# 23. Sovereignty and Sovereign Right of A Port State: Prognoses of The Existing Customary Law And Epitome of A Developing Country Experience

**Abdulrazaq O. Abdulkadir** Ph.D.
LL.B, LL.M, Ph.D. (IIUMalaysia)
Senior Lecturer, Faculty of Law,
University of Ilorin, Ilorin, Nigeria
**&**
**Sharifah Zubaidah Syed Abdul Kader**
LL.B (First Class), MCL (IIUMalaysia) SJD
(Bond University, Australia)
Associate Professor and Formerly Deputy Dean,
Ahmad Ibrahim Kulliyyah of Laws,
International Islamic University, Malaysia

## Summary of the Chapter

*This paper examines some existing conventions that regulates right of foreign ships to navigate to port states. The paper argues that treaties are not a new phenomenon and a number of attempts have been made to guarantee access of foreign flagged vessels to ports through various bilateral agreements. It is observed that some national provisions like NPA Act which requires a ship to supply information before departure to the country have not adequately followed. The paper concludes that the 1923 Convention has a limited number of signatories and in all likelihood is not representing the position of the existing customary law.*

***Keywords: Sovereignty, Sovereign Right, Portand State***



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## 1. Introduction

Broadly speaking, a port state has power under the International law to control the entry or stipulates conditions for ships to access its ports, the only exception are warships and governments who are entitled to immunity because of the principle of *Par in parem non habet imperium,* which means an equal has no power over an equal.[1302] The essence of port state power to regulate and stipulate conditions for access to its port is to ensure maximum security in the port state. Port security is indispensable to international commercial growth. The continued existence and development of legitimate international commerce is not without its bad stories, hence the growth has been marred with criminal activities and purposes. Therefore, exercising, ensuring sovereignty and sovereign rights at sea has become one of the leading national security strategies by coastal states with regards to their jurisdiction and expanding Exclusive Economic Zone (EEZ) under the UNCLOS.[1303]

To this end, port states have designed various strategies and stipulate conditions that will enable foreign vessels that have come to load and unload cargoes in their ports right of access to their ports. Where a vessel that has come to their port fails to meet the requirements, the port state might exercise right to deny access to such vessel. It is against this background that this paper considers the provisions of the 1923 Convention with the aim of examining the viability of the port state control right to deny access to foreign vessels. The paper also takes into consideration the limited number of signatories of the Convention and whether in all likelihood, the Convention represents the position of the existing customary international law.

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[1302] See Mohammed NaqibIshan Jan, *Principles of Public International Law: Modern Approach,* (Malaysia: IIUM, 2009), 263-264. See also Konig. D, *Flag of Ships* (Heidelberg: Oxford University Press, 2010), 9. Kasoulides. G.C, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (The Netherland: MaltniusNijhoff Publishers, 1993) 1. Kaye .S, "Threats from the Global Commons: Problems of Jurisdiction and Enforcement", *Melbourne Journal of International Law* Vol.8 (2007).

[1303] Rahman .C, "The Concept of Maritime Security: A strategic perspective on alternative visions for good order and security at sea, with policy implications for New Zealand", *CSS Discussion Paper 07/09,* (New Zealand: Centre for Strategic Studies, 2009), 34.



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## 2. Right of Foreign Flagged Vessel to Access Port State

The right of access to ports is the corollary of a foreign flagged vessel to enter into the ports of another state known as port state. Apparently, the principle of freedom of the high seas[1304] does not apply to ports, hence the several attempts to establish a right of access of foreign flagged vessels to ports. The 1923 Convention on the International Regime of Marine Ports was the first treaty dealing with this issue[1305] and it provides for reciprocity by states to the convention, allowing access to vessels of all member states.

By the principle of public international law, states must open their ports to foreign vessels except in circumstances where the interests of the states will be jeopardised.[1306] The issue of access to ports of other states by foreign flagged vessels has been a subject of controversy among scholars.[1307] Although, the right of access is usually granted by treaty between the states concerned,[1308] the general view is that there is

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[1304] See Article 87 of UNCLOS provides for the freedom of the high seas: "the high seas are open to all States whether coastal or land-locked and it also comprises, *inter alia*...(a) freedom of navigation."

