

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 5

2023

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The Crucial Interplay between Ships' Nationality, Manning, and Port Access in the Maritime Sector

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ABSTRACT

The law of the sea is a branch of international law that governs the rights and responsibilities of nations with regards to their use of world seas, their conservation and management of marine resources, boundaries, and navigation. This paper analyses the law of the sea with regards to conventions related to nationality of ships, labour standards and access to ports with relevant cases. According to Article 5 of the 1958 Convention on the High Seas and Article 91 of the 1982 UN Convention on the Law of the Sea, there must be a "genuine link" between a ship and the State that is claiming to grant that ship its nationality. However, neither Convention clarifies or specifies what is meant by a genuine link, nor do they both specify what happens in the event a genuine link cannot be established. This study's objective is to explain what is meant by a "genuine link" and what consequences its absence has.

Additionally, this paper examines the international conventions governing the employment of seafarers and the acknowledgement of the impact of human factors on ship manning and safety. The responsibilities of flag states are no longer the sole subjects receiving international attention; other issues include trade-related regulations, port state control, state control of citizens, and information retrieval and interchange. This paper aims to provide a deeper understanding of this important area of international law and its contemporary relevance to global governance.

Keywords: *Genuine link, Manning, ILO, Sea port access, United Nations Convention on Law of Sea.*

I. INTRODUCTION

A sea is a vast body of water that is encircled by land. It is a fundamental component of transportation, trade, the mining of minerals, the production of electricity, and it is currently regarded as a key component of the blue economy. The sea today includes new areas of commercial activity and scientific inquiry, whereas it was formerly seen primarily as a medium

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of communication. Since the 1970s, when the notion of the marine environment was first introduced in a number of international documents, there is a deeper understanding of the need to respect and safeguard this ecosystem and those who live within it.

The international law of the sea is a maritime law that defines various maritime jurisdictions as well as the rights and obligations of the coastal States in these zones, particularly with regard to the conservation of the marine environment and biodiversity. It also serves to peacefully resolve international disputes over maritime boundaries between or among States.

States are the main subjects of international law, and they have both rights and obligations. However, by special legal provisions, objects of international law such as ships, aircraft, and spacecraft are exempt from performing all the tasks that a natural person would be required to carry out by law.³ The LOS Convention is a thorough agreement that covers almost all aspects of the uses and resources of the seas.⁴ The Preamble, which states that the parties intend to settle "all matters relevant to the law of the sea," demonstrates this point by stating that these issues are "closely interrelated and need to be examined as a whole." The need to manage issues that are human, technical, economic, and environmental still exists.

The true challenge is adapting the oceans' legal system to the world's changing conditions, a pursuit that has in the past led to both great successes and disastrous failures. This essay aims to examine the technicalities pertaining to ship nationality and marine labour laws. It also emphasizes the challenges posed by flagged vessels in accessing ports. Additionally, it examines a number of treaties and conventions, including the International Labour Standards⁵ and the United Nations Convention on the Law of the Sea, which have served as a basis for international maritime law.

II. GENUINE LINK: A PERTINENT REQUIREMENT TO DETERMINE NATIONALITY OF SHIPS

Nationality of a ship is determined by the nation in which it is registered or the nation whose flag they are entitled to fly. A ship that carries a state's flag as a sign of diplomatic protection is known as a "flag state," and when a state grants a ship the right to fly its flag, it also grants the

³ States in international law (no date) Encyclopedialike Britannica. Encyclopædia Britannica,inc. Available at: <https://www.britannica.com/topic/international-law/States-in-international-law> (Accessed: February 10, 2023).

⁴ United Nations Convention on the law of the sea (no date). Available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (Accessed: February 11, 2023).

⁵ ILO: International Labour Organization - Office of the secretary-general's envoy on youth (no date) United Nations. United Nations. Available at: <https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/> (Accessed: February 7, 2023)

ship specific rights and advantages.

