lack of coordination. One of advantages of this agreement is to confer the right on a Party to request assistance from other Party, through the Center or directly, to take appropriate measures, including arrest or seizure, against ships used for committing piracy or armed robbery against ships.[191]

As regards to vessel boarding issue, the Agreement does not include specific boarding provisions between parties of ReCAAP. The ReCAAP only provides the general obligations for Parties to prevent and suppress piracy and armed robbery against ships, to

[188] See ReCAAP, art. 1(2).
[189] See id.
[190] Rosemary Collins and Daud Hassan, "Applications and Shortcomings of the Law of the Sea in Combating Piracy: a South East Asian Perspective", Journal of Maritime Law and Commerce (January 2009), at 111.
[191] ReCAAP, art. 10 (2).

seize ships used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships.[192] The Agreement does not confer the right upon a ReCAAP's contracting party to pursue offenders into territorial sea of other Party, thus only coastal State can board pirate vessels in its territorial sea to suppress piracy and armed robbery. Consequently, offenders can still sail to neighboring territorial waters to escape the pursuit.[193]

Although the ReCAPP enhances the sharing of information and coordination between regional States to combat piracy in the Southeast Asian region, it does not handle the practical aspects of anti-piracy measures, including patrolling and boarding.[194] Therefore, the agreement cannot fully address the piracy problem in the Malacca Strait.

In conclusion, for the suppression of piracy and armed robbery against ships, there are legal instruments at both the global and regional levels, e.g. UNCLOS, ReCAAP. Under the present legal instruments, all States will have the enforcement jurisdiction to board offending vessels or vessels taken by pirates in the EEZ and on the high seas. However, the treaties cannot solve certain practical problems in some areas like Aden Gulf, Malacca Strait, where pirates always flee into the territorial sea to avoid arrest and prosecution. Without continuous efforts of international community in the fight against piracy, the consequences of piracy and armed robbery against ships could be disastrous to the world maritime sector.

[192] ReCAAP, art. 3.
[193] See Rosemary Collins and Daud Hassan, supra note 190, at 111
[194] See id, at 112.

2. Illicit traffic in drugs

Trafficking in narcotic drugs poses a serious threat to the health and welfare of human beings and adversely affects the economic, cultural foundations of society. During the 80s, international community were deeply concerned by the rising trend in the illicit production of, demand for and traffic narcotic drugs and psychotropic substances, and recognizing also that illicit traffic is an international crime activity, the suppression of which demands urgent attention and the highest priority. As a result, countries have strengthened cooperation in the suppression of illicit traffic in drugs by sea. In 1988, the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances was adopted. The convention entered into force on 11 November 1990. As of 15 March 2011, 185 countries have ratified the convention.[195]

Objective of this convention is to provide comprehensive measures against drug trafficking. In particular, the convention provides for international cooperation through, for example, extradition of drug traffickers, controlled deliveries and transfer of proceedings, of which Article 17 of the convention governs cooperation in suppression of illicit traffic in drugs by sea.

Paragraphs 1 and 2 of Article 17 of this convention are similar to paragraphs 1 and 2 of Article 108 of UNCLOS. Paragraph 1 of Article 17 imposes on the parties the duty to "cooperate to the fullest extent possible to suppress illicit traffic by sea",[196] while paragraph 2 stipulates that "if a State has reasonable ground to suspect that a vessel flying its flag is engaged in illicit traffic, it may request the cooperation of other States to suppress such traffic".[197] The United Nations Convention against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances further imposes on the requested Party to render such assistance within the means available to them.

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[195] See status of treaties, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en

[196] See the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances, art.17(1) and the UNCLOS, art. 108 (1).

[197] See the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances, art.17(2) and the UNCLOS, art. 108 (2).

Paragraph 3 of Article 17 of the convention permits any party having reasonable grounds to suspect that a vessel is engaged in illicit traffic to notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel. Upon the request or basing on an agreement or arrangement reached between the parties, the flag State may authorize the requesting State to board the vessel; search the vessel; and, if evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.[198] As regards enforcement action beyond boarding and searching, it is entirely up to the flag State and requesting State to agree on what the "necessary action" would be taken in each particular case. In other words, "any enforcement action, including boarding and inspection of vessel suspected of drug trafficking by a non-flag State must be preceded by agreement, whether in the form of existing or *ad hoc* treaty, or otherwise, with the flag State."[199]

Upon the request of other party of this convention, paragraph 7 of Article 17 requires requested State to respond expeditiously to requests from another party to determine whether a vessel flying its flag or not and to requests for authorization made pursuant to paragraph 3.[200]

Regarding safeguard provisions, paragraph 5 of Article 17 requests Parties when taking actions to take due regard of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State. In the meantime, a Party which has taken any action such as boarding a vessel in accordance with Article 17 is obligated to promptly inform the flag State concerned of the results of that action.[201]

Furthermore, it is noted that any action taken against suspect vessels shall take due account of the need not to interfere with, or affect, the rights and obligations and the

[198] See the Convention against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances, art. 17 (4).
[199] See Hayashi Moritaka, "Enforcement by Non-flag States on the High Seas under the Fish Stocks Agreement on Straddling and Highly Migratory Fish Stocks", Geo. Int'l Envtl. L. Rev. 1 (1996-1997), at 8.
[200] See the Convention against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances, art. 17 (7).
[201] See ibid, art. 17 (8).

exercise of jurisdiction of coastal States in accordance with the international law of the sea.[202]

The convention also encourages Parties to enter into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of the provisions of this Article.[203]

From the above-mentioned analysis, it is clear that the prerequisite condition for boarding a foreign vessel suspected of illicit traffic in drugs under this convention is the consent of flag State even there is a reasonable suspicion that the vessel is engaged in this illicit traffic. Flag State maintains its exclusive jurisdiction over vessels flying its flag except when the flag State consents to other State to interdict its vessels.

It should be noted that when dealing with drug crimes, the law enforcement authorities should act as quickly as possible because any delay may allow the smugglers to jettison their cargoes to destroy evidence. Therefore many countries have been seeking multilateral and bilateral boarding agreements in order to streamline the process involved in obtaining permission from flag State to board a foreign ship suspected of illicit traffic in drugs.

In 1995, member States of the Council of Europe signed Agreement on Illicit Traffic by sea, implementing article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[204] In this agreement, Contracting Parties agreed that if a State Party which has reasonable grounds to suspect a vessel flying the flag or displaying the marks of registry of another State Party, is engaged in or being used for the commission of a relevant offences, the intervening State may request authorization of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party.[205] The flag State shall immediately acknowledge receipt of the request and communicate a decision thereon as soon as possible and wherever practicable, *within four hours of receipt*

[202] See the Convention against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances, art. 17 (11).
[203] See ibid, art. 17 (9).
[204] See full text of this Agreement, available at http://conventions.coe.int/Treaty/EN/Treaties/HTML/156.htm
[205] See 1995 EU Agreement on Illicit Traffic by sea, art. 6.

of the request.[206] Comparison with the United Nations Convention Against Illicit Traffic in Drugs, the agreement further imposes the duty to flag State to give response within a specific timeframe, therefore, the agreement helps intervening States reduce remarkably the waiting time to obtain permission for boarding ships suspected of illicit traffic in drugs. With regard to safeguard provisions, the agreement requires the intervening State when boarding the suspected ships to take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo and not to prejudice any commercial or legal interest of the boarded vessel. Furthermore, under this agreement, the intervening State shall be liable to pay compensation for any resulting loss, damage or injury where the boarding action in a manner which is not justified by the terms of this agreement or if the suspicions prove to be unfounded and provided that the vessel boarded, the operator or the crew have not committed any act justifying them.[207] There is no doubt that although the agreement still requires consent of the flag State before boarding (neither tacit agreement or preauthorization), the boarding procedures of this agreement with a timeframe for response has facilitated EU States in obtaining permission in a quick manner to promptly board vessel flying the flag of other EU members to suppress illicit traffic in drugs.

With regard to bilateral boarding agreements against illicit traffic in drugs, we should mention the United States. A large number of boarding agreements have been signed between the United States and Latin American and Caribbean States in the 90s due to the fact that there was a flow of illicit trafficking in drugs from the countries into the United States, which traveled over maritime routes.[208]

As mentioned above, under the UNCLOS and customary law, no country is allowed to enter the territorial sea of other country or board a foreign vessel on the high seas or in the EEZ to suppress the illicit traffic in drugs. Hence, the United States law enforcement authorities must seek authorization from Latin American and Caribbean nations to board their vessel or enter their territorial sea to suppress illicit traffic in drugs. However, the process of obtaining consent from the flag State or coastal State is often a time consuming.

[206] See id, art. 7.
[207] See id, arts. 12 and 26.
[208] See Joseph E.Kramek, "Bilateral Maritime Counter Drug and Immigrant Interdiction Agreements: Is This the World of the Future?", University of Miami Inter – American Law Review, Vol. 31, Issue 1 (Spring 2000), at 130.

Therefore, the United States has actively engaged in negotiation and conclusion of boarding agreements to combat illicit traffic in drugs.

In the short period between 1995 -2000, the United States entered into twenty-nine bilateral boarding agreements with Latin American and Caribbean States for the purpose of combating illicit traffic in the transit zone, of which most of the agreements against illicit traffic in drugs.[209] Even the United States has a model agreement on boarding to fight against the illicit traffic.[210] The six part U.S. Model Maritime Agreement[211] is designed to provide standing authority and procedures for the United States law enforcement authority to take action against illicit traffickers.[212] With regard to vessel boarding, there are four parts of the model agreement, namely: ship-boarding, entry to investigate, shipriders and hot pursuit.

The provision on "shipboarding" in the model boarding agreement constitutes advance authorization from the country which signs the agreement with the United States to allow the law enforcement authorities of the United States to stop, board, and search vessels flying its flag when those vessels are located seaward of the territorial sea and are suspected of illicit traffic.[213]

The provision on "entry-to-investigate" allows the law enforcement authorities of the United States to enter the territorial sea of the country which signs the agreement with the United States to investigate, board and search vessels located therein that are suspected of illegal activities.[214]

The provision on "pursuit," allows the United States law enforcement authorities to

[209] See Joseph E.Kramek, supra note 208, at 124
[210] See id, at 123
[211] See id, supra note 208, at pages from 152-160-(full text of the model maritime agreement).
[212] See id, at 133.
[213] See id, at 133 (Fourteen of the twenty-nine nations with which the United States has bilateral agreements have agreed to the ship boarding provision).
[214] See id, at 133-134 (Twelve of the twenty-nine nations with which the United States has bilateral maritime agreements have agreed to entry-to-investigate authority).

pursue vessels suspected of illicit traffic into foreign territorial seas.[215]

It is noted that the aforesaid rights in the model agreement are exceptions to the existing international conventions and customary international law. Futhermore, the rights related to ship-boarding, pursuit and entry-to-investigate under the text of this model agreement are not reciprocal.

The model agreement also has provision on "shipriders", which allows a law enforcement officer of one State to embark on a law enforcement ship of another State[216]. Once embarked, the shiprider can authorize certain law enforcement actions with respect to his nation's territorial sea or vessel sailing under his country's flag which the foreign State's law enforcement authorities could not take on their own.

During the process of conclusion of bilateral agreements between the United States and Latin American and Caribbean States, each country has agreed to use some provisions related to vessel boarding, but usually not all, of the provisions of the model maritime agreement.[217] For example:

- *The Agreement between the United States and Barbados concerning cooperation in suppression illicit maritime drug trafficking*

The Agreement was signed in 1997. With respect to vessel boarding, the agreement is based on provisions of model agreement regarding shipriders and pursuit.[218] The Agreement does not have provisions on shipboading, it means that the United States still needs consent of Barbados to board Barbados' vessels suspected of illicit traffic in drugs on the high seas or in the EEZ.

[215] See Joseph E.Kramek, supra note 208, at 134 (Twelve of the twenty-nine nations with which the United States maintains bilateral agreements have agreed to pursuit authority).
[216] See id, at 134 (Seven of the twenty-nine nations with which the United States. has bilateral agreements with have agreed to order-to-land authority).
[217] See id, at 124.
[218] See Article 3 and Article 6 of the United States – Barbados Agreement concerning cooperation in suppressing illicit maritime drug trafficking

-The Agreement between the United States and Trinidad and Tobago concerning Maritime counter drug operations

The agreement was signed in 1996, and entered into force since the date of signing. With respect to vessel boarding, the Agreement is based on all provisions of the model maritime agreement regarding shipriders,[219] shipboarding[220], pursuit, and entry to investigate.[221] It can be considered as an ideal boarding agreement for the United States.

- *The Agreement between the United States and Jamaica concerning cooperation in suppression illicit maritime drug trafficking*

The Agreement was signed on 6 May 1997. The Agreement is not based on the aforesaid model maritime agreement except for the shipriders provisions. With respect to vessel boarding, the agreement follows the principle: consent of flag State is prerequisite condition for boarding. However, Article 14 of this agreement stipulates detailed procedures for requesting and granting authorization to board and search suspect vessels, which has definitely facilitated the process for the law enforcement authorities of the United States to board vessels flying the flag of Jamaica and vice versa.

Although bilateral boarding agreements confer the right to board a foreign vessel suspected of illicit traffic in drugs at different levels, all the bilateral maritime agreements have served to reduce the inherent delay in the traditional maritime boarding process.[222] Once the bilateral maritime agreements have been concluded, which shall provide the law enforcement authorities with more flexibility to pursue and board foreign vessels to combat illicit traffic in drugs by sea.[223] There is no doubt that the bilateral boarding agreements are ideal for enforcement officials to board foreign vessels to suppress illicit traffic in drugs.