[1305] Article 2 which provides that: "Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Art. 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full employment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers. The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the government, public authorities, concessionaries or undertakings of any kind."

[1306] Connell. D.P.O', *The International Law of the Sea, Vol. II* (Oxford: Clarendon Press, 1984) 848. See also the case of *Saudi Arabia v Arabian American Oil Company (ARAMCO)* (1958) 27 I. L. R. 117.

[1307] Tasikas .V, "The Regime of Maritime port access: A Relook at Contemporary International and United States Law" *Loyola Maritime Law Journal,* 5 loy.mar L.J 1 (2007), 1.

[1308] Klein N, *Maritime Security and the Law of the Sea*, (Oxford, University Press, 2010), p. 66.



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no such separate customary right.[1309] A more accepted view is that the states are entitled to prescribe and enforce circumstances for port entry.[1310] It has been observed that the coastal state enjoys power to regulate access to its ports by virtue of its sovereignty[1311] notwithstanding the rule of international law that ports of a state must be open to foreign vessels.

While some authors agree that the right of access to port exists in favour of a foreign vessel, others believe that rationalising that states are legally obligated to maintain open ports, due to the general right and interest based on free trade and navigation existing between states concerned. However, this view is far from certain as the legal position and argument of scholars given above were expressed in opposition to each other. Consequently, scholars have[1312] refuted the argument or notion that ports of a state are presumed open under international law. They however maintain that customary international law does not advocate a general notion of a right of port state access and establishes no basis for a right of entry into maritime ports.

## 3. Non-Recognition of a Sovereign State to Control Access to Ports

Some scholars of international law have contended that foreign vessels have a right of access to port of states. The advocates of this regime, beginning with Hugo Grotius who was considered the founding father of the law of the sea, pronounced the legal doctrine of the freedom of the sea, and perhaps the ocean is incapable of being occupied by a state or a state cannot claim sovereignty over the ocean, hence the oceans and seas are free to all nations. This argument was further fortified by the notion that no sovereign could deny port access to a foreign merchant vessel[1313]

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[1309] De La Fayyette. L,"Access to Ports in International Law", *International Journal of Marine and Coastal Law*, (1996) 1, 1 1-2.

[1310] Ibid at 30. See also *Nicaragua v US (Merits)* [1986] ICJ Rep, 14, 111 para. 213.

[1311] Ibid.

[1312] Tasika.V, at 2.

[1313] Ibid. Hugo Grotius maintained that he shall base his argument on the flowing most specific and unimpeachable axiom of the law of the nations known as a primary rule or



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and that any state who denies foreign vessels access to its ports neglects the advancement of international interaction, navigation and trade which customary international law imposed on it. It is on the basis of this that a scholar posited that no state appears to be an island itself from outside the world or can refuse to relate with other states in terms of economic and commercial advancement. Expectedly, a state that is willing to achieve this development must be willing to allow access of foreign vessels to its ports.[1314] Therefore, the freedom of navigation will be of no meaning if the states do not have the right to the sea and ships cannot traverse the territorial sea of another state to trade with them and improve their economy.[1315] Perhaps the circumstances where states would deny the right of access to foreign vessels except on the ground of quarantine or time of war is almost unthinkable.[1316] In a nutshell, the reasons for the supposition of the view that there should be a right of access of foreign flagged vessels to port states could be summarised as follows:

i. Customary international allows the right of access to ports;
ii. Every nation is free to travel to every other and trade with it;
iii. Preventing a foreign flagged vessel access to a port state is apparently tantamount to neglect of the duties of the promotion of international relationship and economic development;
iv. States are bound to construct ports for the sake of maritime commerce and must furnish such ports with security to merchants; and
v. The circumstances under which a state can deny right of access to ports is during the time of war, quarantine etc.[1317]

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first principle, the spirit of which is self- evident and immutable which goes that every nation is free to travel to every other nation and trade. See generally Hugo Grotius, *The Freedom of the Sea*, Magoffin R.V.D, Scott. J.B, (ed), (Oxford: University Press, 1916).

[1314] Ibid.