The concept that the flag State has primary jurisdiction over vessels is one of the more reliable customary norms that was adopted in the 1982 United Nations Convention on the Law of the Sea (LOS)⁶. It is widely acknowledged that each State retains exclusive jurisdiction over the granting of its nationality to ships, especially given that such registration aims to create a long-term legal relationship between the State and the ship based on which the State undertakes specific duties and obligations, which are mentioned in the LOS Convention. They include the responsibility to efficiently exercise its authority and control over matters that are administrative, technical, and social, encompassing everything from ship design, equipment, and seaworthiness to crew manning, working conditions, and crew training.⁷ It follows that a flag State's failure to uphold its implementation and enforcement duties may have a significant impact on whether the rule of law is upheld on the high seas. In order to determine the flag state of a ship, it is essential to assess a genuine link between the ship and the concerned state.

The term “genuine link” makes its first official appearance in the 1958 Convention on the High Seas.⁸ Its Article 5(1) reads:

“Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag”.

In a similar manner, the 1982 United Nations Convention on the Law of the Sea's⁹ Article 91(1) states:

“Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.”

These provisions gave rise to two essential questions. Firstly, what is meant by “a genuine link” between a ship and the State which has purported to confer its nationality upon that ship?

⁶ Supra Note 3

⁷ Chrchill, R. and Hedley, C. (no date) The meaning of the “Genuine link” requirement in relation to the ... Available at: <https://orca.cardiff.ac.uk/45062/1/ITF-Oct2000.pdf> (Accessed: February 9, 2023).

⁸ Convention on the high seas - united nations office of legal affairs (no date). Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf (Accessed: February 11, 2023)

⁹ Supra note 3

Secondly, what repercussions follow where there is no “genuine link” between a ship and the State which has purported to confer its nationality upon that ship?

Genuine link was developed as a legal theory that describes a legal connection between a person and the state that confers nationality upon them. Furthermore, the same was defined in the case of *Guatemala v. Liechtenstein*¹⁰ (Nottebohm), where Nottebohm received Liechtenstein's nationality under questionable circumstances. Guatemala refused to recognise Nottebohm's citizenship by Liechtenstein, claiming that the test should be based on the actual bond between the state and the individual, not just on verbal preferences and thus defined genuine link as a legal bond between state and individuals. Unfortunately, the international community has been unable to create an acceptable formula regarding this genuine link over the past 20 years.¹¹ The issue of genuine link between flag state and ship has aroused intellectual and political controversy since its inception at the 1958 Convention on the High Seas. Genuine link has subsequently been transformed into a legal principle with political ramifications.

In accordance with historical records, Sweden, Norway, and Denmark signed a treaty in 1826 that marked the first attempt to grant ships nationality. The idea was expanded to include ships when the International Law Commission established laws relating to the allocation of nationality to persons in 1930.¹² Particularly, parties to the convention on International Commercial Navigation Laws accepted a flag state's discretionary power to choose and control the circumstances under which to grant nationality to ships.¹³ This notion became a basic principle of international law according to the 1958 Convention on the High Seas. While the right to grant nationality is exclusive, the right to fly the flag of a state is necessarily conditioned upon the registration of the ship in the territory of the flag state.

(A) Registration of Ships

Registration is an administrative mechanism by which a state confers its nationality upon a ship. The procedure includes documenting a ship to show its national identity. Identification of a vessel's nationality and giving her the ability to claim that national character wherever she is found are the nature and purpose of registration.¹⁴

¹⁰ *Liechtenstein v. Guatemala*, [1955] ICJ 1.

¹¹ D'ANDREA, A.R.I.E.L.L.A. (no date) The “Genuine link concept in responsible fisheries legal aspects and ... Available at: <https://www.fao.org/3/bb094e/bb094e.pdf> (Accessed: February 8, 2023).