[219] See the United States-Trinidad and Tobago Agreement concerning Maritime Counter-drug Operations, paragraphs 5, 6.
[220] See id, paragraphs 11.
[221] See id, paragraph 8.
[222] See id.
[223] See Joseph E.Kramek, supra note 208, at 124.

Together with the boarding right conferred by the 1988 Convention or multilateral and bilateral agreements as above-mentioned, countries can seek ad-hoc consent from the flag State at anytime to board foreign vessels suspected of illicit traffic in drugs.

However, it should be noted that the physical act of boarding is only a first step in the interdiction of a ship at sea by boarding State of jurisdiction over the foreign ship.

> The international lawfulness of boarding as such does not automatically also permit any conclusions about what additional steps the boarding State might be permitted to take in relation to the foreign vessel, its cargo, crew, or passenger."[224] "When a flag State consents to the boarding of its flag vessel by another State, whether by special agreement in advance or ad-hoc, its permission may be limited to just that and not necessarily include also authorization to investigate or to further "process" the vessel.[225]

Therefore, in case of ad-hoc consent by the flag State, the boarding State should be cautious when deciding what practical measures could be taken. If not, offenders may sue competent authorities for inappropriate actions taken during the process of interdiction although ad-hoc consent was granted by flag State. The case *Medvedyev and others v. France* is an example .[226]

In this case, French authorities interdicted a Cambodian vessel named the *Winner* suspected of drug smuggling on the basis of Cambodian consent.[227] Those aboard were

[224] Gunther Handl, supra note 14, at 188.
[225] See id.
[226] See *Medvedyev and others v. France* judgment, 29 March 2010, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=865670&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.
[227] In early June 2002, the Central Office for the Repression of Drug Trafficking ('OCRTIS'), a ministerial body attached to the Central Police Directorate of the French Ministry of the Interior suspected the ship 'Winner' of carrying large quantities of drugs, with the intention of transferring them to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe, and requested authorization to intercept it. In a diplomatic note dated 7 June 2002, in response to a request from the French embassy in Phnom Penh, the Cambodian Minister of Foreign Affairs gave his Government's agreement for the French authorities to intercept, inspect and take legal action against the ship *Winner*, flying the Cambodian flag. On 13 June 2002, at 6 a.m., the French frigate spotted a merchant ship travelling at slow speed through the waters off Cape Verde, several thousand kilometers from France. It was not flying a flag, but was identified as the *Winner*. The merchant ship suddenly changed course and began to steer a course that was dangerous both for the frigate and for members of the armed forces who had taken place on board a speedboat. While the *Winner* refused to answer the attempts of the commander of the frigate to establish radio contact, its crew jettisoned a number of packages into the sea; one of the packages, containing about a hundred kilos of cocaine, was recovered by the French seamen. After several warnings and warning shots fired under orders from France's Maritime Prefect for the Atlantic went unheeded, the French frigate fired a shot directly at the *Winner*. The merchant ship then

confined aboard during the 13 day voyage into a French port. The suspects were later convicted in France of drug-smuggling offences and brought proceedings before the European Court of Human Rights (ECtHR) challenging the legality of their detention at sea and the delay involved in bringing them before a court under articles 5(1) and (3), European Convention on Human rights (ECHR), a violation of article 5(1) of ECHR was found. France appealed to the Grand Chamber, and the decision by the Grand Chamber was handed down on 29 March 2010.

The applicants claimed that they had been arbitrarily deprived of their liberty after the ship was boarded by the French authorities. They relied on Article 5 (1) of the European Convention on Human rights.[228]

The applicants challenged the existence of any *ad hoc* agreement justifying the stopping of the *Winner* and considered that even if there had been such an agreement, it did not justify the detention of the crew following the French military operation.

The difficulty for France arose from the fact that its domestic legislation at the time covering drug interdictions at sea was designed only to implement interdictions authorised by a flag State pursuant to the UN Narcotics Convention 1988, to which Cambodia was not a party. The only legal basis for the French action was an exchange of diplomatic notes. And at the court hearing, the representative of the Government of France argued that in any event that the agreement given by Cambodia to the French authorities by diplomatic note had made the intervention of the French navy perfectly lawful from the international law perspective.[229]

At the court' assessment, the Grand Chamber focused on two matters: there was clear legal authority for the action either at French law or international law; and the relevant law satisfied a quality of "foresee-ability" (i.e. that those to whom it was applied

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answered by radio and agreed to stop. Then the crew of the *Winner* were confined to their quarters under military guard on the voyage to Brest.

[228] The relevant parts of Article 5 (1) read as follows: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

[229] See *Medvedyev and others v. France* judgment, supra note 226, para. 54.

could have predicted its application).[230] Finally, the court did accept that the diplomatic note was a source of international law capable of justifying the French interdiction. The note did not, however, sufficiently clearly specify a right to detain the crew. It granted power only to "intercept, inspect and take legal action against the ship".

Thus, the court concluded that the deprivation of liberty to which the applicants were subjected between the boarding of their ship and its arrival in Brest was not "lawful" within the meaning of Article 5 (1), for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty.

From the aforesaid case, it seems that the exercising of coercive law-enforcement jurisdiction over a foreign vessel on the high seas beyond authorities allowed under the ad-hoc permission will bring the law enforcers within ECHR jurisdiction. It should be noted that enforcement action beyond boarding and searching, it is entirely up to the concerned States to agree on what the "necessary action" would be taken in each particular case. Therefore, the competent authorities should follow strictly authorities permitted under the ad-hoc consent of the flag State when boarding foreign vessels to suppress the illicit traffic in drugs.

In conclusion, although the issue of drug smuggling at sea is a global problem, it was not long before the international community returned to this issue in an effort to provide

[230] The Court observed as follows: First of all that the text of the diplomatic note mentions "the ship *Winner*, flying the Cambodian flag", the sole object of the agreement, confirming the authorization to intercept, inspect and take legal action against it. Evidently, therefore, the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a "clearly defined law" within the meaning of the Court's case-law[230]. Secondly, the court considers that the diplomatic note did not meet the "foreseeability" requirement either. Nor have the Government demonstrated the existence of any current and long-standing practice between Cambodia and France in the battle against drug trafficking at sea in respect of ships flying the Cambodian flag; on the contrary, the use of an *ad hoc* agreement by diplomatic note, in the absence of any permanent bilateral or multilateral treaty or agreement between the two States, attests to the exceptional, one-off nature of the cooperation measure adopted in this case. Added to the fact that Cambodia had not ratified the relevant conventions, this shows that the intervention of the French authorities on the basis of an *ad hoc* agreement cannot reasonably be said to have been "foreseeable" within the meaning of the Court's case-law, even with the help of appropriate advice. In any event the Court considers that the foreseeability, for an offender, of prosecution for drug trafficking should not be confused with the foreseeability of the law pleaded as the basis for the intervention. Otherwise any activity considered criminal under domestic law would release the States from their obligation to pass laws having the requisite qualities, particularly with regard to Article 5 (1) of the Convention and, in so doing, deprive that provision of its substance.

boarding procedures applying to vessels suspected in the illicit traffic of drugs. This was reflected well in the 1988 United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances. However, the convention as well as the UNCLOS or the 1995 Council of Europe Agreement on illicit Traffic by Sea all affirm the requirement of flag State consent for high seas interdiction of vessels suspected of drug smuggling. Besides, bilateral agreements, which support goals of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention on the Law of the Sea, also play an important role in the fight against illicit traffic in drugs by sea.

3. Smuggling of migrants

Irregular maritime migration is not a new problematic issue, however, recently there has been growing trend towards mixed migration flows, whereby individuals move within population flows that include “both forced and voluntary movements”. Although the illegal movements of migrants by sea is more dangerous for migrants than other forms of transportation due to the nature of sea voyage, it can endanger the lives and security of the migrants involved, nevertheless annually there are still thousands of people heading for promising lands by sea. With a view to preventing and combating illicit traffic in migrants, countries had actively worked on a draft of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime. The protocol was signed in 2000 and entered into force in 2004. One of the main aims of the protocol is to facilitate and encourage international co-operation so that the smuggling of migrants by sea can be prevented and combated. So far, the protocol is the sole multilateral treaty having boarding provisions for counter migration purposes. In the scope of this paper, part II of the protocol titled “Smuggling of migrants by sea” will be discussed. This part includes articles 7, 8 and 9, which are largely based on provisions of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

According to Article 7, States shall co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea in accordance with international law. Article 8 stipulates procedures for boarding a foreign vessel. Accordingly, a State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may notify the flag State and request confirmation of registry. If nationality is confirmed, the requesting Party shall ask the flag State for authorization to board and to take appropriate measures with respect to the suspect ship. Upon the request, the flag State may authorize the requesting State,

inter alia to board and search the vessel.[231] Obviously under the provisions, the boarding of a foreign vessel on the high seas is only permissible if consent of flag State is obtained. However, the requested Party is obliged to respond expeditiously to a request from another State party to determine whether a vessel that is claiming its registry of flying its flag is entitled to do so and to a request for boarding authorization made.[232]

Article 9 deals with the safeguards clauses related to the measures taken in accordance with Article 8 of the protocol. Accordingly, in the course of interdiction of suspect vessel, the law enforcement officials must:

(i) ensure the safety and humane treatment of the persons on board;

(ii) take due account of the need not to endanger the security of the vessel or its cargo;

(iii) take due account of the need not to prejudice any commercial or legal interests; and

(iv) ensure that any measure taken with regard to the vessel is environmentally sound.

Besides, Article 9(2) stipulates that if grounds for enforcement measures taken by law enforcement officials to be unfounded, the boarded vessel shall be compensated for any loss or damage that may have been sustained, provided the vessel has not committed any act justifying the measures taken.[233] In addition, there is a strict requirement that any measures taken at sea including boarding suspect vessel to suppress smuggling of migrants by sea shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service.[234]

Before the entry into force of the aforesaid protocol in 2004, in the 80s and 90s, several countries, which have been facing serious problems of illegal entries of migrants by sea e.g. the United States and Italy, have actively concluded bilateral boarding agreements

[231] See UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 8(2).
[232] See id, art.8(4).
[233] See id, art. 9(2).
[234] See id, art. 9(4).

to combat illicit traffic in migrants. The countries were of the view that without a treaty, interdicting migrants on board foreign vessels on the high seas can be contradictory to the existing international law due to the fact that such immigrants are not subject to the jurisdictional authority of any country until they enter the territorial sea of that country.

The first agreement of this type was signed in the 80s between the United States and Haiti due to the Haitian exodus to the United States. The agreement permitted the United States authorities to board and inspect private Haitian vessels on the high seas and to interrogate the passengers.[235] In other words, the United States authorities had advance permission to board the Haitian vessel suspected of smuggling of migrants.[236] Besides, the United States has concluded similar boarding agreements with a number of Caribbean countries e.g. Dominican Republic, Bahamas.

Such migration interdiction agreements are also found in the Europe and more specifically in the Mediterranean Sea. For example, Italy, a country faced with a major flow of immigrants from Albania since mid-1990, concluded an agreement with Albany in 1997 for the control and suppression of clandestine migration by sea.[237] "The agreement conferred the right upon the Italian Navy to stop Albanian vessels on the high seas and send them back to Albanian ports."[238] "The Italian Navy was also given the right to carry out its mission in Albanian territorial waters and stop any private vessel irrespective of its nationality."[239] In the Mediterranean sea, Spain also faces illegal migration issues, therefore, Spain has signed boarding agreements with several neighboring countries to suppress the illicit traffic in migrants e.g. agreements with Senegal, Mauritania. Under these agreements, Senegal and Mauritania permit patrols ships of Spain to operate from a base in Dakar, Senegal and from Nuadibú, Mauritania to board vessels suspected of illicit traffic in migrants.[240]

[235] See "US Immigration Policy on Haitian Migrants", Ruth Ellen Wasen, Specialist in Immigration Policy, available at: http://trac.syr.edu/immigration/library/P960.pdf
[236] In 1994, the agreement was terminated by Haiti.
[237] See Efthymios Papastavridis, "Interception of Human Beings on the High Seas: a Contemporary Analysis Under International Law", Syracuse Journal of International Law and Commerce (2009), at 181.
[238] See id.
[239] See id.
[240] See id.

Although there were a number of bilateral agreements between Mediterranean countries and African countries on cooperation against illicit traffic in migrants, recently illegal migrants from North African countries to EU through the Mediterranean sea are still on the rise. For example, only in 2008 around 36,500 refugees arrived by boat in Italy,[241] in 2010, Spanish police intercepted some 14,000 illegal immigrants and 663 illegal vessels.[242] During the sea voyages, many of the people drown or are killed.[243] Therefore, further action is necessary to deal with the humanitarian catastrophe to prevent the loss of life at sea as well as to reduce refugee problems for countries in the Mediterranean sea.