[1315] A.O. Abdulkadir and S. Z. Syed Abdul Kader, "Right of Ship Access to Port State under International Law: All Bark with No Bite", *Australian Journal of Basic & Applied Science,* (2012),6(11), 215.

[1316] Ibid.

[1317] The proponents of this argument are Hugo Grotius, Colombos, Hyde, Cundick, Foulke, Wolff, etc.



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## 4. Recognition of a Sovereign State to Control Access to Port

Contrary to the view expressed by the proponents of the right of access of the foreign flagged vessels to the states ports control, scholars have expressed reservation that states ports control reserved the right to deny access to foreign ships. The proponents made use of the principle that access to port was deemed customary international law as stated in the case of *Saudi Arabia v ARAMCO,*[1318] where the issue involved the interpretation of a contractual disagreement between the parties. The Tribunal announced a general responsibility of all littoral states to allow port access to foreign flagged vessels. According to the Tribunal, the ports of every state must be open to all vessels except where the circumstances demand especially the vital interest of the state. What informed the Tribunal decision was the fact that it recognised a sovereign interest of a state in controlling its ports and denying access to its ports during specific situations as provided under the 1923 Ports Convention[1319] which permits a contracting state to depart from the principle of equal treatment among sea-going vessels where emergency affecting the safety of the state or the vital interests of the country has occurred. Thus, the circumstances under which a foreign flagged vessel will be denied access must be a temporary one as the port states are under obligation to respect and observe the bilateral relationship among them.[1320]

In a sharp disagreement with the position stated above, scholars observed that the states are not under obligation to open their ports to foreign flagged vessels[1321] and their position was supported by the decision of the International Court of Justice in the case of *Germany v Denmark,*[1322] where the court reflected on the drafters' intent in adopting Article 6 of the 1923 Convention to the effect of whether the equidistance principle was to be codified as an existing international customary rule. The court noted that international custom developed

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[1318] Ibid.
[1319] Article 16.
[1320] Tasika.V, at 5.
[1321] Ibid.
[1322] (1969) I.C.J 3, this case is popularly referred to as North Sea Continental Case.



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based on the significant participation of the state actors and action by a few states cannot constitute customary norms.

Therefore, in exercising the right of denial of access to ports by port states, it is expected that such will be done in accordance with the customary international law, the treaties which the states have ratified as well as the undertaking the states have assumed.[1323] The right of access cannot be denied to a foreign vessel where there is a bilateral agreement, between the states but in a situation where there is no such agreement the state's sovereign right extends over its internal waters, including ports and a foreign flagged vessel does not have an inherent right under international law to access a port of another state without prior permission.[1324]

Indeed, the decision of the ICJ in the case concerning the military and paramilitary activities in *Nicaragua v. United States of America,*[1325] is of paramount importance in this circumstance as the court stated emphatically that it does not recognise a customary right of maritime port entry for foreign ships. Actually, the decision of the court was informed by the fact that the United States entered into a bilateral agreement with Nicaragua to allow access to her ships which presupposes the rights of navigation and trade. The notion was that the United States could terminate the agreement as specified in the treaty between the parties, however, notice of termination needs to be given to Nicaragua and the United States could not deny access during the

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[1323] Ibid. See also Thirlway. H, "The Sources of International Law", in Malcolm Evans (ed), *International Law*, (New York: Oxford University Press, 2010), 107 and Guggenheim P., *Traite de Droit International Public*, (1953) 419, where the author maintained that sea-ports are integral parts of the territory of the state. They belong to its maritime ways. Nevertheless, customary international law, bilateral treaties as well as the statute on the regulation of ports limit considerably the sovereign right of the state. Sea ports are in principle open to the foreign commercial ships and may be closed only when the vital interest of the state so demands.

[1324] See Abdulkadir O.A and SharifahZubaidah Syed Abdul Kader, "Right of Ship Access to Port State under International Law: All Bark with No Bite", *Australian Journal of Basic and Applied Sciences*, 6(11), (2012), 216.

[1325] Judgment of 27 June 1986 available at http://www.icjcij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5 (accessed on 9/4/2012).