¹² Gotthard Mark Gauci & Kevin Aquilina, *The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – the Triumph of Formality over Substance?* ICLR, 2017, Vol. 17, No. 1

¹³ BROWN, Edward D. *The International Law of the Sea, Volume 1: Introductory Manual*. Aldershot: Dartmouth Publishing Company Limited, 1994, p. 287

¹⁴ SIMON W. TACHE, *The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link*, INTERNATIONAL LAWYER pp.301-312

Although the International Tribunal on the Law of the Sea has expressly reiterated that "determination of the criteria and establishment of procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State," adopting specific terms and conditions for the granting of nationality to ships would have been one way to address the lack of effective exercise of jurisdiction.¹⁵ International rules on the matter were attempted, but they were not successful. Since it was never put into action, the 1986 UN Convention on Conditions for Registration of Ships continues to be an exercise in futility. It is a very ambiguous statement that aims to reinforce the real connection between the flag State and the ship by imposing nationality requirements on the extent of ownership or crewing. However, it's not obvious if a "genuine link" with the flag State may be established by the simple act of registration. According to the Tribunal's ruling in the *M/V Saiga No. 2* case¹⁶, "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be contested by other States."

III. MARITIME LABOUR STANDARDS

The regulations that strive to control the maritime industry are known as "maritime labour standards," and they were initially established at the international level through the International Labour Organization (ILO).¹⁷ The International Labour Organization was founded in 1919 with the goal of promoting social justice and, in turn, helping to bring about a world at peace that would last forever. This was done by encouraging decent living standards, fair working conditions and pay, and ample employment opportunities for all people around the world.¹⁸

The ILO is recognized by the UN as a body with expertise in relation to the preservation and protection of the maritime environment. However, the earliest ILO maritime documents contain the notion that maritime labour standards are a component of what is today referred to as the "marine environment." Unfortunately, the White Star Liner Titanic accident in 1912, a cutting-edge ship that sank owing to human navigational error, killing more than 1,500 passengers and crew, served as the impetus for the development and implementation of international maritime standards.¹⁹ The pressure of public opinion forced the international community to take up the

¹⁵ *Id.*

¹⁶ *Saint Vincent and the Grenadines v. Guinea*, ITLOS Case No. 2.

¹⁷ International Labour Standards, <https://www.ioe-emp.org/policy-priorities/international-labour-standards> (Accessed on 13.02.2023).

¹⁸ Maritime Labour Standards, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/maritime-labour-standards> (Accessed 05.02.2023).

¹⁹ Jatau, Solomon Usman, Ship manning and safety: Problem in the recruitment, selection and retention of seafarers,

urgent, compelling, and universal cause of safety of life at sea in the pre-war period, when nearly all international legislative activity had ceased, given the primacy of travel by sea and the crucial communication link provided by the maritime sector at the beginning of the century.

The first International Convention for the Safety of Life at Sea (SOLAS)²⁰ was adopted in 1914, but the start of World War I prevented it from going into effect immediately. More than a quarter of the Conventions established during the ILO's first ten years of operation (1919– 1929) related to maritime standards. The International Labour Conference's special maritime sessions, held on a regular basis since 1920, have now adopted more than 60 conventions and recommendations that are specifically geared towards the maritime industry in recognition of the challenging and unusual working and living conditions inherent in the seafaring profession. These were consolidated into one Maritime Labour Convention in 2006. The

agreement recognises the right of employees to freedom of organisation and collective bargaining as a basic right.²¹

Although this division is neither formal nor legal, maritime labour norms can be broadly divided into two categories: protection and safety. The main purpose of seafarer protection standards is to safeguard each seafarer from the special problems that pertain to his or her area of work, such as recruitment and placement agencies, the maritime employment contract, special identity documents, health care and social welfare. Safety regulations that impact the safety of life at sea and, as a result, reflect the general concern for the safety of everyone on board a ship as well as the safety of other ships at sea are regulations that also directly and personally safeguard seafarers. The minimum age to work at sea, medical tests for sea service, safety manning and work hours, crew housing, food and catering, and crew training for specific jobs are all safety regulations.²²

(A) United Nations Conventions on the Law of the Sea and Maritime Labour Standards:

According to the 1958 Convention on the High Seas²³, flag States must comply with and enforce compliance to generally recognised international norms in order to ensure maritime safety. The phrase "the manning of ships and labour conditions for crews taking consideration of the

World Maritime University 2002.