One of concrete actions to cope with the situation has been conducted by the Council of the European Union. On 26 April 2010, the Council promulgated the Decision No 2010/252/EU supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The objective of this Decision is to prevent unauthorized border crossings, to counter cross-border criminality and to apprehend or take measures against persons who have crossed borders illegally. Regarding the issue of interdiction of foreign ships to suppress illegal migrants, basically, the provisions of this Decision are in line with principles regarding interception of foreign ships at sea as laid out in the UNCLOS and the United Nations Convention Against the Smuggling of Migrant by Land Sea and Air.[244] Accordingly, in the territorial waters and contiguous zone, the stopping, boarding and searching of the foreign ships is only conducted with the authorization of the coastal State.[245] In the high seas beyond the contiguous zone, if the ship flies the flag of a Member State that does not participate in the operation or of a third country, confirmation

[241] See "Hundreds dead as boats sailing from Libya to Italy 'sink in storm', available at http://www.bild.de/BILD/news/bild-english/world-news/2009/03/31/illegal-immigrants-drown-in-mediterranean-sea/hundreds-drown-as-boats-sailing-from-libya-to-italy-sink-in-storm.html

[242] See "Illegal Immigration from Senegal to Spain-poor African People", available at http://www.saflirista.com/AmiAmi/video/illegal-immigration-from-senegal-to-spain/

[243] See Sebastian Rotella and Borzou Daragahi, "200 migrants feared drowned in Mediterranean", Los Angeles Times (1 April 2009), or see "Illegal immigrants drown off Malta", available at http://www.france24.com/en/20080827-illegal-african-immigrants-drown-malta-europe.

[244] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, paragraph 6.

[245] Annex of the Council Decision, art. 2.5.1.2.

of registry shall be requested from the flag State though appropriate channels, and if nationality is confirmed, authorization shall be requested from the flag State.[246] The procedure is similar to the boarding procedure stipulated in Article 8.2 of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime. It means that the consent of flag State is a prerequisite condition for boarding. Even if the suspect ship flies the flag or displays the marks of registry of the nationality of a member State participating in the surveillance operation, the boarding of the vessel also requires authorization by the flag State.[247] However, the national official representing that Member State at the coordination centre shall be entitled to grant or to transmit such authorization,[248] this will facilitate the obtaining of authorization from the flag State.

Furthermore, the Council Decision also confers the right to verify documents of a vessel if there are reasonable grounds for suspecting that the ship is in reality the same nationality as a member State or the ship is without a nationality though flying a foreign flag or refusing to show a flag, if suspicion remains after the document has been checked, the ship may be boarded for further examination, which shall be carried out with all possible consideration.[249] The country of which the ship is allegedly flying the flag shall be contacted though the appropriate channels to seek authorization for further action.

From the aforesaid analysis, it is clear that except in the case of advance consent authorized by bilateral boarding agreements, a State must obtain authorization from the flag State in order to interdict a foreign vessel in areas beyond the territorial sea to suppress the illicit traffic in migrants. If not, undoubtedly, defendants will challenge the lawfulness of the interdiction of ships as well as the judicial jurisdiction of the court. The case *United States v. Best* is an example. [250]

In this case, the ship "*Cordeiro de Deus*" was boarded in the contiguous zone and

[246] Annex of the Council Decision, art. 2.5.2.2.
[247] See ibid, art. 2.5.2.1.
[248] See ibid.
[249] See ibid, art. 2.5.2.3, 2.5.2.4, 2.5.2.5.
[250] See United States v. Best 304 F.3d (3rd Cir.2002), available at: http://openjurist.org/304/f3d/308/united-States-v-best.

the competent authority discovered a group of Chinese nationals that appeared to be hiding in the cargo hold.[251] The ships was arrested and the Government presented Best and four others for an advice of rights on the criminal charge of alien smuggling. A grand jury returned an indictment charging Best with conspiring to bring illegal aliens to the United States in violation of 8 U.S.C. § 1324 (a) (1)(A)(v)(I) and bringing illegal aliens to the United States in violation of 8 U.S.C § 1324 (a)(1)(A)(i). On 1 August 2001, Best filed a motion to dismiss the indictment, arguing that the District Court lacked personal jurisdiction over him because the United States had taken him from the high seas in violation of international law. The District Court agreed with Best, holding that the United States was required to obtain consent from Brazil under international law before it could seize Best from the *Cordeiro de Deus* and try him for violating the immigration laws. Because the United States failed to secure such consent, the court concluded that it lacked jurisdiction over Best and entered an order dismissing the indictment on 26 October 2001.[252]

However, the Government of the United States filed a motion for reconsideration on 5 November 2001 and a notice of appeal on 21 November 2001.

The United States Court of Appeals, Third Circuit held hearing of the case on 13 May 2002 and decided on 18 September 2002. An issue in this appeal is whether the District

[251] On 16 May 2001, the United States Coast Guard patrol boat '*Nuvivak'* was patrolling the waters near St. Croix, US, Virgin Islands. That evening, the patrol boat spotted a large, wooden cargo vessel named the *Cordeiro de Deus* approximately sixteen nautical miles east of St. Croix. This placed the vessel within the twenty four nautical mile "contiguous zone" of the United States, but outside the territorial waters. At the time the Coast Guard spotted the vessel on radar, the *Cordeiro de Deus* appeared to be on a standard smuggling route headed for St. John or St. Thomas. After the vessel failed to respond to several radio calls, an officer of the *Nuvivak* formed a four-person boarding team and instructed it to contact the *Cordeiro de Deus*. He further instructed the boarding team to ask right of visit questions of the crew and to seek consent to board the vessel. Traveling in a small, inflatable boat, the boarding team approached the starboard side of the *Cordeiro de Deus* and observed five men standing on that side of the deck. The crew members understood that the Coast Guard sought to come aboard and indicated their permission for the boarding team to do so. Best was one of the five men standing on the deck of the *Cordeiro de Deus* and was identified by the other men as the captain of the vessel. The boarding team asked to inspect the vessel's documents. In response, the crew produced paperwork from Brazil and one document that contained a stamp from Suriname. The United States claims that the boarding team was unable to determine the nationality of the *Cordeiro de Deus* from these documents. The boarding team next began a safety inspection. During the inspection, two members of the boarding team discovered a group of Chinese nationals that appeared to be hiding in the cargo hold. The boarding team reported its findings to the Nunivak, which, after contacting Coast Guard authorities, was instructed to escort the Cordeiro de Deus close to St. Croix then agents from immigration agency determined that there were thirty three Chinese nationals on board.

[252] See judgment of United States v. Best 304 F.3d, para. 7.

Court has personal jurisdiction over a defendant charged with violating the immigration laws and seized from a foreign vessel on the high seas.

The Court of Appeals invoked the case *Frisbie v. Collins* to refer to the rule: “It is well established that a court's power to try a defendant is ordinarily not affected by the manner in which the defendant is brought to trial”[253] in order to defend the jurisdiction of court over the defendant. In the *Frisbie*, the Supreme Court of the United States explained that "there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will”.[254]

Best argues that the language of the United States law, the Fed.Reg. 48701 (Proclamation)[255] demonstrates that the Government can only "punish" individuals found in the contiguous zone for the infringement of laws "committed within its territory or territorial sea". Because the *Cordeiro de Deus* never entered the territorial sea of the United States, he contends that he cannot be punished under the language of the Proclamation.

Nevertheless, the court was still of the view that even if the court was to agree with Best's interpretation of the above-quoted language, the Proclamation also States that "nothing in this proclamation amends existing Federal or State law". Accordingly, the court rejected any suggestion that the Proclamation has an effect on the scope of the well-established rule of *Ker-Frisbie and* concluded that the doctrine is fully applicable to this case. Thus, Robert Best, who was seized by the Coast Guard beyond the territorial waters of the United States aboard a vessel sailing under the Brazilian flag, may be tried in federal district court for the violation of United States immigration laws even though the Government did not secure Brazil's consent to intercept the vessel and seize the defendant. The court will therefore reverse the District Court's order dismissing the indictment and will remand the case for trial.

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[253] See United States v. Best 304 F.3d (3rd Cir.2002), supra note 250, para. 10.
[254] See id, para. 11.
[255] The Fed.Reg. 48701 (Aug. 2, 1999) of the United States law ("Proclamation"), which provides:
“The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea”.

In brief, the interdiction of a foreign vessel in the area seaward of territorial sea to suppress smuggling of migrants is only permissible if there is consent of flag State; if the competent authorities exercise enforcement jurisdiction over foreign vessels without consent of the flag State, not only the interdiction but also the judicial jurisdiction of court will be challenged by the defendant although he should be put on trial by a court for his committed crime.

4. Threat of transportation of weapons of mass destruction by sea

> After the terror attacks of September 11, 2001, the international community is deeply concerned by the proliferation of weapons of mass destruction (WMD) and related materials, as well as by the risk that these may fall into the hands of terrorists. There exists a wide-spread consensus that this menace, together with terrorism, constitutes the greatest challenge to international security.[256]

On 31 May 2003 at Krakow, Poland, President of the United States George W. Bush announced the formation of the Proliferation Security Initiative (PSI) - "Krakow initiative".[257] The initiative was initially joined by eleven countries: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. In December 2003, Canada, Denmark, Norway, and Singapore joined the PSI; the Czech Republic joined in April 2004, and Russia joined in May 2004. Currently, "more than 90 countries have expressed their support for the initiative."[258] "One of principal objectives of the PSI is to facilitate the boarding, search, and seizure of foreign flag vessels on the high seas suspected of carrying WMD, materials, or related personnel."[259] However, the PSI participants in their joint Statement emphasized that the interdiction principles will be consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.[260]

Not long since the PSI was formed and its Interdiction Principles Statement was adopted, on 28 April 2004, the UN Security Council adopted the Resolution 1540 on Non-proliferation of weapons of mass destruction, establishing for the first time binding obligations on all UN member States under Chapter VII of the UN Charter to take and

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[256] Chairman's Statement at the first meeting of PSI on 12 June 2003 in Spain, available at: http://www.State.gov/t/isn/115302.htm

[257] See The Krakow Initiative: Another blow from Bush by Luis Gutiérrez Esparza, 11 November 2003, available at http://www.wagingpeace.org/articles/2003/11/11_esparza_krakow-bush.htm

[258] See PSI from http://www.State.gov/t/isn/c10390.htm

[259] Gunther Handl, "the Nuclear Non-Proliferation Regime: Legitimacy as a Function of Process" 19 Tulane J. Int'l & Comp. L. (2010), at 31.

[260] See further Statement of Interdiction Principles from website: http://www.psi.msz.gov.pl/index.php?document=105

enforce effective measures against the proliferation of WMD, their means of delivery and related materials.[261] In the resolution, paragraph 2 requires all States to

> adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.
>
> Paragraph 3 (d) of this Resolution further requires States to
>
> develop and maintain appropriate effective border controls and law-enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law.

While UN Resolution 1540 creates binding obligations on all UN member States, the intention of the PSI is not to create legally binding commitments, but as an alternative, the Statement of Interdiction Principles calls on PSI participants to 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.[262] With respect to vessel boarding, principles contemplated in paragraphs 4(b), (c) and (d) of the Statement call upon States to board and search vessels suspected of transport WMD cargoes.[263]

In particular, paragraphs 4(b) and (c) call on flag States to board and search their own vessels regardless of their location and to consider providing consent to other States

[261] Paragraph 2 of UN Resolution 1540, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement

[262] See full text of PSI interdiction principles, available at http://www.State.gov/t/isn/c27726.htm

[263] The subparagraphs are read as follows: 4 (b). At their own initiative, or at the request and good cause shown by another State, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other State, that is reasonably suspected of transporting such cargoes to or from States or non-State actors of proliferation concern, and to seize such cargoes that are identified; 4 (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; 4 (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.

for such boardings. Undoubtedly, texts of subparagraphs 4(b) and (c) are in line with the existing international law.

According to Paragraph 4(d) of the PSI Statement, a country may be able to interdict a foreign vessel suspected of transporting WMD materials in its territorial sea and contiguous zone. The text of this paragraph may pose problems under purview of UNCLOS because in the contiguous zone, a State may only exercise the control power necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish infringement of the above laws and regulations committed within its territory or territorial sea. If the ship only passes the contiguous zone without entering territorial sea, there is no reason to interdict the foreign vessel because "prevention" would probably not include a seizure of vessel for a violation of customs laws, which has not yet committed in the territorial sea of the coastal State. "This formulation may be overly broad as a coastal State's jurisdiction over foreign customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."[264] Therefore except in special circumstances such as giving rise to the right of self defense, the coastal State has no right to interdict the vessel concerned in the contiguous zone.[265]

Besides, there are some views against paragraph 4(d) as the implementation of the paragraph 4(d) of PSI Statement may deprive vessels carrying WMD materiel of the right of innocent passage. They contend that the carriage of WMD materiel or components on board the ships may not threat to the peace, good order or security of a coastal State, "it is hard to see that a latent threat in the vessel's hold, destined elsewhere, has any 'external' manifestation capable of affecting the character of innocent passage."[266] Therefore, it may not be convincible to say that the passage of a ship carrying WMD on board in the territorial sea is not innocent so that the coastal State can board the vessel.

Because of the aforesaid contentiousness,

[264] Gunther Handl, supra note 259, at 32.
[265] See id.
[266] See Douglas Guilfoyle, "Maritime Interdiction of Weapons of Mass Destruction", Journal of Conflict and Security Law (Spring 2007), at 12.