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period of notice.[1326] The power of a state to regulate entry of vessels in to her ports was reinstated by the U.S Congress that stated thus:

> "The port State may condition entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. [It] may also exercise jurisdiction to enforce international standards with respect to some activities that occurred prior to entry into its ports or internal waters (for example, illegal discharge of pollutants."[1327]

From the foregoing, the argument against right of access can be summarised as follows:

i. The port states reserve the right to deny foreign vessels access to its ports;
ii. Where there is an agreement between states on the right of foreign flagged ships access to ports, the states are under obligation to honour the agreement;
iii. Right of entry or access to ports is tantamount to sovereign right of a state;
iv. The right of access cannot be denied where the agreement is in existence and will not be denied during the pendency of the notice to terminate.

Bearing the argument on the pros and the cons above, it can be deduced that the right of access to ports is from customary international law. Essentially, foreign flagged vessels would only have right of access to ports of states provided that three conditions are met.

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[1326] Ibid.

[1327] The Congress was quoted and referred to in Oliver J.T, "Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports", *South Carolina Journal of Internal Law and Business,* vol.5 Issue 2 (2009), 216. Also, on the right of a port state to close its port against a foreign vessel that fails to meet its entry requirements, see Kaye .S, "Threats from the Global Commons: Problems of Jurisdiction and Enforcement", *Melbourne Journal of International Law* Vol.8 (2007).



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Firstly, there must be a bilateral agreement on the right of access to ports between the two countries in question;[1328]

In the case of *Khedivial Line v. Seafarers' International Union,*[1329] a United Arab Emirates owned merchant vessel was denied access to the port of New York, wherein the plaintiff sought *interalia*, an injunctive relief and damages based on the international right of access. The court in deciding the case stated as follows:

> "Plaintiff concedes that there is no treaty between the United States and the United Arab Republic granting the latter's vessels free access to United States ports. Plaintiff has presented no precedents or argument to show either that the law of nations accords an unrestricted right of access to harbors by vessels of all nations or that, if it does, this is a right of the foreign national rather than solely of the nation. In any event the law of nations would not require more than comity to the ships of a foreign nation, and here they are cause of the picketing is a harassment of American shipping and seaman by the United Arab Republic that is not denied."

It is apparent from the decision of the court that the United States has the sovereign right to deny access to foreign vessels, but preserves the principle of equality of treatment of foreign vessels, hence denial of port access should not be done randomly or unjustifiably.[1330]

Secondly, the foreign flagged vessels must have met the requirements for ports entry as laid down by the ports state. These requirements

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[1328] An example is found in the case of *Nicaragua v U.S (Merits) supra,* where there was agreement between the two countries, although was later in breach but the court held that Nicaragua was still entitled to enjoy the privileges of the agreement until after the expiration of the notice of termination of the agreement.

[1329] 278 F.2d 49, (2d Cir. 1960).

[1330] Tasikas .V, at 14.



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are often found in the laws and regulations of the ports states.[1331] Thirdly, the port state may publish regulations guiding port entry.[1332]

## 5. The General Rule under International Law and Vital Interest of State

As a general rule under the international law, the port of every state is presumed to be open to all commercial vessels but the same international law also permits an exception if the vital interest of the state concerned will be jeopardised.[1333] A port state enjoys the right of conditioning access of foreign flagged commercial vessels to its port and the authority of the government of the port state has inherent power to deny access to ships during the time of war. It is no doubt that these rights have been widely acknowledged.[1334] Therefore, a port state reserves the right to deny access to a foreign ship where the ship breaches the following:

i. Failure to comply with the rules and regulations for the conduct of the business of the port;[1335]
ii. Involvement of vessel in the transportation of hazardous material;[1336]
iii. Nuclear-powered ships.[1337]

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[1331] See the case of *Patterson v Bank Eudora*, 190 U.S (1903) where the court held that the government has unfettered discretion to impose conditions for foreign entry of ports. Note that these requirements of port entry under the laws and regulations of both Nigeria and Malaysia are the focus of this thesis in chapters 3 and 4.

[1332] Tasikas.V, at 14.

[1333] Sohn L.B and Noyes J.E, *Cases and Materials on the Law of the Sea* (New York: Transitional Publishers, 2004), 363.

[1334] Ibid.