²⁰ *Id.*

²¹ Vladimir Golitsyn, Freedom of Navigation: Development of the Law of the Sea and Emerging Challenges, 93 INT'L L. STUD. 262 (2017).

²² Churchill, R. R. (2023, February 11). Law of the Sea. Encyclopedia Britannica. <https://www.britannica.com/topic/Law-of-the-Sea>.

²³ Convention on High seas, 1958, UN

applicable international labour instruments" appears several times in Article 10.

Similarly, the 1982 United Nations Convention on the Law of the Sea (UNCLOS)²⁴ mentions flag states' obligations to maintain marine safety with reference to, among other things, specific maritime labour standards. Since UNCLOS came into effect in 1994, the most recent marine labour conventions established by the ILO, such as the Protocol of 1996 to the Merchant Shipping (Minimum Standards) 1976 Convention²⁵, have made explicit mention of UNCLOS in their preambles. By doing this, the UN and ILO have both reaffirmed that maritime labour standards are essential to the conservation and maintenance of the marine environment as well as maritime safety, and as such constitute a part of the Law of the Sea.

A significant feature and key to understanding maritime labour standards is both the ethos and the specificity of this sector within the ILO itself. Purely maritime issues have been dealt with independently by the ILO since its inception (1920). Therefore, much of this work is carried out by ship owners and sailors themselves, i.e., those who have first-hand experience at sea and frequently share the same concerns regarding the crucial issues of safety of life at sea and protection of the marine environment.²⁶ The term "manning" refers to the minimal staffing level required to operate a ship safely in accordance with all applicable technical, managerial, and legal criteria.²⁷ Depending on the type of ship, age, degree of onboard technology, and crew qualifications, this number, which serves as the basis for the demand for labour, changes.²⁸ The "manning level" of a company's fleet refers to the average number of seafarers employed on each ship in that fleet.

Even though ships are free to travel the seas without interference from the government, they must still abide by the same laws and have the same rights and obligations. It's true even if international standards have trouble defining what constitutes a true connection between the State and the ship.

²⁴ Supra note 3

²⁵ Convention c147 - Merchant Shipping (minimum standards) convention, 1976 (no. 147). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C147 (Accessed: February 9, 2023).

²⁶ Law of the sea Available at: <https://www.oxfordbibliographies.com/abstract/document/obo-9780199796953/obo9780199796953-0162.xml> (Accessed: February 9, 2023).

²⁷ Maritime labour standards (no date) Eurofound. Available at: <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/maritime-labour-standards> (Accessed: February 8, 2023).

²⁸ Ship manning and safety: Problems in the recruitment, selection ... - WMU (no date). Available at: https://commons.wmu.se/cgi/viewcontent.cgi?article=1284&context=all_dissertations (Accessed: February 12, 2023).

IV. SEA PORT ACCESS: AN OVERVIEW OF THE CURRENT ISSUES AND CHALLENGES

Ports are defined as a place on a coast or shore that provides safety for vessels and where ships can load and unload cargo and passengers. Ports are important infrastructures for international trade and commerce, serving as the interface between sea and land transportation.²⁹ They can be natural or man-made, and may include facilities such as docks, piers, wharves, cranes, warehouses, and storage areas. Ports can also provide various services such as customs and immigration clearance, repair and maintenance facilities, and bunkering services. Ports constitute crucial intermodal nodes in the freight and passenger transport network as well as important border control points. Their security is therefore of paramount importance not only because of their critical transport functions but also because of their specific role, as control points.³⁰

Ports are very complex and diverse entities. However, in their extreme diversity, ports have some fundamentally common functional characteristics such as move freight and passengers across the sea to land interface and/or Service the maritime vessels, i.e., provide a refuge, supplies, maintenance, receive the ship wastes, etc.³¹ Commercial ports can be seen as intermodal points of convergence between the sea and the land domain. Ports are maritime but also land terminals as well as important border control points for people and cargo.³² Some ports, due to their extent, also constitute borders that require surveillance. Ports, besides the above-cited functions, have a range of secondary, yet important functions related to their host cities, the local and the wider communities.³³