> it would seem prudent to seek legal clarifications through consultations, in particular with the States that are parties to UNCLOS, as to whether a coastal State can exercise criminal jurisdiction on board a foreign flag vessel exercising innocent passage though the State' territorial sea if it carries WMD-related materials, people, etc, whose maritime transportation is subject to criminal sanctions in accordance with the Security Council resolution 1540.[267]

Furthermore, in the framework of the PSI cooperation, some countries have concluded bilateral agreements to seek authority on a bilateral basis to board foreign vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. The United States is the first country that has initiated and signed PSI boarding agreements with other countries. So far the United States has signed PSI boarding agreements with 11 flag of convenience States, namely: Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama and St. Vincent and the Grenadines.[268]

According to these bilateral agreements, if a vessel registered in the United States or the partner country (including vessel registered under a bare-boat charter) is suspected of carrying proliferation-related cargo, either one of the Parties to this agreement can request the other Party to confirm the nationality of the ship in question and, if needed, authorize the boarding, search, and possible detention of the vessel and its cargo. "These agreements all work within the framework of flag-State consent, upholding the requirement of flag-State permission to board a vessel on the high seas and the primacy of its jurisdiction to prosecute any offences discovered aboard."[269]

However, most of the bilateral agreements provide for deemed consent. For example, agreements between the United States and Liberia, Panama, Mongolia, Antigua and Barbuda[270] contain a provision to give deemed consent for the boarding in international waters if there is no response to an acknowledged request within two hours of the acknowledgement. Furthermore, these agreements also stipulate that "if the nationality is not verified within the two hours, the requested Party may authorize the boarding or refute

[267] Gunther Handl, supra note 14, at 191.
[268] Proliferation security initiative boarding agreements available at http://www.State.gov/t/isn/c27733.htm
[269] Douglas Guilfoyle, supra note 266, at 20.
[270] See full text of these agreements, available at http://www.State.gov/t/isn/c27733.htm

the claim of the suspect vessel to its nationality". A Statement of non-objection or refutation of nationality would certainly allow boarding because with that Statement, the ship seems to be a stateless vessel and any State will have the right to visit the vessel as stipulated by the UNCLOS.

The PSI agreements with Belize and St. Vincent and the Grenadines also requires a response two hours after a boarding request is acknowledged. However, if a response is not received within two hours, the requesting State must contact again with the requested State. If at that stage no contact can be made, the requesting State may board the suspect vessel and inspect its documents to verify its nationality. If the vessel is confirmed as having the nationality of the requested party, there is deemed consent to question persons on board and to search the vessel to determine if it is so engaged in proliferation by sea.[271]

Whereas agreements between US and Marshall Islands, Cyprus, Malta,[272] provides a 4 hour timeframe for requested State to respond to requesting State, if 'nationality is not verified or verifiable within that timeframe, then the requested party *must* either (a) 'stipulate that it does not object to the boarding and search by the requesting Party' or (b) 'refute the claim of the suspect vessel to its nationality'.

"However, the system of implied consent has been subject to criticism, as it reflects the unequal bargaining power or the United States vis-à-vis Belize, Liberia, Panama, Cyprus and the Marshall Islands."[273] Two hours, even four hours is obviously a period of time inadequate for relevant authorities of the flag State to assess the credibility of a request for interdiction and the interests involved.[274]

It should be noted that the agreement between the United States and Croatia contains no deemed consent provision. The agreement obliges the requested State to reply within four hours, no consequences follow from exceeding this time as it expressly provides "the requesting Party shall not board the vessel without the flag State's express written

[271] Paragraph 3 of the PSI Belize-US boarding agreement, available at http://www.State.gov/t/isn/trty/50809.htm
[272] Full text of these agreements can be downloaded from website: http://www.State.gov/t/isn/c27733.htm
[273] Natalie Klein, supra note 3, at 313.
[274] See id.

authorization."[275]

Although most of the PSI bilateral treaties between the United States and other countries provide a deemed consent as above-mentioned, all provide for a preferential right of flag-State enforcement jurisdiction. However, the flag States under these agreements may consent to the exercise of jurisdiction by the other Party.

Before the PSI was formed, in practice, at sea, some States had already stopped and searched vessels suspected of carrying WMD.[276] "There are credible reports that many such high-seas interdictions have been conducted since 11 September 2001 by PSI member-States, all with the flag-State's consent."[277] The *So San* incident is an example.

On 10 December 2002, two Spanish naval ships stopped and boarded a North Korean cargo vessel on the high seas about 600 miles from the coast of Yemen.[278] The Spanish boarding team found fifteen Scud missiles on board the vessel.[279]

The legal basis for the interdiction can be based on the fact that the *So San* flew no flag, and had obscured its name and home port, it was presumptively stateless and could be boarded under article 110 of UNCLOS.[280] "While article 110 would certainly have permitted boarding to ascertain its nationality, it appears that prior to boarding, flag-State authorization was sought and received from Cambodia after the master 'had attempted to declare it is a Cambodian vessel."[281]

However, once the Spanish determined that the *So San* flying Cambodian flag was carrying Scud missiles to Yemen and that there was no legal justification for keeping these missiles from Yemen's government, the Spaniards were obliged to let the *So San* continue its voyage. With regard to the incident, White House spokesperson said "there is no provision

[275] Paragraph 4 of the PSI Croatia - US Boarding agreement from http://www.State.gov/t/isn/trty/47086.htm
[276] Douglas Guilfoyle, supra note 266, at 19
[277] Douglas Guilfoyle, supra note 266, at 19.
[278] Frederic L. Kirgis, "Boarding of North Korean Vessel on the High Seas", ASIL INSIGHTS, available *at* http://www.asil.org/insights/insigh94.htm (Dec. 12, 2002) (last visited Nov. 9, 2010).
[279] See id.
[280] See Douglas Guilfoyle, supra note 266, at 19.
[281] See id.

under international law prohibiting Yemen from accepting delivery of missiles from North Korea".[282] He added "while there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen, therefore, the merchant vessel is being released". [283] "Thus it seems that the United States Government has conceded that detaining the vessel or seizing the missiles in this case would be unconvincing."[284]

The aforesaid incident has demonstrated that in all cases interdiction of a ship at sea must fully respect international law under the circumstances currently prevailing.

In conclusion, vessel boarding with respect to illicit transport of WMD is a new trend from the beginning of 21st century. Under the eminent threats of proliferation of WMD many efforts were made by countries during recent years to prevent and combat the trafficking in WMD by sea. The efforts are well reflected in the adoption of UN Resolution 1540 as well as Joint-Statement of Proliferation Security Initiative. However, there is no doubt that the boarding of the foreign vessels in the area beyond territorial sea under these initiatives are still in line with the principle of the UNCLOS.

[282] "U.S. lets Scud ship sail to Yemen", Al Goodman Barbara Starr, John King, Andrea Koppel and Frank Buckley, CNN Thursday, December 12, 2002, available at http://edition.cnn.com/2002/WORLD/asiapcf/east/12/11/us.missile.ship/ (last visited Nov. 9, 2010).
[283] See id.
[284] Frederic L. Kirgis, supra note 278.

5. Vessel boarding on the high seas in the context of IUU fishing

Illegal, unreported and unregulated (IUU) fishing is a serious global problem, one of the main impediments to the achievement of sustainable development of world fisheries sector. Nowadays, technological advances in the fishing industry have made it easier to catch larger numbers of fish. As a negative result, most of the commercially harvested fish species are either overexploited or depleted. This situation has adversely affected the balance of ocean ecosystems. Therefore, many coastal States are taking strong measures to preserve depleting fish stocks, even shots were fired on the high seas in the fishing incident between Canada and Spain.

On 9 March 1995, patrol boat of Canada intercepted the Spanish trawler *Estai* fishing in the high seas 245 miles from the Canadian coast. The vessel was fired, stopped, inspected, boarded, arrested and taken to the port of Saint John, in the Canadian province of Newfoundland.[285] Canada justified its action on the suspected breach of the law and regulations on the protection of coastal fisheries and the prevention of overfishing of Greenland halibut by Spanish vessels. On 28 March 1995, Spain filed an application instituting proceedings against Canada following the boarding on the high seas by a Canadian patrol boat. In its application, Spain maintained that Canada had violated the principles of international law which enshrine freedom of navigation and freedom of fishing on the high seas, and had also infringed the right of exclusive jurisdiction of the flag State over its ships on the high seas. On 21 April 1995, Canada informed the court that, in its view, it lacked jurisdiction to deal with the case by reason of a reservation made in its declaration of 10 May 1994. In this declaration, Canada stated that the court had compulsory jurisdiction "over all disputes . . . other than . . . disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the Northwest Atlantic Fisheries Organization's Regulatory Area . . . and the enforcement of such measures". Although the court concludes it has no jurisdiction to adjudicate upon the

[285] See the ICJ Canada Spain fishing dispute, case notes, Reciel volume 8 issue 2, 1999, available at http://onlinelibrary.wiley.com/doi/10.1111/1467-9388.00200/pdf.

dispute,[286] Canada, by its unilateral act underlined the need for an international agreement on the management of straddling stocks. There is no doubt that "conflict between coastal States and distant water fishing fleets regarding international over-exploitation of fish stocks was sparked by weakness in the available legal framework for jurisdiction over straddling stocks."[287]

As referred to earlier, under the UNCLOS, beyond the 200-mile limit, the use of the high seas is open to all States. The freedoms on the high seas include the conditional freedom to fish.[288] All States have the right for their fishing vessels to engage in fishing on the high seas subject to their treaty obligations and the interests of coastal States.[289] The UNCLOS only requires all States to conserve and manage the living resources of the high seas,[290] it lacks specific provisions on the legal rights and duties of States harvesting fish that swim back and forth between coastal States' EEZs and adjacent high seas areas.[291] In addition, the interdiction of foreign fishing ships on the high seas is not allowed by the principle that a vessel on the high seas is subject to the exclusive jurisdiction of flag State.

> Therefore, during the process of drafting the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, one of the most controversial issues which the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks had to tackle was precisely the question of such an exception: to what extent should a fishing vessel be subject to enforcement action taken by States other than the flag State on the high seas when it is suspected of undermining regionally agreed measures for the conservation and management of straddling or highly migratory stocks?[292]

Before the signing of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, several bilateral and multilateral treaties were concluded permitting enforcement measures against foreign fishing vessels on the high seas by a non-

[286] See press release 1998/41 of ICJ: Case concerning fisheries jurisdiction (Spain vs Canada), available at: www.icj-cij.org/docket.
[287] Christopher C. Joyner, "Compliance and Enforcement in International Fisheries Law", Temple Int'l & Comp.L.J, Vol. 12.2, at 289.
[288] See UNCLOS, art. 87.
[289] See UNCLOS, art. 116.
[290] See UNCLOS, art. 63(2).
[291] See Christopher C. Joyner, supra note 287, at 289.
[292] See Hayashi Moritaka, supra note 199, at 1.

flag State. For instance:

The Convention on Conduct of Fishing Operations in the North Atlantic (1967):

This convention permits boarding and inspection when the intervening State has reasonable cause to believe that an infringement of provision of the convention is being or has been committed.[293]

The Convention on conservation of anadromous stocks in the North Pacific Ocean (1992):

The convention allows the duly authorized officials of any Party to board vessels of the other Parties which can be reasonably believed to be engaged in directed fishing for or incidental taking of anadromous fish to inspect equipment, logs, documents, catch and other articles and question the persons on board for the purpose of carrying out the provisions of this convention.[294] However, such inspections and questioning shall be made in an appropriate manner so that the vessels suffer a minimum of interference and inconvenience. The convention also provides for the seize and arrest of vessels of a Party of this convention by other Party if the vessel is actually engaged in operations in violation of the provisions of this convention.[295]

The Convention on the Conservation and Management of Pollock Resources in Central Bering Sea (1994):

Contracting parties to the convention consent to the boarding and inspection of fishing vessels flying its flag and located in the convention area by duly authorized officials of any other Party for compliance with this convention or measures adopted, such action can be taken without specifying that it be preceded by a suspicion of infringement of the convention or measures adopted pursuant.[296]

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[293] See the Convention on Conduct of Fishing Operations in the North Atlantic (1967), art. 9(5).
[294] See the Convention on Conservation of Anadromous Stocks in the North Pacific Ocean, art. V(2) -full text of this Convention available at http://eelink.net/~asilwildlife/ConventionfortheConser.html (last visited on 7 December 2010).
[295] See id.
[296] See the Convention on the Conservation and Management of Pollock Resources in Central Bering Sea (1994), art. XI, para 6.