[1335] See the 1923 International Regime of Maritime Ports, Article 3. This may include clearance procedure tonnage duties, pilotage etc. The International Maritime Organisation has developed standardised shipping documents as contained under the various conventions like 1966 Load Lines Convention and MARPOL 73/78.

[1336] Ibid, Article 17. See also Article 211 of the 1982 Convention on the Law of the Sea.

[1337] See the 1962 Convention on Liability for Operators of Nuclear Ships, Article 17 which provides that "nothing shall exclude the right of port state to deny access to its waters and harbor in respect of ship licensed by another state to nuclear ship." The



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Importantly, a port state may limit the port access of all foreign ships, subject to anyrights of entrance clearly granted under the 1923 Convention and the 1982 United Nations Convention on the Law of the Sea and those ships in distress owing to *force majeure.*[1338] In the same vein, it is the assumption of international law that the right of access to port will not be restricted by port states to foreign flagged commercial vessels or that the port state will not impose sanctions upon foreign flagged vessels other than to ensure the security, the safety at both entry and departure of ships in the course of navigation and conducting business in the port state.[1339]

Moreover, the right to exercise jurisdiction on the foreign flagged vessels by the port state while vessels are within the port state's waters must conform to well recognised and fundamental principles of international law.[1340] Doing otherwise would be tantamount to arbitrary and unreasonable exercise of a port state's sovereignty over foreign-flag ships and it would give rise to a series of redress including retaliatory restrictions, diplomatic protests, dispute settlement procedures, liability for damages, etc.[1341] The arbitrary and unreasonable exercise of a port state's sovereignty was the evidenced when a shipping company in Germany proposed a ferry service between Southampton and St. Malo in 1975 wherein the French Union prevented the service from operating, notwithstanding the government undertaking and clearance to the effect that the crew would be half French and half British. The German shipping company took legal action and the tribunal held that the company had the right of free entry under both community law and

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issue of port access of nuclear-ships has arisen with regard to warships and in response to Egypt, the United States opined that neither the bilateral agreement which were used for the N.S Savannah nor the provision on the safety assessment contained in the 1969 Safety of Life at Sea Convention (SOLAS) apply in the case of nuclear-powered warships. In recognition of this provision, the U.S permits entry into its ports without any special agreement or safety assessment. See generally, Sohn L.B and Noyes J.E, at 365.

[1338] Sohn L.B and Noyes J.E, id, p.395. See also O'Connell D.P, *The International Law of the Sea*, I.A.Shearer, (ed.) (New York: Clarendon Press, 1984), Vol. II. at 853.

[1339] O'Connell. D.P. Ibid, at 849.

[1340] Ibid.

[1341] Ibid, at 850.



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international law to St. Malo and because of the fact that this had been denied, the company was entitled to damages from the French state.[1342]

### *a. The Position under the 1982 UNCLOS*

In the face of its innovative work, the 1982 United Nations Convention on the law of the Sea (UNCLOS) only ostensibly deals with the issue of right of access to ports. It is evidenced from the provisions of the UNCLOS that apart from one narrow provision concerning the right of innocent passage in internal waters which has been considered as part of a coastal State's territorial sea, the UNCLOS provides only definitional articles.[1343] The UNCLOS defines ports as outermost permanent harbour works which form an integral part of the harbour system, regarded as forming part of the coast.[1344] Accordingly, the scope of the UNCLOS with respect to ports is to merely delineate internal waters and ports from[1345] the territorial sea. A vivid look at the provisions of the UNCLOS reflects as if the legal regime of port access is not within the scope of the international law of the sea[1346] but the sovereignty of a state includes both its territory and inland waters.[1347] It is logical therefore to infer that ports will be governed by a legal regime similar to the national law of a state, quite different from the international law of the sea.[1348]

It is noteworthy that UNCLOS[1349] makes provisions regulating ports and allows states to institute proceedings for violation of their national laws and regulations[1350] to enhance port state jurisdiction as a possible concession between the maritime and coastal state interests. It

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[1342] See generally, *The Mary Poppins case*, 19 *Jahrb. Int. R.* (1976), 139.