The right of access to ports is the corollary of a foreign flagged vessel to enter the ports of another state known as port state control. There is a presumption that all ports used for international trade are open to all merchant vessels, but this is a practice only, based upon convenience, commercial interest and *opinio juris*; it is not a legal obligation. Ports are situated in a state's internal waters, which form part of its territory, and which consequently are subject to the state's territorial sovereignty. Limitations to sovereignty cannot be presumed and there is

²⁹ Book on international law – Malcolm Shaw – 9th edition – 2021 release, Encyclopedia.Migrationlaw.Org - Locus Iuris. Available at: <https://encyclopedia.migrationlaw.org/books/book-on-international-law-malcolm-shaw-9th-edition-2021-release/> (Accessed: February 6, 2023).

³⁰ Access to ports, and to port infrastructure - the key service industry (no date) Ashurst. Available at: <https://www.ashurst.com/en/news-and-insights/insights/access-to-ports-and-to-port-infrastructure/> (Accessed: February 8, 2023).

³¹ Dasgupta, S. (2022) What are different types of ports for ships?, Marine Insight. Available at: <https://www.marineinsight.com/ports/what-are-the-various-types-of-ports> (Accessed: February 5, 2023)

³² Assessment of a seaport land interface: An analytical framework - UNCTAD (no date). Available at: https://unctad.org/system/files/official-document/sdtetlbmisc20043_en.pdf (Accessed: February 9, 2023).

³³ Introduction to seaport and harbour, Daily Logistics. Available at: <https://dailylogistic.com/introduction-to-sea-port-and-harbour/> (Accessed: February 7, 2023).

no evidence of any limitations in state practice in relation to sovereignty over ports.³⁴ Pursuant to this sovereignty, states have absolute control over access to their ports. The only exception is for vessels in distress, which have a right to take refuge in the nearest port. The right to designate only certain ports as being open is not questioned, nor is the right to impose conditions upon entry.

The right to access a sea port is typically determined by national and international laws and regulations governing maritime transportation and trade. In general, nations have the right to control access to their ports and set rules for their use, but there are also international agreements and conventions that provide for freedom of navigation and access to ports for vessels from other countries. Ultimately, the specific right to access a sea port depends on the legal framework in place and the circumstances surrounding the request for access.

Article 87 of UNCLOS states:

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law.

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research.

*2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.*³⁵

The principle of freedom of the high seas does not apply to ports, hence several attempts to establish a right of access of foreign flagged vessels to ports have been made.³⁶ The 1923

³⁴ Port denials: What are states' international obligations? The Maritime Executive. Available at: <https://maritime-executive.com/editorials/port-denials-what-are-states-international-obligations> (Accessed: February 11, 2023).

³⁵ Supra note 3

³⁶ Hugo Grotius, 1916. The Freedom of the Sea, Ralph Van Deman Magoffin trans., James Brown Scott ed,(Oxford

Convention on the International Regime of Marine Ports was the first treaty that dealt with this issue, 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 interest of the states will be jeopardised. The issue of access to ports of other states by foreign flagged vessels have been a subject of controversy since time immemorial.³⁷

Although, the right of access is usually granted by treaty between the states concerned, the general view is that there is no such separate customary right. A more accepted view is that the states are entitled to prescribe and enforce circumstances for port entry. It has been observed that the coastal states enjoy power to regulate access to its ports by virtue of its sovereignty, notwithstanding the rule of international law that ports of a state must be open to foreign vessels.³⁸ This is always subjected to their discretion based on security and other circumstances of national interest. There is a disagreement among jurists regarding whether foreign vessels have a right to access ports. Some believe that states are obligated to maintain open ports in order to facilitate free trade and navigation, while others do not agree with this view.³⁹ These differing opinions indicate that there is no clear consensus on the legal position regarding this issue.