However, these multilateral treaties, which permit a non-flag State party to board and inspect a vessel flying the flag of another State party, are limited to fisheries specific to certain regions or to types of fish stocks.[297] "These multilateral treaties are all regional in scope and legally binding upon small number of Contracting States, no such treaty had been concluded at the global level,"[298] therefore, the problem of IUU fishing continues to grow because many IUU fishing vessels come from flag of convenience States, which are not bound by the regional initiatives. In addition, the regulation of "straddling stocks" and "highly migratory species" – those fish stocks that are found both within and outside an EEZ- has presented a particularly challenging management issue. "Many coastal fishers, who operate subject to national regulations, complain that fishing vessels from other nations sit in the areas just beyond the 200 nautical mile line and fish indiscriminately without any regulation, thus depleting the stocks available within the 200-mile zone."[299]

With a view to ensuring the long term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks and providing more effective enforcement measures for States to achieve the objective, in 1993, the General Assembly of the United Nation convened Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks to discuss about a new legal instrument governing the issue. The Conference adopted the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement) on 4 August 1995. The Agreement entered into force on 11 December 2001. As of 30 November 2010, 78 countries have ratified and adhered to the Agreement.[300]

The agreement sets forth principles and frameworks for the conservation and management of those fish stocks. It promotes good order in the oceans through the

[297] See Hayashi Moritaka, supra note 199, at 10
[298] See id.
[299] See Jon M. Van Dyke, "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources; the Straddling Stocks Negotiations", The International Journal of Marine and Coastal Law, Vol 10, No 2, 1995, at 220.
[300] See status of the Fish Stocks Agreement, available at http://www.un.org/Depts/los/reference_files/status2010.pdf.

effective management and conservation of high seas resources by establishing, among other things, detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks.[301] In addition, the agreement also provides enforcement jurisdiction for States to board foreign flagged vessels suspected of IUU fishing in the highs seas covered by a sub-regional or regional fisheries management organization or arrangement. In other words, when a State becomes a Party to the Fish Stocks Agreement, the State concurrently consents to implement: sub-regional and regional schemes for cooperation in enforcement pursuant to Articles 21 and 22, including requirements for such vessels to permit access by duly authorized inspectors from other States.[302]

The provisions on enforcement of the Fish Stocks Agreement created a new regime, moving away from the principle of exclusive flag State jurisdiction over vessels on the high seas.[303] For the first time, fishing vessels of a Party of this agreement may be boarded and inspected on the high seas areas covered by regional fisheries measures by another Party of the agreement whether or not the first Party is a member to the regional fisheries management organization.[304]

Requirements and procedures for taking actions against foreign vessels are stipulated in Articles 21, 22 of the Fish Stocks Agreement. The right to board and inspect a foreign vessel on the high seas is allowed when the following conditions are satisfied:

(i) Boarding and inspection must be carried out by the inspectors, who are duly authorized by the inspecting State to carry out such inspections;[305]

(ii) The procedures for boarding and inspection have been accepted through regional fisheries management or arrangement, and given due publicity;[306]

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[301] See "Introduction of the Agreement" (source: Information from the Division for Ocean Affairs and the Law of the sea of UN), available at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm

[302] See Fish Stocks Agreement, Art. 18 (3)(g-(i)).

[303] See Peter Orebech, Ketill Sigurjonsson and Ted L. Mc Dorman, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", the International Journal of Marine and Costal Law (1998), at 131.

[304] See Hayashi Moritaka, supra note 199, at 27.

[305] See Fish Stocks Agreement, arts. 21 (1), 22 (1)(a).

(iii) flag States have been informed of the form of identification of the inspector by the inspecting State;[307] and

(iv) the inspecting State makes the inspection known to the flag State.[308]

During the process of negotiation of draft text of Article 21, some countries argued that such boarding and inspection should be allowed only when there are *reasonable grounds* for suspecting that the vessel has involved in activity contrary to the conservation and management measures.[309] "These arguments were, however, strongly opposed by several coastal States and accordingly were not accepted."[310]

It is noted that the boarding and inspection of foreign vessels as well as any subsequent enforcement action by a non-flag State party shall be conducted in accordance with procedures for boarding and inspection established though sub-regional or regional fisheries management organizations or arrangements. If, within two years since the adoption of this agreement, any organization or arrangement has not established such procedures, boarding and inspection as well as any subsequent enforcement action, the actions shall be conducted in accordance with the basic procedures set out in article 22 of this Agreement.

Article 22 stipulates the duties and rights of duly authorized inspectors, such as the showing of credentials, initiate notice to the flag State at the time of boarding and inspection, noninterference with the master's communication with authorities; and the duties of the vessel's master such as accept and facilitate prompt and safe boarding by the inspectors.

Following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures, the inspecting State shall promptly notify the flag State of the alleged violation and the flag State is obligated to respond within 3 days either:

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[306] Fish Stocks Agreement, arts. 21 (2), 21(3).
[307] Fish Stocks Agreement, art. 21(4).
[308] Fish Stocks Agreement, art. 22(1)(b).
[309] Hayashi Moritaka, supra note 199, at 20.
[310] See id.

- itself investigate, take enforcement action and report back to inspecting State the results of its investigation and any enforcement action, or

- authorize the inspecting State to investigate.[311]

If inspecting State is authorized to investigate, it must communicate without delay the result to flag State, which in turn shall either take enforcement action itself or authorize the inspecting State to take action.

In addition, the agreement has constituted a legal basis for permitting the inspecting State to bring a suspected vessel to a port for further investigation in case there are reasonable grounds for believing that it has committed a "serious violation" as defined in the agreement.[312]

Paragraph 17 of Article 21 also allows a State to board and inspect a fishing vessel on the high seas if there are reasonable grounds for suspecting that vessel is without nationality. In this case, the fishing ship will be regarded as a stateless vessel and undoubtedly the right of visit can be applied.

Nevertheless, in order to protect interests of boarded vessels, a safeguard provision is inserted in paragraph 18 of Article 21, which obligates inspecting States to be liable for damage or loss attributable to them arising from action taken when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this article.

From the above analysis, it is clear that under the agreement, fishing vessels can be boarded and inspected on the high seas covered by regional fisheries measures by a non-flag State so long as the flag State and boarding State are both parties to the Fish Stocks Agreement, regardless of whether the flag State belongs to the local Regional Fisheries Management Organizations or not. Furthermore, under this agreement, boarding and inspection are permitted to take place before the flag State is contacted, neither "reasonable suspicion" nor "clear grounds" are required.

[311] Fish Stocks Agreement, art. 22(5)-(6)
[312] Fish Stocks Agreement, art. 21 (8).

Since the conclusion of the UN Fish Stocks Agreement, coastal States and States fishing on the high seas have been enhancing regional cooperation in relation to straddling fish stocks and highly migratory fish stocks. For example, in 2000 the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was adopted. The convention entered into force on 19 June 2004. As of November 2004, Australia, China, Cook Islands, Federated States of Micronesia, Fiji Islands, Korea, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu had ratified or acceded to the convention.[313] The objective of the convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the UNCLOS and the 1995 UN Fish Stocks Agreement. For this purpose, the convention establishes a Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The Contracting Parties to the Convention are, ipso facto, members of the Commission.

For the purposes of ensuring compliance with conservation and management measures, in the year 2006, the Commission established procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area. Accordingly, each member of the Commission shall ensure that fishing vessels flying its flag accept boarding by duly authorized inspectors in accordance with such procedures.[314] It is noted that only vessels and authorities or inspectors listed on the Commission's register are authorized under these procedures to board and inspect fishing vessels flying flag of a member of the Commission on the high seas within the Convention Area. Following a boarding and inspection, if authorized inspectors observe an activity or condition that would constitute a serious violation as defined by the Procedures, the authorities of the inspection vessels shall immediately notify the authorities of the fishing vessel, directly as well as through the Commission. Upon receipt of a notification, the authorities of the fishing vessels shall without delay: (i) assume their obligation to investigate and, if the evidence warrants, take

[313] See introduction of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, available at http://www.wcpfc.int/key-documents/convention-text.
[314] See Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures, para. 7.

enforcement action against the fishing vessel in question and so notify the authorities of the inspection vessel, as well as the Commission; or (ii) authorize the authorities of the inspection vessel to complete investigation of the possible violation and so notify the Commission.[315]

Safeguard provisions are also inserted in the Procedures to protect the interest of the boarded vessels, e.g.

> Boarding and inspection must be carried out in accordance with internationally accepted principles of good seamanship so as to avoid risks to the safety of fishing vessels and crews or be conducted as much as possible in a manner so as not to interfere unduly with the lawful operation of the fishing vessel.[316]

In the meantime, intervening States shall be liable for damage or loss attributable to their action in implementing these procedures when such action is unlawful or exceeds that reasonably required in the light of available information.[317]

The adoption and implementation of the Boarding and Inspection Procedures is a concrete step among the Western and Central Pacific Ocean States to implement Article 21 of the Fish Stocks Agreement, which requires Contracting Parties to establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection.

With the entry into force of the Fish Stocks Agreement in 2001 and other subregional and regional agreements on boarding and inspection procedures, a new era of ocean governance of the living resources of the high seas was created, that strengthened the enforcement powers of countries in protecting the migratory living resources.

[315] Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures, paras. 32-33.
[316] See ibid, para. 23.
[317] See ibid, para. 45.

Chapter 4. Critical analysis of the ship boarding aspect of the 2005 Protocol to the SUA Convention

1. SUA Convention

On 7 October 1985, the Italian ocean liner *Achille Lauro*, carrying about seventy passengers and 340 crewmembers through international waters, bound from Alexandria to Port Said, Egypt, was hijacked by four Palestinian hijackers.[318] The four Palestinian hijackers boarded the ship in Genoa, posing as tourists, and managed to smuggle on board automatic weapons, grenades and other explosives.[319] The hijackers held the ship's crew and passengers hostage and threatened to kill passengers unless Israel released 50 Palestinian prisoners.[320] In addition, the hijackers threatened to blow up the ship if a rescue mission was attempted, and when their demands were not met, one of the passengers was murdered. Eventually, the four hijackers surrendered in exchange for safe passage.[321] "This hijacking marked one of the first actual terrorist acts recorded in modern history."[322]

The international community immediately reacted to the hijacking. In November 1985 the problem was considered by IMO's 14th Assembly. In November 1986 the Governments of Austria, Egypt and Italy proposed that IMO prepare a convention on the subject of unlawful acts against the safety of maritime navigation to

> provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole.[323]

Upon the proposals, an Ad Hoc Preparatory Committee open to all States was

[318] Helmut Tuerk, "Combating terrorism at sea- the Suppression of unlawful acts against the safety of maritime navigation", University of Miami International and Comparative Law Review (Spring, 2008), at 338.
[319] See id.
[320] See id.
[321] See Larry A.Mc Cullough, "International and domestic Criminal law issues in the Achille Lauro Incident: A functional analysis", Naval Law Review (1986), at 58.
[322] See Rosalie Balkin, "The International Maritime Organization and Maritime Security", 30 Tulane Maritime Law Journal (Winter/Summer 2006), at 5.
[323] See Introduction of SUA Convention, available at: http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686.

established with the mandate to prepare a draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, basing on the draft submitted by Austria, Egypt and Italy. This Committee concluded its work very quickly and the Convention was adopted on 10 March 1988.

"The SUA Convention in substance is based on previously existing anti-terrorism conventions by adapting their provisions to the maritime field."[324] Seven offenses related to illegal acts against safety of maritime navigation are listed in Article 3 of the convention. The offences cover a broad range of activities including

(i) seize and control of the ship by force, threat or other form of intimidation;
(ii) acting violently against person on board a ship;
(iii) destroying the ship or its cargo;
(iv) placing destructive devices aboard a ship;
(v) destroying or damaging maritime navigational facilities;
(vi) communicating false information, and
(vii) injuring or killing any person, in connection with the commission or the attempted commission of any of the above acts. [325]

However, a person only commits an offence if that person *unlawfully and intentionally* conducts the aforesaid activities. It is noted that all of these aforesaid activities to a certain extent adversely affect to the safety of navigation of a ship.[326]

According Article 5 of the SUA Convention, States Parties are required to establish their jurisdiction over specified offenses and make these offenses punishable by appropriate penalties, which take into account the grave nature of those offences. Article 10 is the core provision of the SUA Convention, which requires States to extradite or prosecute offenders.[327] The goal of this provision is to ensure that offenders will be prosecuted in a

[324] See Helmut Tuerk, "The Resurgence of Piracy: A Phenomenon of Modern Times", University of Miami International and Comparative Law Review (Fall, 2009), at 28.
[325] SUA, art. 3.
[326] Rosalie Balkin, supra note 322, at 26.
[327] Helmut Tuerk, supra note 324, at 6.

court and he will not be able to hide in any territory of any party to the convention. Besides, the offences set forth in article 3 are deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. In the absence of specific extradition treaties in force between the requesting and requested States, the latter may at its option consider the Convention as a legal basis for extradition.[328]

In regard to vessel boarding issue, in the SUA Convention, Article 9 stipulates that "nothing in the Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag".[329] In other words, the Agreement follows the general principle of exclusive jurisdiction of flag State over its vessel in the areas beyond the territorial sea of any State. The Agreement does not create a new rule on enforcement jurisdiction over foreign vessel to suppress offences listed in the SUA Convention. "In striving for consensus at the Diplomatic Conference the co-sponsors had purposely avoided tackling highly controversial issues, such as the boarding of suspect vessels at sea by non-flag State authorities. The issues were not yet ripe for resolution."[330]

In brief, the main purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships.[331] The convention obliges Contracting Governments either to extradite or prosecute alleged offenders.[332] However the convention is problematic as it lacks provisions on enforcement procedures that would allow law enforcement officials to board foreign vessels in the waters beyond the outer limits of its territorial sea to suppress offences listed in the SUA Convention.

[328] See Article 11 (1) (2) of SUA Convention.
[329] See SUA Convention, art. 9.
[330] Helmut Tuerk, supra note 324, at 5.
[331] See introduction of SUA Convention, available at http://www.imo.org/OurWork/Facilitation/SUAConvention/Pages/Default.aspx.
[332] See id.

2. Vessel boarding under the 2005 Protocol to SUA Convention

"Since the SUA Convention entered into force in 1992, terrorism and the proliferation of weapons of mass destruction have increasingly plagued global security."[333] After the traumatic event 11 September 2001, countries are more concerned of the threats of terrorist attacks targeting transport infrastructure such as sea ports, airports, railway terminals. Besides, the shift towards containerization in the transportation of general cargo and the use of flags of convenience also raise concerns of the potential risk of terrorist attacks due to the following reasons:

(i) Containerized cargo is rarely inspected;[334]

(ii) FOCs make vessels more difficult to track;[335]

(iii) lax registration requirements as well as lack of transparency of ownership under FOC;[336] and

(iv) lack of control of vessel by flag State.

