Since time immemorial, sea ports were recognized as ‘a gateway to the city and country which it serves’. In addition, they provide indispensable services and facilities for the sea transport such as pilotage, towage, mooring, cargo handling, storage and navigational aids. Naturally, the purpose of maritime ports cannot be accomplished without facilitating free ingress and egress of vessels. Thus, ‘access to maritime ports’ is important to facilitate international trade.

The port state’s right to deny access to unseaworthy and substandard vessels is well recognized under international law. The judicious use of this right will resolve many pollution issues connected with substandard shipping in ports. In no case, the criteria for denial should overlook international law. In addition, the port state actions should not be curtailing trade but facilitating it.

Denial of access to foreign vessels is certainly a unilateral port state action. Port state denial on unconvincing grounds may stir up hot political arguments between the flag state and port state, which may crumble the trade relations and economy. Therefore, Port state jurisdiction should be carefully invoked, balancing all hostile interests; it should not be mere political knee jerk reactions. “Trade and environment are two facets of the same coin; both have to compliment mutually…at least in the sense that increasing world welfare can lead to citizen demands and governmental actions to improve protection for the environment.”


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“Safe ports are less prone to pollution effects”\(^3\). Hence, the current Indian practice of giving access to different types of vessels and the criteria set by law for denying access is critically examined. A comparative study is attempted on the basis of universal denial policies and general international law on the topic.

**Why there should be Port State Jurisdiction- an Additional Safety Net?**

In comparison to land based sources, vessel sourced pollution is deteriorating since 1970’s.

“… as a result of the stringent regulations, the pollution from maritime transportation have fallen below 75% during the period of 1973 to 1989, and generally about 60% ever since 1970’s”\(^4\). Maritime trade is intensively regulated at the international level and naturally, a question on the relevance of more powers to port states arises. The legality of strict port state enforcement on environmental grounds is a substantial issue.

Prior to 1970, port states had limited power for denying access under the customary international law. Under the aegis of the International Maritime Organization\(^5\), many international conventions were adopted on safety in shipping and pollution control. The implementation of these conventions would not have been possible without considering coastal state interests. Also, the traditional flag state responsibility was not found adequate to monitor substandard ships. Thus, coastal and port state jurisdictions got ample recognition under the conventional law.

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\(^4\) Joint Group of Experts on the Scientific Aspects of Marine Pollution, “Impact of Oil and Related Chemical and Wastes on the Marine Environment”, Reports and Studies No.50, the IMO, London (1993)

\(^5\) Hereinafter to be referred to as the IMO
Dr. Oya Ozcayir says, “In an ideal world there is no need for the port state control but when the regulatory regime falls below the required standards, port state control gains prominence”\(^6\). In the *San Marco Case*\(^7\) the loopholes in the ‘international safety net’ were unveiled and the need for more powers to port states was emphasized. The Canadian Coast Guard had detained the vessel in 1993, for serious deficiencies. The P&I club withdrew its insurance and the classification society its class in the same year. Later it was certified by the Hellenic Register of Shipping surveyor to be in “good condition and maintenance”. The Canadian Coast Guard had no legal authority to demand immediate repair works of the vessel. As a result, the vessel continued to trade in an unseaworthy condition under the class certification from the register till 1995. In November 1995, off 15-200 miles from the South African coast, the vessel lost two shell plates from both sides and cargo worth 5000 tons in that hold. The case is significant from the perspective of existing deficiencies in the international regulatory regime on flag state inspections and monitoring.

Thereafter, on 12\(^{th}\) December 1999, the super tanker *Erika* broke off into two along the coast of Brittany in France, spilling around 30,000 tonnes of crude oil devastating the entire coastal area. This was a major marine casualty that had triggered the demand for strengthening port state powers. The IMO decided to re-assess industry’s safety net by giving more powers to port states.