In the case of *Khedivial Line v. Seafarers' International Union*⁴⁰, a merchant ship owned by the United Arab Emirates was refused entry into the port of New York. The plaintiff requested, among other things, an injunctive relief and damages based on the international right of access. In its ruling, the court made the following statements:

“The plaintiff admits that there is no agreement allowing a vessel from the United Arab Republic to enter American ports without charging a fee. In order to demonstrate either that the law of nations grants an unrestricted right of access to ports by vessels of all nations or that, if it does, this is a right of the foreign national rather than just the nation, the plaintiff has not provided any precedents or arguments.”⁴¹ The court's ruling makes it clear that the United States has the sovereign power to refuse port access to foreign vessels while upholding the concept of equal treatment for all foreign vessels; as a result, refusals of port access should not be made arbitrarily

University Press 1916)

³⁷ Convention and Statute on the International Regime of Maritime Ports and Protocol of Signature. (1928). The American Journal of International Law, 22(2), 69–82. <https://doi.org/10.2307/2213065>

³⁸ Chapter Three General Access to Ports in International Law, Anthony P. Morrison, BRILL

³⁹ LawTeacher. November 2013. The Right of Innocent Passage in the UN Convention. [online]. Available from: <https://www.lawteacher.net/free-law-essays/international-law/the-innocent-passage-in-the-un-convention-international-law-essay.php?vref=1> [Accessed 15 February 2023].

⁴⁰ *Khedivial Line v. Seafarers' International Union* 278 F.2d 49 (2d Cir. 1960)

⁴¹ *Id.*

or without cause.

In a sharp disagreement with the position stated, jurists have observed that the states are not under obligation to open their ports to foreign flagged vessels and their position was supported by the ruling of the International Court of Justice in the case of *Germany v Denmark (1969)*⁴² where the court observed that international custom develops on the basis of a significant participation of the state actors and action by a few states cannot constitute customary norms.

Inferring from International Court of Justice's judgement it can be stated that for a practice to be categorised as an international custom, two clauses must be fulfilled, namely:

- Participation of states
- Practice arising due to a legal obligation- *Opinio Juris*

In this instance, according to the International Court of Justice, opening of ports for foreign flagged vessels, has neither been practised by a significant number of states nor has it been due to any legal obligation. Thus, States have the liberty to deny access to ports to foreign flagged vessels.

If there is a bilateral agreement between the states, the state's sovereign right extends to its internal waters, including ports; however, in the absence of such an agreement, a foreign flagged vessel does not have an inherent right under international law to access a port of another state without prior permission. In fact, the International Court of Justice's ruling in *Nicaragua v. The United States of America*⁴³ Regarding military and paramilitary actions is crucial in this situation because the court adamantly emphasised that it does not recognise a customary right of marine port entry for foreign ships.

Jurists have rejected the idea that a state's ports are automatically considered open under international law. However, they argue that there is no general principle of a right of access to marine ports without a specific justification.⁴⁴ They also note that this principle is not supported by customary international law.

⁴² Latest developments: North Sea continental shelf (Federal Republic of Germany/Netherlands): International Court of Justice (no date) Latest developments | North Sea Continental Shelf (Federal Republic of Germany/Netherlands) | International Court of Justice. Available at: <https://www.icj-cij.org/en/case/52> (Accessed: February 9, 2023).

⁴³ *Nicaragua v. The United States of America* 1986 I.C.J. 14.

⁴⁴ Pace International Law Review (no date). Available at: <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?httpsredir=1&article=1188&context=pilr> (Accessed: February 10, 2023).

(A) Ports and United Nations Convention on The Law of The Sea (UNCLOS) 1982⁴⁵

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is an international treaty that establishes the legal framework for maritime affairs, including countries' rights and responsibilities in relation to ocean use and resources. The United Nations Convention on the Law of the Sea recognises coastal states' right to establish and control ports within their territories, as well as to regulate access to those ports.