> Facing the current threats of terrorist acts against maritime sector, it was evident that the previous work of the IMO to combat terrorism at sea was insufficient to prevent this new kind of terrorist activity from posing a serious threat to the safety of international shipping.[337]

In November 2001, the IMO Assembly adopted Resolution A.924(22) calling for:

> a review of the existing international legal and technical measures to prevent and suppress terrorist acts against ships at sea and in port and to improve security aboard and ashore, in order to reduce any associated risk to passengers, crews and port personnel on board ships and in port areas and to the vessels and their cargoes.[338]

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[333] Helmut Tuerk, "Combating terrorism at sea- the Suppression of unlawful acts against the safety of maritime navigation", University of Miami International and Comparative Law Review (Spring, 2008), at 353.

[334] See Justin S.C.Mello, "Missing the boat; the Legal and Practical Problems of the prevention of maritime terrorism", 18 AM.U.International Law Review (2002-2003), at 348.

[335] Alexander J Marcopoulos, "Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience", Tulane Maritime Law Journal, Winter 2007, at 290.

[336] See id, at 294.

[337] Rosalie Balkin, supra note 322, at 16.

[338] See the IMO Assembly adopted Resolution A.924(22) available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24550/A924%2822%29.pdf.

In October 2002, the Legal Committee reviewed the provisions of the 1988 SUA Convention. Two key conclusions were made by the Committee:

> (i) the categories of unlawful acts set forth in these legal instruments were too narrow and would require considerable expansion in order to cope with modern day terrorist threats, including threats from biological, chemical and nuclear weapons or material.[339];
> (ii) these instruments did not include provisions that would allow law enforcement officials to board foreign flag ships on the high seas, either to search for alleged terrorists or their weapons, or to render assistance to a vessel suspected of being under attack".[340] "Therefore, the drafting of such provisions became one of the main focuses of the revision exercise.[341]

As a result of great efforts made by countries, amendments to the SUA Convention were adopted in October 2005. The Protocol entered into force on 28 July 2010.

The key supplements of the 2005 Protocol to the SUA Convention are Article 3bis, which enlarges the offenses covered by the SUA Convention to deal with terrorist threats; and Article 8bis, which provides a ship boarding mechanism.

According to Article 3bis(1)a, an offense within the meaning of the Convention is committed if a person for the purpose referred to unlawfully and intentionally:

> (i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN--biological, chemical, nuclear--weapon and other nuclear explosive devices--in a manner that causes or is likely to cause death or serious injury or damage;
> (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
> (iii) uses a ship in a manner that causes death or serious injury or damage; or
> (iv) threatens to commit any of these offences.

However, the listed offences can only be committed and governed by this protocol

[339] Rosalie Balkin, supra note 322, at 23.
[340] Rosalie Balkin, supra note 322, at 23.
[341] Rosalie Balkin, supra note 322, at 23.

when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

Objective of Article 3bis(1)(b) is to target threats of maritime transportation of weapons of mass destruction, accordingly, it prohibits the shipping of BCN weapons, source material not covered under the International Atomic Energy Agency's comprehensive safeguards agreement, other explosive or radioactive material to be used in a terrorist attack or such a threatened attack, and any equipment, materials or software or related technology that is intended to contribute to the design, manufacture or delivery of a BCN weapon.[342] Nevertheless, the transportation of nuclear materials is not considered an offense if, subject to specific conditions, such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.[343]

> The inclusion of provision on the so-called transport offenses, which were the result of a compromise after extensive debate within the Committee, has proved to be much more controversial."[344] "Opposition to the inclusion of any provisions of this nature has been forthcoming mainly from a few Member States to the 1988 SUA Convention that are not parties to the International Nuclear Non Proliferation Regime."[345] "More specifically, these States have expressed their opposition to any attempt to curtail their right to transport, including on their own merchant vessels, nuclear or nuclear-related dual-use materials, equipment, and technologies for use in their civilian nuclear power programme.[346]

By adding a large list of new offences in Article 3bis, the drafter of this protocol has addressed the first shortcoming of the SUA Convention as pointed out by the IMO Legal Committee in order to fight against modern day terrorist threats. Unlike the list of offences in the SUA Convention, only some of the new offences added in the 2005 Protocol may adversely affect to the safety of navigation of a ship, which reflected a significant change compared with the initial objective of the SUA Convention.[347]

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[342] 2005 Protocol, art. 3bis (1)(b).
[343] 2005 Protocol, art. 3bis (2).
[344] Rosalie Balkin, supra note 322, at 27.
[345] See id.
[346] See id.
[347] See id, at 26.

The second shortcoming of the SUA Convention was addressed by article 8bis, which covers the co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of another State Party.

> During the Committee's discussion, most delegations expressed their concern at this article in view of the fact that it involved consideration not only of a legal but also of a political kind."[348] "Reference was made to the potential lack of compatibility between the proposed boarding procedures and the principles of freedom of navigation and flag State jurisdiction."[349] "This draft article was debated at some length in the Legal Committee of IMO, not least because, if adopted, it will create new international law by empowering law enforcement or other authorized officials of one State party to board foreign vessels located in the EEZ or on the high seas that are reasonably suspected of being involved in, or being the target of terrorist attacks.[350]

The following will analyze boarding provisions of the 2005 Protocol: article 8bis.

a. Conditions for making a boarding request

Conditions for making a boarding request under Article 8bis include a reasonable ground for suspecting that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence as set out in Article 3, 3bis, 3ter or 3quarter of the SUA Convention and the 2005 Protocol.[351] It is noted that each request should, if possible, contain the name of the suspect ship, the IMO ship number, the port of registry, the ports of origin and destination, and any other relevant information.[352] If a request is conveyed orally, then it must be confirmed in writing.[353]

b. Procedures for permitting vessel boarding

Under the 2005 Protocol, the requesting Party shall not board the ship or take

[348] See Chirstopher Young, "Balancing maritime security and freedom of navigation on the high seas: A study of the multilateral negotiation process in action", the University of Queensland Law Journal (2005), at 359.
[349] See id.
[350] Rosalie Balkin, supra note 322, at 28.
[351] 2005 Protocol, art.8bis, para. 5 .
[352] 2005 Protocol, art. 8bis (2).
[353] See id.

measures without the express authorization of the flag State. In authorizing a boarding, a State party, with respect to a vessel flying its flag, has three options:

(i) give consent on an ad-hoc basis;[354]

(ii) give consent implicitly if prior authorization is notified to the IMO Secretary-General and if its authorities do not respond to a request after four hours;[355] or

(iii) give consent implicitly if prior authorization is notified to the IMO Secretary General.[356]

Options (ii) and (iii) depend on the choice of a State party upon or after depositing its instrument of ratification, acceptance, approval or accession to the Protocol. In other words, vessel boarding requires express flag State authorization and tacit and advance authorization to board are optional. "The optional declarations by States are far cry from a specific provision in the treaty itself that would eliminate altogether the need to obtain the flag's State consent or establish a legal presumption that boarding is authorized".[357]

When proceeding on an ad-hoc basis, the requesting State must wait for confirmation of nationality of vessel from the flag State before seeking authorization to board.[358] Once nationality is confirmed, the requesting Party will be entitled to ask the flag State for authorization to board and to take appropriate measures with respect to the suspect ship which may include searching the ship, its cargo and persons on board and questioning the person on board in order to determine if an offence set forth in article 3, 3bis, 3 ter or 3 quarter has been, is being or is about to be committed.[359] It means that the requesting State must follow two separate steps, one after another to obtain authorization for boarding. Requested State must respond to requests as expeditiously as possible.[360]

[354] 2005 Protocol, art. 8bis 5(c).
[355] 2005 Protocol, art. 8bis 5 (d).
[356] 2005 Protocol, art. 8bis 5 (e).
[357] Gunther Handl, supra note 259, at 35.
[358] 2005 Protocol, art. 8bis, para 5 (a).
[359] 2005 Protocol, art. 8bis para 5 (b).
[360] 2005 Protocol, art. 8bis 1.

Upon the request for boarding from requesting State, the flag State is given four options under the 2005 Protocol in deciding on how the boarding should proceed. It may:

(i) authorize the requesting Party to board and to take appropriate measures;
(ii) conduct the boarding and search with its own law enforcement or other officials;
(iii) conduct the boarding and search together with the requesting Party; and
(iv) decline to authorize a boarding and search.[361]

Furthermore, flag State may subject its boarding authorization to conditions, for example obtaining additional information from the requesting Party, and conditions relating responsibility for and the extent of measures to be taken.[362]

In short, for ad hoc authorizations and boardings, without consent from the flag State, the requesting State cannot proceed with boarding and other enforcement measures in respect of a suspect vessel. This approach is obviously consistent with the exclusive jurisdiction of flag State principle as laid out in the UNCLOS and customary law.[363]

c. Safeguard provisions

Article 8bis also provides obligations that a boarding State must follow in undertaking a boarding. In the course of boarding, law enforcement officials of the boarding State are obliged to: take due regard of the need not to endanger the safety of life at sea; ensure that all persons on board are treated in a manner which preserves human dignity and in compliance with the applicable provisions of international law, including international human rights law; take due account of safety and security of the ship and its cargo; ensure that measures taken are environmentally sound; and take reasonable efforts to avoid a ship being unduly detained or delayed.[364] In addition, paragraph 9 of Article 8bis stipulates that

[361] 2005 Protocol, art. 8bis (5c).
[362] 2005 Protocol, art. 8bis 7.
[363] See Natalie Klein, supra note 3, at 324.
[364] 2005 Protocol, art. 8bis (10a).

the use of force is to be avoided "except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances". [365]

It is noted that States Parties shall also be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this article when the grounds for such measures prove to be unfounded, or unlawful, or exceed those reasonably required in light of available information.[366] This provision will prevent vessels from being stopped and searched without reasonable grounds.

If evidence of unlawful conduct in relation to the offenses under the 1988 Convention and 2005 Protocol is discovered as a result of the boarding, the flag State shall be promptly informed by boarding State.[367]

As analyzed above, Article 8bis of the 2005 Protocol can be considered as an important development in the law of the sea to deal with terrorist acts because it establishes detailed enforcement procedures for warships to board foreign vessels to suppress offences related to terrorist acts. Nevertheless, the 2005 Protocol still requires the consent of flag State for boarding foreign vessels. In other words, the boarding procedures in the 2005 Protocol do not change any rule of international law. Furthermore, for all boardings pursuant to the protocol, the flag State maintains the right to exercise jurisdiction over a detained ship, cargo or other persons on board, including seizure, forfeiture, arrest and prosecution, save only in the case the flag State consents to the exercise of jurisdiction by another State.[368] Due to the aforesaid strict regulations, it seems that paragraph 13 of Article 8bis of the 2005 Protocol, which encourages State parties to conclude agreements or arrangements between them, is a good solution for States to consider to facilitate law enforcement operations carried out in accordance with this protocol.

[365] 2005 Protocol, art. 8bis (9).
[366] 2005 Protocol, art. 8bis (10b).
[367] 2005 Protocol, art. 8bis (6).
[368] 2005 Protocol, art. 8bis (8).

In conclusion, the boarding procedure of this protocol coupled with the expanded range of offenses which trigger the right to make boarding request is a significant addition to counter-terrorism efforts, provided that the protocol can attract large number of State parties.[369] However, the 2005 Protocol could not move beyond flag State consent as the fundamental organizing principle for handling boarding issues. In other words, consent of flag State is prerequisite condition to be able to board a foreign vessel in the waters beyond the territorial sea of a State even if that vessel or a person board is reasonably suspected of involvement in an act of terrorism implicating WMD.[370]

[369] As of 30 September 2010, 16 countries have ratified the Protocol. See IMO, Summary of Status of Convention, available at www.imo.org.
[370] Gunther Handl, supra note 259, at 35.

IV. CONCLUSION

> In modern times the seas have been considered a resource available for the use of all nations and the exclusive property of none, however, the recent history of law of the sea continues to reflect conflicts between States seeking un-hampered navigation and utilization of resources and other States seeking exclusive control over adjacent seas.[371]

Although it is a firmly established rule of international law that a ship on the high seas is subject to the exclusive jurisdiction of its flag State, States can board foreign vessels on the high seas in certain exceptions conferred by customary law, UNCLOS and other treaties.

As discussed in the preceding chapters, there are number of exceptions permitting the boarding of foreign vessels by non-flag States. There is no doubt that the exceptions vary according to each period of time to cope with emerging threats to maritime activities as well as to protect interest of States. As such, vessel boarding practices could be categorised by three periods of development: (i) vessel boarding before 1982; (ii) vessel boarding for the period of 1982 – 2001; (iii) vessel boarding after the traumatic event 11 September.

Vessel boarding before 1982

Before 1982, interdiction of foreign vessels was mainly based on customary international law.[372] The occasions when warships may interfere with foreign merchant vessels are few, and supposedly well–established. Accordingly, the practices of maritime interception on the high seas to deal with piracy, slave trade or stateless vessel had been generally accepted as legally binding among countries. The customary norms have been codified in the Convention on the High Seas (1958). Besides, in the time of war, the exercise

[371] Karin M Burke and Deborah A. De Leo, "Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea", the Yale Journal of World Public Order, Vol.9:398, 1983, at 389.