A flag state is least concerned about pollution incidents beyond their territories and is mostly reluctant to take enforcement actions against its own vessels. Flags of convenience and open registries set serious limitations for the flag state implementation\(^8\). At the same time, the coastal and port states have to control substandard shipping and take precautions against pollution of their

\(^6\) Dr. Z. Oya Ozcayir, *Port State Control*, Informa Professional, London/ Hongkong (2001), P.93, para.4.1

\(^7\) *Ibid*

\(^8\) Here in after to be the FSI
coasts. Therefore, major coastal states expanded their jurisdictional powers under the existing conventional scheme by means of unilateral legislations.

Owing to the newer versions of vessel pollution such as the biological, nuclear, chemical and air, the environmental consciousness of littoral states have intensified in the past few decades. The devastations of marine pollution are felt largely on the coastal area, which also justifies coastal and port states’ resilient jurisdictional control over foreign vessels.

The dynamism in maritime operations resulting in lower turnaround time of vessels and increased cargo handling capacities compels the need for meticulous regulations on vessel standards and movements in the port area. The ever demanding revolutionary transformations in the needs of the industry has promulgated advancements in naval architecture and ship building technology to contribute vast diversity in marine fleet involved in the sea transport. Political controversies like the ‘Suez Canal crisis’ has led to the manufacturing of super tankers like the Very Large Crude Carriers\(^9\) and Ultra Large Crude Carriers\(^{10}\) that could carry voluminous cargoes in lesser time schedules. As these giant ships ply across the oceans carrying hazardous and dangerous cargoes, the strong call for yet another safety grid in the regulatory regime is justified by all means.

Speaking on the Torrey Canyon Disaster Goldie had said:

“...the legal system and public opinion have significantly failed to keep pace with the development of tankers and their noxious cargoes of ever growing bulk and threat. Significant differences set the giant tankers apart from all cargo ships, for example, their ratio of their dead weight to their net tonnage, their power with their ratios, their draft when laden, their

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\(^9\) Here in after to be the VLCC’s

\(^{10}\) Here in after to be the ULCC’s
maneuverability, and their minimum turning circles. Indeed, relative to the bulk they carry and their power, they are ‘no more than fragile containers transporting vast quantities of noxious fluids’. The larger these vessels become, the more cheaply it is said, they can carry their cargoes from production to distribution centers. On the other hand, the more they increase in capacity, the greater will be the risk to coastal and insular populations, and to ocean environment, of pollution by oil. Hence, the economies these big ships create are, at least in part, not merely economies in size, but also savings made at the expense of third parties (namely coastal populations) and environment”11.

It is a strenuous task for any flag administration to scrutinize these vast spectra of super modern marine fleet. At the same time, many vessels visit ports for undertaking repair works and may be in unseaworthy conditions. The potential threat offered by this manifold fleet to port environment is unpredictable and mandates their timely inspections and detentions. Therefore, port state control is a necessity to ensure sustainable shipping.

In the post-world war era, crude oil emerged as the primary source of energy and the prime commodity for maritime transport. As a result, the American, French and British coasts were largely affected by the tanker casualties such as the Torrey Canyon, Exxonvaldez, Amococadiz, Prestige and Erika and there were public uproars in these countries against the loopholes in the existing regime of flag state control. Consequently, these maritime countries responded rigorously by enforcing their sovereignty over ports. The traditional notions of free navigation eroded in favour of punctilious coastal

regulations on vessel movements. Thus, port state jurisdiction became more scrupulous in developed countries like North America, Canada, the United Kingdom and Australia. “…growing demand for oil as a source of energy in industrialized economy was a major cause of increased maritime transport across the globe” and therefore more risks of major spills and the requirement of tight enforcement regime\textsuperscript{12}.

\textbf{Evolution and Development of the Concept of Port State Jurisdiction}

Over a period of time, the un-debated and exclusive flag state enforcement has been reiterated in all maritime conventions and bilateral treaties. The SOLAS Convention, 1914 had vested with the flag states full responsibility for issuing certificates and their compliances. Under it, port states were given minimal powers to check these certificates and inform flag states of the deficiencies.