[1343] See Article 18(1) (a) and (b).See also Maclaughlin .R, *United Nations Naval Peace Operations in the Territorial Sea,* (The Netherland: MartinusNijhoff Publishers, 2009), 102 and the cases of Qatar v Bahrain (Merits) (2001) ICJ No.87, 16 and *Nicaragua v Honduras* [2007] ICJ, paras 33-50.

[1344] Abdulkadir.O.A and SharifahZubaidah Syed Abdul Kader, at 217.

[1345] Tasikas.V, at 14.

[1346] Ibid.

[1347] The legal regime of inland waters here also includes ports.

[1348] Tasikas.V.

[1349] UNCLOS, Article 218 (1).

[1350] Ibid, Article 220 (1).



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allows for the port state's enforcement jurisdiction of appropriate international rules and standards for violations taking place on the high seas but does not make allusion for the port state to exercise jurisdiction over violations occurring in the state's EEZ outside the territorial sea. Indeed during the early period of the United Nations Convention on the Law of the Sea negotiations, maritime interests had expressed concerns over the recognition of port state enforcement jurisdiction regardless of the *locus* of the violation.

As a sequel to this, a series of draft versions of Article 220(1) at that time showed the emerging idea that the port state's enforcement jurisdiction must be somehow curtailed, either by restricting its enforcement of national measures to the territorial sea alone or permitting the enforcement of only international measures in areas outside the territorial sea.[1351] Therefore, it was crystal clear that there were already doubts whether to accord enforcement powers to the coastal state if the *locus delicti* was outside the territorial sea, notwithstanding the fact that the offending ships were to later come into port.[1352]

### *b. The Position of the 1923 Convention*

The issue of right of access to ports of foreign flagged vessels as enshrined in the International Regime of Maritime Ports, 1923 enjoys limited support even from court decisions. This position could be gleaned from the approach of the Arbitration Tribunal in *Saudi Arabia v. ARAMCO*[1353] when it held that a great principle of public international law recognises that ports of every state must be open to foreign merchant ships and can only be closed when the vital interests of the state so demand. However, with regard to the arbitration, it can certainly

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[1351] Khee-Jin A.Tan, at 479. See also Platzoder .R, (ed), *The United Nations Conference on the Law of the Sea Documents*, vol. X (1984), 407-413 citing European Communities Working Paper dated 25 July 1974. See also "the proposal by France on Article 20, Revised Single Negotiating Text, Part III, dated 21 June,1977", reproduced in Platzoder, ibid, 494, referring to in –port enforcement of "international rules and standards established through competent international organizations or general diplomatic conference".

[1352] Ibid.

[1353] 27 (Arb.Trib. 1958) I.L.R. 117.



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be argued that the fundamental interests of a state would comprise the necessity to keep its country free of the threat of terrorist attacks.[1354]

Based on the above provisions, the following emerged:

1. *Restricted Access to Strategic Ports*. The port convention of 1923 gives the right of access to ports for foreign trade[1355] and this principle is not applicable to military or other strategic ports.[1356]
2. *Access to Ports and Multilateral Treaties*. The ports convention allows right of access to ports through multilateral treaties. The UNCLOS does not expressly provide for access to ports but merely makes provision for a right of innocent passage through the territorial sea for the purpose of entering or leaving internal waters.[1357]
3. *Access to Ports and Bilateral Treaties*. The convention gives room for bilateral arrangement between states and indeed there are several agreements between states which incorporate the principle of freedom of access to ports.[1358]

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[1354] Justin S.C. Mellor at 341.

[1355] Article 1.

[1356] A good example of this could be found in the "U.S Executive Order No.1613 (1912), reprinted in 4 Whiteman, *Digest* 408", which prohibited entrance of foreign commercial and government vessels to 7 strategic ports without prior authority to do so.

[1357] Sohn L.B and Noyes. J.E, *Cases and Materials on the Law of the Sea*, (Great Britain: Transnational Publishers, 2004), 360. See also Articles 17 & 18. See also, *Nicaragua (Nicaragua v United States of America, id.* and Thirlway. H, "The Sources of International Law", in Malcolm Evans (ed), *International Law*, (New York: Oxford University Press, 2010), 107. It has been mentioned that parties to a treaty should be able to have faith and rely on its performance notwithstanding the fact the performance of an obligation in such a treaty is unwelcome to the party performing it. See Thirlway. H, at 99. See also Akande.D, "International Organizations", in Evans .M, (ed), *International Law*, (New York: Oxford University Press, 2010), 262 and case of Westland Helicopters v Arab Organization for Industrialization et al (1989), 80 ILR 595. Maclaughlin .R.