[372] Customary international law has two distinct component parts: It is the general practice of States, and must also be accepted as law (See art.38 of Statute of the International Court of Justice). Both must be established in order for a new rule of custom to emerge. The second component part is more critical to the determination of the existence of customary law, it requires a State' acceptance of the general practice as legally binding on its internal and external relations.

of belligerent rights is justified and may take the form of a blockage of the enemy's ports and coast.[373] "The right of visit, search, and capture may be exercised against neutral ships carrying contraband or engaged in acts of un-neutral service."[374] Furthermore, under customary law, States are entitled to board foreign vessels in the case of self defense or hot pursuit.

Since the 19th century, States started to pay attention to emerging issues such as protection of submarine cables, prevention and combating of smuggling of migrants or liquor, protection of certain types of fish in certain areas therefore, several treaties were concluded among countries to confer the right to board each other's vessels to deal with these threats, e.g. Convention for the Protection of Submarine Cables (1884),[375] Convention to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States (1924),[376] Convention on Conduct of Fishing Operations in the North Atlantic (1967). Nonetheless, except the High Seas Convention (1958), other treaties concluded during this period, which were binding upon small number of countries, did not have much impact on the practice of exercising enforcement jurisdiction over foreign vessels. In short, vessel boarding practices before 1982 strictly followed customary international law.

Vessel boarding for the period of 1982 - 2001

This period marked by the adoption of the UNCLOS. The convention entered into force in 1994, however, at the time of the adoption of the UNCLOS, countries expressed their desires to strengthen enforcement power over foreign vessels, which were reflected in the text of UNCLOS on exclusive economic zone regime. Several exceptions to the principle of the exclusive jurisdiction of flag State are newly added to deal with emerging issues in the EEZ such as illegal fishing or pollutions from vessel and dumping in the zone. Accordingly, the coastal State is granted the enforcement jurisdiction to board foreign vessels in the EEZ to ensure compliance with its laws and regulations with respect to the exploration,

[373] Ian Brownlie, supra note 4, at 242.
[374] See id.
[375] See Convention for the Protection of Submarine Cables, 1884, art. X, available at http://cil.nus.edu.sg/wp/wp-content/uploads/2009/10/Convention_on_Protection_of_Cables_1884.pdf.
[376] See Convention to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States, 1924, art. II, available at http://untreaty.un.org/cod/riaa/cases/vol_III/1609-1618.pdf in the Reports of arbitral awards of the "I'm Alone" case (Canada, United States).

exploitation, conservation and management of living resources, and take necessary actions against vessels violating international regulations as regarding pollution of the marine environment. The UNCLOS' provisions regarding enforcement jurisdiction of coastal State over foreign vessels in the EEZ could be considered a new trend in vessel boarding during this period. As regards to boarding on the high seas, the provisions of UNCLOS simply reflect customary international law.

The entry into force of the UNCLOS in 1994 has officially created a comprehensive legal framework governing all issues related to ocean governance, in which provisions regarding enforcement jurisdiction have been considered as a legal basis for countries to invoke when dealing with vessel boarding issue.

During the 80s and 90s, important developments related to the interdiction of ships have taken place with respect to the control of narcotic drug trafficking at sea, illegal immigration by sea, and IUU fishing. Accordingly, boarding procedures have been stipulated in a number of treaties e.g. the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances (1988), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Convention on Conservation of Anadromous Stocks in the North Pacific Ocean (1992), the Convention on the Conservation and Management of Pollock Resources in Central Bering Sea (1994), the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. However, except for the Fish Stocks Agreement, which introduced certain new concepts and principles related to high seas enforcement by non-flag States,[377] other treaties against illicit traffic in migrants and drugs could not move beyond flag State consent as the fundamental framework for boarding.

Furthermore, during this period, a large number of bilateral agreements have been concluded among countries to confer power upon non-flag States to interdict foreign vessels to suppress illicit traffic by sea, that could be considered as a noteworthy trend in vessel boarding.

[377] Actually, when a State ratify or adhere to the Fish Stocks Agreement, the State has also agreed to give consent to other party of this Agreement to board its fishing vessels on the regulated area in the high seas.

In short, vessel boarding practices for the period 1982-2001 were mainly based on principles laid out in the UNCLOS. Although many efforts have been made thereafter in strengthening enforcement power over foreign vessels, they could not move beyond principles of the convention.

Vessel boarding trends after 11 September 2001

After September 11 traumatic event, a new trend in vessel boarding has emerged to deal with threat of terrorist acts. There is no doubt that many States have been seeking greater powers over foreign vessels to ensure their security. As a result, the 2005 Protocol to the SUA Convention was adopted to supplement provisions on boarding procedures, which shall be followed if a State Party of this Protocol desires to board a ship flying the flag of another State Party to deal with offences related to terrorist acts. However, the new provisions on boarding under this Protocol still conform to the principles of the UNCLOS regarding enforcement jurisdiction against foreign ships. There is no doubt that although the threat of terrorist acts against maritime interests are apparent and many countries show their willingness to fight against the threat, States have still struggled to take appropriate action due to the principle of exclusive jurisdiction of flag State.[378]

Apart from the 2005 Protocol to SUA Convention, a greater multilateral effort has been made through the Proliferation Security Initiative (PSI) to deal with the threat of terrorist acts. Although the PSI does not create legally binding commitments, the Statement of Interdiction Principles calls on PSI participants to take specific actions in support of interdiction efforts regarding cargoes of WMD. Besides, in the framework of PSI cooperation, some States have concluded bilateral agreements to obtain the necessary authority to board foreign vessels to deal with terrorist acts. "International treaty practice, in particular the bilateral practice of the United States, indicates an emerging trend toward facilitating boarding".[379] Nonetheless, "such special treaty-based authorization do not cover vessels of all nations of potential interest, nor do they always provide clear or unrestricted authority to the boarding State. Indeed, many flag States remain reluctant to enter into such

[378] Natalie Klein, supra note 3, at 317.
[379] Gunther Handl, supra note 14, at 189.

agreements, or if they do, will often make their consent to boarding subject to various conditions."[380]

During this period, piracy and armed robbery, IUU fishing and illicit traffic by sea are still prominent maritime threats. Consequently, cooperation among countries have been being enhanced to fight against the threats and several efforts were undertaken through UN Resolutions, regional and bilateral agreements to strengthen enforcement power over foreign vessels. Nevertheless "the principle of exclusive flag State jurisdiction has survived in all recent international legislative attempts to establish a separate exception for security-related boarding on the high seas."[381]

Finally it should be noted that the interdiction of ships at sea whether specified by treaty or customary international law, rests on the cooperation of international law and the national laws of States possessing a maritime flag as well as maritime security partnership between States. In the coming years, the remaining issues of the exercise of enforcement jurisdiction over foreign ships are unlikely to be solved by a new treaty. The cooperation between States will be a good solution to facilitate the exercise of enforcement jurisdiction over foreign vessels by non-flag State to prevent and suppress maritime crimes. The following proposed activities should be applied in order to facilitate maritime boarding:

- Establishing domestic procedures to respond to boarding requests from other countries and assign to an agency the coordination function for responding boarding requests;

- Raising awareness of enforcement officials on international legal framework on vessel boarding in order to ensure that they can exercise the enforcement jurisdiction to board foreign vessels in accordance with international law;

- Carrying out personnel training to have qualified staff serving for maritime security partnership in general and for vessel boarding cooperation in particular;

[380] Gunther Handl, supra note 14, at 184.
[381] Gunther Handl, supra note 14, at 189.

- Strengthening bilateral and multilateral efforts through bilateral and multilateral arrangements to facilitate the boarding of foreign vessels in international waters by shortening the requested flag State's response time;

- Establishing networks between countries to share information and create channel for receiving and responding boarding requests in order to provide quick actions related to vessel interdiction; and

- Considering the possibility of adhesion and implementation of international treaties related to vessel interdiction e.g. the United Nations Convention Against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances (1988), the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, the United Nations Agreement on Straddling Fish stocks and Highly Migratory Fish Stocks, the 2005 Protocol to SUA Convention.

However the proposed activities in the framework of multilateral or bilateral cooperation should not move beyond the principles with respect to interdiction of ship at sea as laid out in the UNCLOS. Boarding of vessel beyond territorial sea should remain subject to flag State consent except where there has been authority deprived from agreements between States in question or customary law. In other words, the principle of freedom of navigation and the principle of the exclusive jurisdiction of flag State on the high seas should remain of critical importance to secure the interests of the global economy, and of basis for countries to deal with vessel boarding issue.

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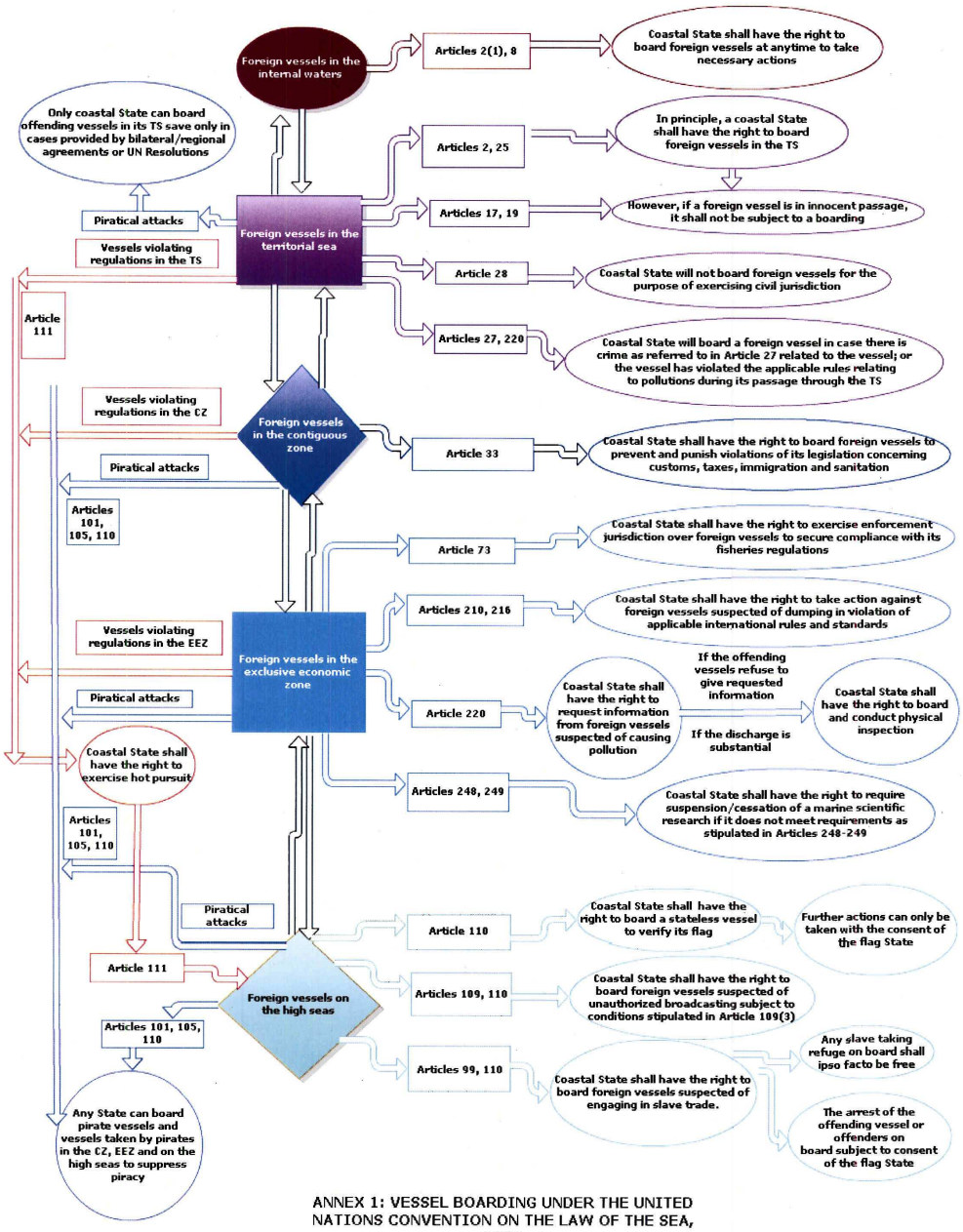
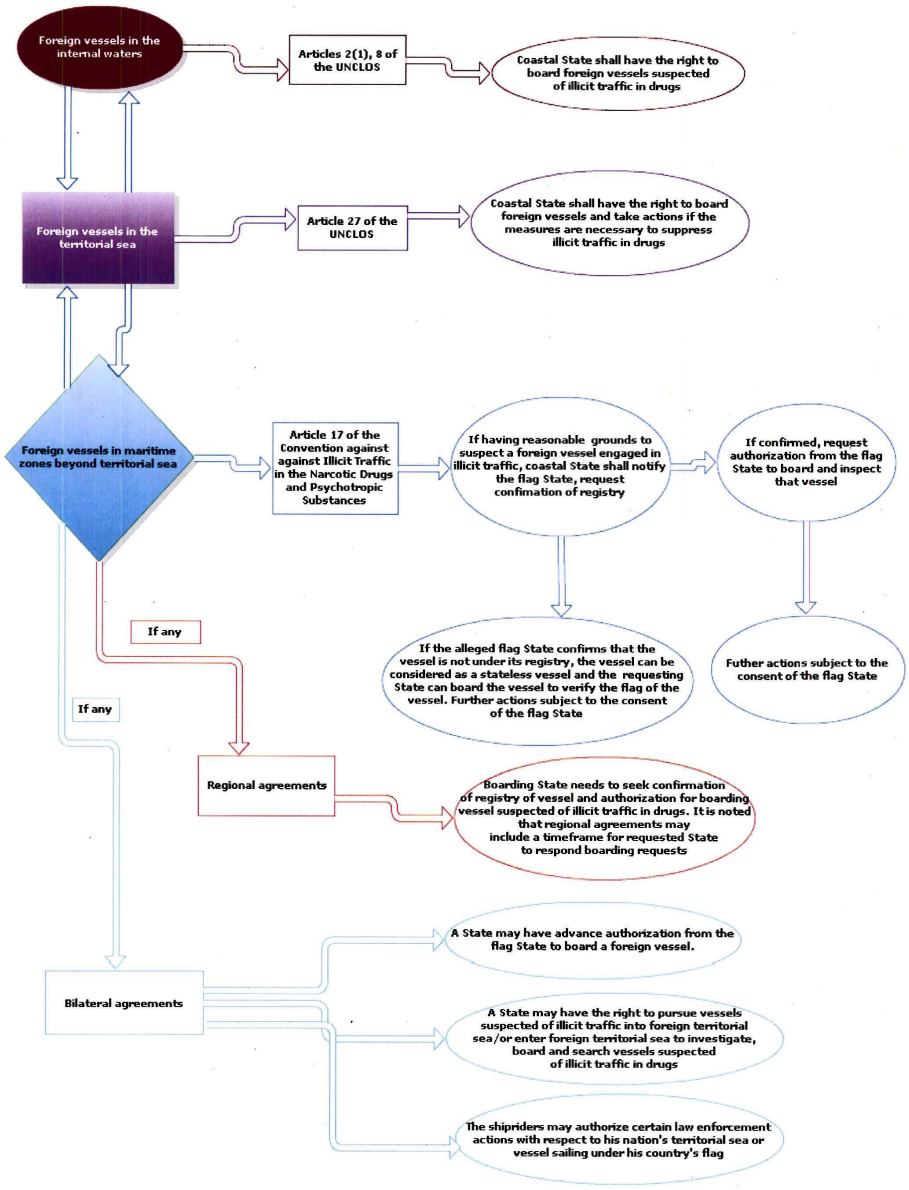
Annex 1: Vessel boarding under the United Nations Convention on the Law of the Sea (summary)