At the same time, UNCLOS includes provisions for freedom of navigation and the right of all states, subject to certain conditions and regulations, to use ports for peaceful purposes. The treaty has been ratified by over 160 countries, making it the most widely accepted legal instrument for ocean and sea governance. The 1982 United Nations Law of the Sea Convention (UNCLOS) is one of the world's most remarkable and innovative multilateral treaties.⁴⁶

The United Nations Convention on the Law of the Sea (UNCLOS) is a comprehensive legal framework that covers nearly every aspect of ocean use and resource management. In addition to modifying existing ocean law concepts, such as the territorial sea and the contiguous zone, the treaty introduces new maritime zones, including the exclusive economic zone, archipelagic waters, and international straits. Consequently, UNCLOS includes detailed provisions on the rights and obligations of coastal states, as well as the freedoms and limitations of ships operating in each maritime zone. The regulation of ocean-going vessels is a key area of focus in the UNCLOS, and the treaty contains numerous articles that outline the rules and restrictions that apply to such vessels in different parts of the ocean.

Despite its extensive coverage of ocean law, the United Nations Convention on the Law of the Sea (UNCLOS) only touches on the issue of port access rights. The treaty includes definitional articles about ports, but with the exception of a narrow provision concerning the right of innocent passage in internal waters, the UNCLOS does not provide substantive regulations on port access. According to the UNCLOS, ports are defined as the outermost permanent harbour works that are an integral part of the harbour system and are considered to be part of the coast. Therefore, the treaty's scope with regards to ports is limited to distinguishing internal waters and ports from the territorial sea. It is apparent from a quick review of the UNCLOS provisions that the legal regime of port access is not governed by the international law of the sea but is instead subject to a state's sovereignty, which includes both its territory and inland waters. Consequently, ports will be subject to a legal regime similar to a state's national law, rather than

⁴⁵ Supra note 3.

⁴⁶ Pedrozo, Raul. "Is it Time for the United States to Join the Law of the Sea Convention." *Journal of Maritime Law and Commerce*. Vol. 41, No. 2 (April 2010): 151-166.

the international law of the sea.

Article 218 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) provides guidelines for regulating ports and allows states to initiate legal proceedings for violations of their national laws and regulations to strengthen port state jurisdiction as a possible compromise between the interests of maritime and coastal states. It enables the port state to enforce international rules and standards in appropriate cases of violations that take place on the high seas but does not authorise the port state to exercise jurisdiction over violations that occur in the state's exclusive economic zone (EEZ) beyond the territorial sea.⁴⁷ In summary, the UNCLOS Article 218 (1) does not give port states more power than coastal states to enforce national measures that exceed international rules and standards. However, there may be a difference between offending ships that are heading to port and those that are only passing through. Some argue that the limitation on international rules and standards only applies to ships in transit, but not to ships that have entered a port voluntarily. Any national laws that go beyond international rules and standards under the UNCLOS must pertain to violations in the territorial sea or the EEZ.

Under the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, coastal states have the right to regulate access to their ports, including determining the conditions and procedures for entry and departure of foreign ships. However, UNCLOS also recognizes the principle of freedom of navigation, which provides that ships of all states, whether coastal or landlocked, have the right to navigate the high seas and access ports for various purposes, including trade, transit, and other peaceful activities. Coastal states are required to ensure that their port regulations do not discriminate against foreign vessels or impede the right of innocent passage through their territorial waters. UNCLOS also establishes rules on the responsibilities of port states, flag states, and coastal states with respect to environmental protection, maritime safety, and security in ports and other coastal areas.⁴⁸

In the realm of international law, coastal states hold the right to safeguard their internal waters while also recognizing the importance of the principle of freedom of navigation. Every port of a state is considered to be open to all vessels to facilitate global economic progress and development. Uninterrupted access to ports is essential for the success of seaborne trade. However, the threat of international terrorism poses a risk to port states, which may result in

⁴⁷ Natalie Klein, 2010. *Maritime Security and the Law of the Sea*, (Oxford, University Press, 2010) , 66.