[1358] A good example of this is Article 19(2) of the 1956 Netherlands- U.S. Treaty of Friendship, Commerce and Navigation which provides that "Vessels of either party shall have liberty, on term with vessels of the other party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation. Such vessels and cargoes



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4. *Reciprocity and Access to Ports.* The right of access of foreign flagged vessels to ports of states is subjected the principle of reciprocity[1359] and some national laws like in the United States reflect this provision of the convention.[1360] It is important to mention here that a land-locked or doubly land-locked states may not be denied right of access to ports on the ground of reciprocity. This is because in the first place states are not naturally endowed with sea and what more of ports, hence reciprocity is not possible.[1361]

## 6. Epitomizing a Developing Country Experience on Vital Interest of State

Threats to port states and maritime security have been witnessed in a series of ways. These threats range from smuggling of weapons, drugs, trafficking of people, toxic waste, contrabands as well as armed robbery and piracy against vessels. Incidents of maritime crime occurred most especially in the areas of heavy commercial maritime movement.[1362] This holds truth particularly where there is significant economic and political instability such as in a developing country like Nigeria, or in regions with diminutive or no maritime law enforcement competence.[1363] The 2013 activity of a Merchant Vessel, M.V Marevia in Nigeria gives credence to the smuggling of contrabands and toxic waste into the country.[1364] The ship, M.V Marevia imported two heavy

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shall in all respects be accorded national treatment and most-favored nation treatment within the ports, places and waters of such other party."

1359 1923 Convention on Maritime Ports, Article 2. Frank .V, at 202.

1360 Louis B. Sohn and John E. Noyes, at 361.

1361 See Paragraph 4 of the 1923 Ports Convention , Article 3 of the High Sea Convention and Article 131 of the UNCLOS. See also Abdulkadir O.A and SharifahZubaidah Syed Abdul Kader, at 218.

1362 Shelton L.D, "The Ebb & Flow of the United States Coast Guard: Our Forgotten Heroes in Times of Crisis," available at: http://works.bepress.com/lynne_shelton/1 (accessed on 11/7/2012).

1363 Ibid.

1364 See A.O. Abdulkadir, "MV Mareva Carriage of Electronic and Toxic Waste: Legality or Illegality of Penalty Imposed and Its Implications on Maritime Commerce", *BIU Law Journal,* vol. 2. No. 1, October, 2015, p. 157.



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containers numbered ECMU 9894590 and ECMU 9870858 that consist of chlorofluro carbons (greenhouse gases), compressor pots, used fridges, batteries, television, etc. into Nigeria. Commenting on the goods, a Computer Engineer, Mr. Dike Ejiogu said although the gadgets were manufactured for human consumption, the chemical used for their manufacturing had converted them to toxins which incongruously becomes harmful to human health especially when the gases are inhaled.[1365]

The above case of M.V Marevia is a clear basis upon which the country can exercise the right of denial of access to port because of its security implications for the nation. Although, in the present case, the ship in question was ordered by the federal government to return back to its country of origin (United Kingdom), a fine of USD 1 million was imposed against the owner of the ship.[1366]

Denial of right of access to port of foreign flagged vessels, particularly to carryout inspection (and could also be employed to facilitate terrorist acts)[1367] as envisaged under the 1923 Convention and Statute on the International Regime of Maritime Port[1368] depicts exercise of sovereign right as a port state. It is not in doubt that the perpetrators of the port and maritime insecurity are usually well prepared and equipped with modern weapons, communications and high-speed craft. The capabilities of these criminals to board, hijack and or seize large underway vessels are all a demonstration of the extent of numerous piracy incidents as well as the incapability of the Nigerian Maritime Administration and Safety Agency and other maritime security agents to curtail the insurgence.

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[1365] Godfrey Bivbere, "Danger: Ship Load of Toxic Waste at Lagos Port", *Vanguard*, 10th January, 2013. Available at http://www.vanguardngr.com/2013/01/danger-shipload-of-toxic-waste-at-lagos-port/ (accessed on 10/1/13).