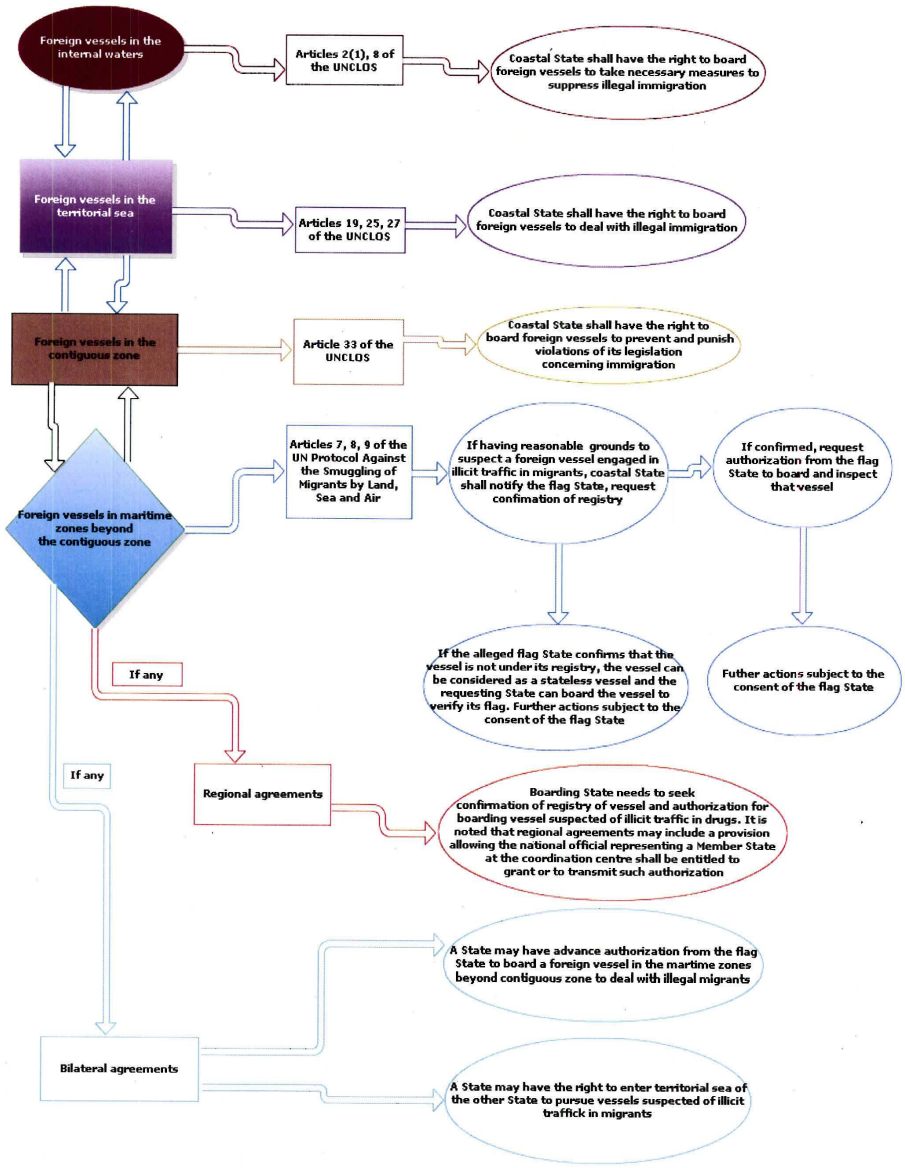
ANNEX 1: VESSEL BOARDING UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982

Annex 2: Vessel boarding to suppress the illicit traffic in drugs (summary)



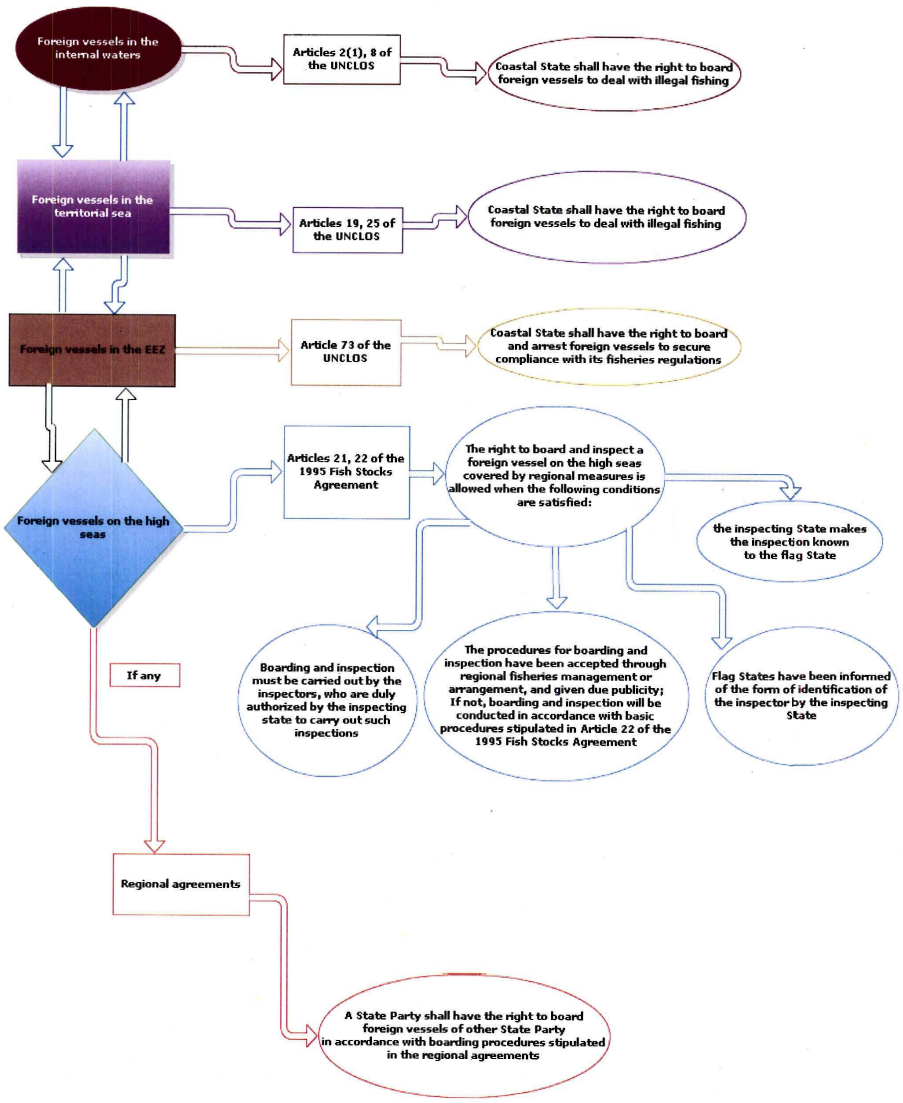
ANNEX 2: VESSEL BOARDING TO SUPPRESS THE ILLICIT TRAFFIC IN DRUGS

Annex 3: Vessel boarding to deal with illicit traffic in migrants (summary)



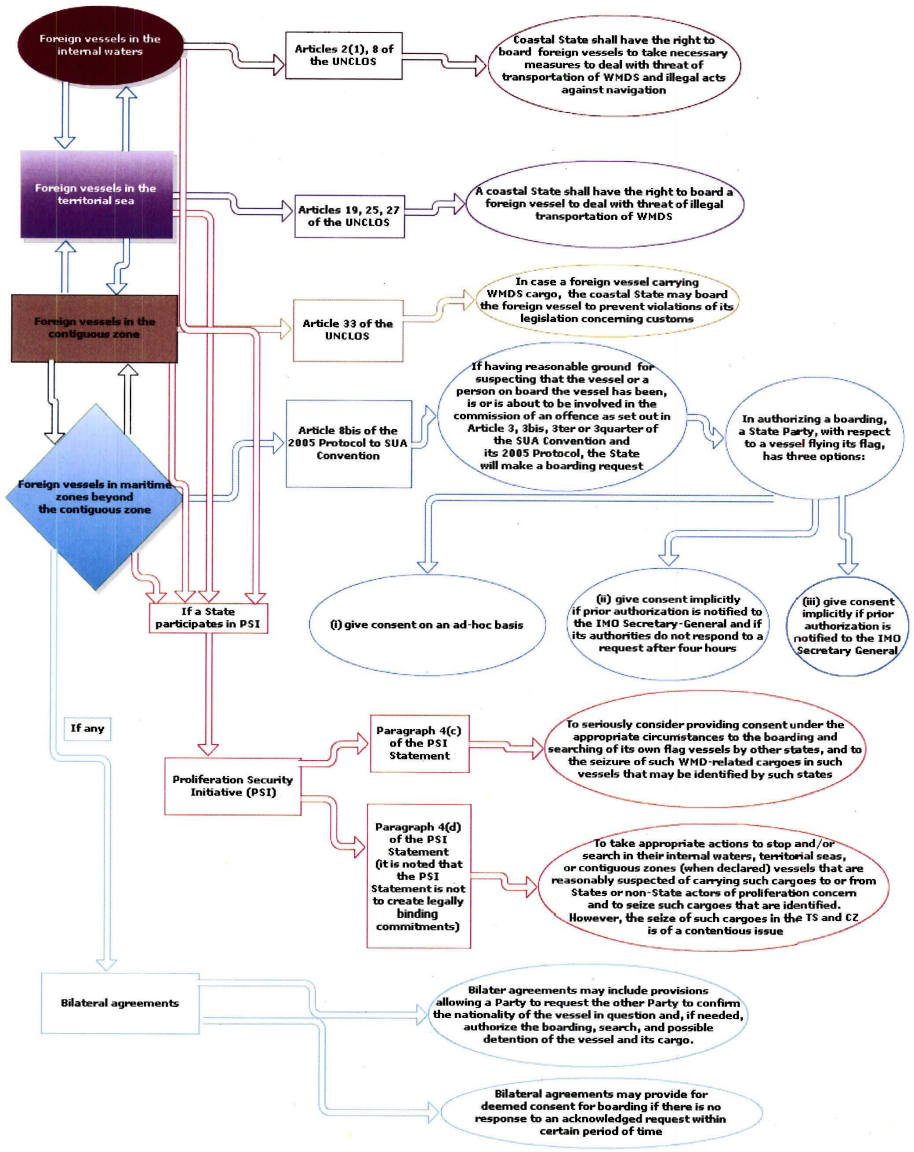
ANNEX 3: VESSEL BOARDING TO DEAL WITH ILLICIT TRAFFIC IN MIGRANTS

Annex 4: Vessel boarding in the context of IUU fishing (summary)



ANNEX 4: VESSEL BOARDING IN THE CONTEXT OF IUU FISHING

Annex 5: Vessel boarding to deal with illegal acts against navigation and threat of illegal transportation of weapons of mass destruction by sea (summary)



ANNEX 5: VESSEL BOARDING TO DEAL WITH ILLEGAL ACTS AGAINST NAVIGATION AND THREAT OF ILLEGAL TRANSPORTATION OF WEAPONS OF MASS DESTRUCTION BY SEA