⁴⁸ Asian N. Wright, 2007. "Beyond the Sea and Spector: Reconciling Port and Flag State Control Over Cruise Ship Onboard Environmental Procedures and Policies" *Duke Environmental Law & Policy Forum*, Vol.118: 215(Fall 2007)- 216.

restrictions to access for national security purposes. Despite this, the port state's power is limited to enforcing applicable international rules and standards and cannot extend to violations occurring in its EEZ. In such instances, the port state may seek alternative forms of remedy when international rules are deemed insufficient.

To maintain control over their territorial waters, coastal states have the authority to regulate access to their ports under international law, but with some limitations and qualifications. This authority allows them to establish entry and exit rules, require advance notification of port calls, and prohibit ships that do not meet certain standards or pose a risk to security or the environment from entering. While coastal states have sovereignty over their territorial waters, they must allow foreign ships to pass through them without exercising unnecessary control or requiring prior authorization, subject to certain exceptions such as for security or environmental protection purposes.

Furthermore, UNCLOS also recognizes the rights and obligations of coastal states, flag states, and port states with respect to marine environmental protection, safety, and security in ports and other coastal areas. Coastal states are responsible for implementing and enforcing international rules and standards for the prevention, reduction, and control of marine pollution from ships and other sources in their internal waters, territorial seas, and exclusive economic zones (EEZs).⁴⁹ Flag states are responsible for ensuring that their ships comply with these rules and standards, while port states have the right to inspect foreign ships entering their ports to verify compliance and to take appropriate measures in case of violations.

In addition to the principles of coastal state jurisdiction and freedom of navigation, the issue of access to ports also involves the responsibility of port states to ensure compliance with international rules and standards related to maritime safety, security, and environmental protection.⁵⁰ Port states have a duty to prevent and control pollution from ships in their ports and to enforce relevant international agreements and regulations, such as the International Convention for the Prevention of Pollution from Ships (MARPOL)⁵¹ and the International Ship and Port Facility Security (ISPS) Code.

In recent years, the issue of access to ports has also been affected by a range of new challenges, such as the emergence of new maritime security threats, including piracy, terrorism, and

⁴⁹ L.S Johnson, L.S., 2004. Coastal State Regulation of International Shipping (Dobbs Ferry, 2004)), 113.

⁵⁰ ISPS Code Requirements for Seafarers, Ships and Ports - ISPS Code; EduMaritime; <https://www.edumaritime.net/isps-code>; [Accessed date 7-2-23].

⁵¹ Raunek; MARPOL (The International Convention for Prevention of Marine Pollution For Ships): The Ultimate Guide; Marineinsight; June 24, 2022; <https://www.marineinsight.com/maritime-law/marpol-convention-shipping> [Accessed date 9-2-23].

cyberattacks, as well as the growing environmental concerns related to climate change and ocean pollution.⁵² As such, the exercise of coastal state jurisdiction over access to ports must take into account these emerging challenges and balance the interests of all states involved, in line with the principles and rules of international law.

V. CONCLUSION

The issues of nationality, manning of ships and access to ports are all interlinked and crucial to the functioning of the international maritime industry. The nationality of a ship determines the legal status, which in turn affects the rights and obligations under national and international law. In order to determine nationality of a ship, assessment of genuine link between the flagship and the nation state is a crucial step. Adherence to the Principles of natural justice yields progressive law of the sea in the near future.

The manning of ships, including the requirements and working conditions of seafarers, plays a critical role in ensuring the safety and efficiency of shipping operations. Further, sets out labour standards which safeguard the interests of the seafarers and eases the fulfilment of the state's obligations with regards to the maritime industry.

Access to ports, including the conditions for entry and the availability of services, is necessary for ships to load and unload cargo and for seafarers to receive essential supplies and services. Despite the international regulatory framework that exists for these issues, challenges remain in ensuring the effective implementation and enforcement of these regulations.

Addressing these challenges requires a collective effort from governments of all states, the maritime industry, and other stakeholders, to ensure the sustainable development of the maritime sector and to promote the welfare of seafarers.

⁵² Zou Keyuan, 2005. *Law of the Sea: Issues and Prospects* (New York, Routledge,2005), 145.