[1366] See Godfrey Bivbere, "Toxic Ship: Federal Government Fines Owner $1m", *Vanguard*, 14th, January, 2013. Available at http://www.vanguardngr.com/2013/01/toxic-ship-fg-fines-owners-1m/ (accessed on 14/1/13).

[1367] Shelton L.D, "The Ebb & Flow of the United States Coast Guard: Our Forgotten Heroes in Times of Crisis," Available at: http://works.bepress.com/lynne_shelton/1 (accessed on 11/7/ 2012).

[1368] See also 1982 Law of the Sea Convention, Article 25(2) and Territorial Sea Convention 1958, Article 16(2).



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Nigeria as a port state, in an effort to combat trans-boundary harm, requires a ship to supply information before departure to the country and this is expected to be done not later than 30 days earlier of the arrival of the vessel.[1369] This in a way allows the designated agents of government to prepare for the inspection of the incoming vessel. It is mandatory that the ship furnish the Nigeria Ports Authority with a written statement indicating the name and physical particulars of the incoming vessel, the name of the port of arrival, estimated time of departure and arrival in Nigeria and detailed information in respect of the cargo carried in the ship.[1370] No ship is allowed access to enter Nigeria without prior approval of the authority.[1371] Importantly, where a master of ship fails to comply with the above provisions of the law, he shall be guilty of an offence which shall be liable on conviction to 2 years imprisonment.[1372] Apart from this notification strategy, the Act appears to be silent on any other modality for port security in Nigeria, although importation of dangerous goods or substances to the port premises is strongly prohibited.[1373]

As a key policy goal to the exercise of states' sovereignty, all states must cooperate to develop and implement efficient and effective conditions on port access to ensurethe security of port states and the international commercial system. Exaggerated restrictive conditions would have a deleterious effect on global trade and the world's economy. However, overly permissive conditions on entry, such as faulty cargo screening, could result in a security breakdown and a devastating terrorist attack on a port city. Such a disaster renders virtually inconsequential the debate over restrictions on port access to achieve political, environmental, safety, law enforcement, or other goals. Even so, international lawyers and policy makers must seek to ensure that access to ports of the world is fundamentally free and only restricted by

[1369] Nigeria Port Authority Act, Cap.126 Laws of the Federation of Nigeria, 2004, section 114.
[1370] Ibid.
[1371] Ibid, section 116.
[1372] Ibid, section, 119.
[1373] See The Nigerian Ports Authority Docks and Premises Bye-Laws, Cap. 126 Law of the Federation Nigeria 2004, section 6 (1), (2) and (3).



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conditions directly, effectively, and reasonably related to the significant interests of the port state and the world community at large.[1374] Therefore, it could be safely concluded that denial of a ship access to port is a concomitant and incontrovertible principle of safeguarding sovereign rights, sovereignty, national security and interests.

## 7. Conclusion and Recommendation

It has been established in this paper that a state has exclusive interest with regard to maritime security, yet there are a range of characteristics relating to maritime security that reveal a shared interest of states in finding suitable responses to maritime security threats. Criminal activity has gone beyond imagination in maritime ports to such extent that certain numbers of states would be affected during the enterprise of this heinous crime. This is because the perpetrators may be nationals of different states, the vessels involved may be flagged to another state, possibly more than one vessel may be utilised to carry out the mission, and vessels may traverse waters of various states and of course call at different ports before getting to the final destination.

## Recommendation

- Cooperation both at regional and at international level will be a useful key response to combating maritime security threat. For this, more than one state needs to tackle transnational crimes if efforts to reduce its episode are to succeed. Ultimately, states in their efforts to control the maritime domain should set effective and acceptable conditions for accessibility of its ports by foreign flagged vessels. This will curb the teething problem of in effective international regulations on access to state ports.

[1374] Oliver. J. T. "Legal and Policy Factors Governing the Imposition of Conditions on Access and Jurisdiction Over Foreign-Flag Vessels in U.S. Ports," *South Carolina Journal of International Law and Business,* Vol. 5.209 (2009), 210-211.



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