The International Convention for the Prevention of Pollution of the Sea by Oil, 1954\textsuperscript{13} had also given primacy for flag state enforcement. The right of the coastal state to intervene in case of pollution threats affecting directly its coastal line, even though the incident happens beyond its limits, became a hot topic for debates after the \textit{Torrey Canyon}. This right got recognized legally by means of two major IMO conventions, i.e. the Intervention Convention\textsuperscript{14} and the Civil Liability Convention\textsuperscript{15}.

The IMO has been continuously imposing increased obligations on both the flag states and port states to ensure safety and pollution free shipping. This

\textsuperscript{12} B. Shaw, “Global Environment: A proposal to eliminate Marine Oil Pollution”, 27 \textit{Journal of Natural Resources Life Sciences Education} 157, (1987)
\textsuperscript{13} Herein after to be referred to as the OILPOL 54
\textsuperscript{14} The International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969
\textsuperscript{15} The International Convention on Civil Liability for Oil Pollution Damage, 1969
was the time when the meetings of the Law of the Sea Convention, 1982\textsuperscript{16} were also going on. By then, the IMO had adopted four major maritime conventions\textsuperscript{17}, which could have been implemented only by giving more powers to port states. In 1973, at the conference on marine pollution, port state jurisdiction was introduced for the very first time. Even though this proposal was rejected, the MARPOL Convention strengthened the Port State enforcement regime.

The MARPOL states\textsuperscript{18}:

“...the port officials in the contracting states may inspect a foreign vessel in order to verify whether it has discharged in any sea area harmful substances in violation of the regulations annexed to the convention”.

This right of inspection applies when the port officials receive from any other party to the convention, a request for an investigation together with “sufficient evidence that the ship has discharged harmful substances or effluent containing such substances in any place”\textsuperscript{19}.

As per MARPOL\textsuperscript{20}, a party (or the port State) must enact law prohibiting violations of the requirements of the convention ‘within its jurisdiction’ and establishing sanctions for such violations.

\textsuperscript{16} Herein after to be referred to as the UNCLOS III

\textsuperscript{17} The International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol 1978, (MARPOL 73/78); the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS 74); the Protocol of 1978 relating to SOLAS 74; and the International Convention on the Standards of Training, Certification and Watch Keeping for Seafarers 1978

\textsuperscript{18} MARPOL 73/78, art.6(2)

\textsuperscript{19} Id., art. 6(5)

\textsuperscript{20} Id., art. 4(2)
By the time the UNCLOS III discussions were going on, many proposals were moved by the U.S.A and other western European countries upon port state enforcement powers. At first there was no distinction as to coastal state and port state enforcement. The major proposal on port state enforcement was moved by nine European Countries in the draft convention\textsuperscript{21}.

Under this proposal, port state enforcement could be conducted irrespective of the place of occurrence of the maritime casualty that had happened within the immediate six months. Yet, the port state enforcement was primarily given an optional status and mandatory only when the information and request was forwarded by any other state. It is interesting to note that “India had agreed to this in principle, but suggested an extension of six months period for the institution of proceedings and more severe penalties for culprits”\textsuperscript{22}. The suggestions and proposals had significant impact on the final adoption of the provisions\textsuperscript{23}.

\textsuperscript{21} The draft convention adopted by the Conference in 1973, art.3, Quoted in George C. Kasoulides, Port State Control and Jurisdiction: Evolution of the Port State Regime, Martinus Nijhoff Publishers, Netherlands (1993), pp. 119-120

\textsuperscript{22} Ibid

\textsuperscript{23} UNCLOS III, art. 218: (1) the port state may initiate investigations and proceedings against vessels for violations of international standards on discharges happening beyond the internal waters, territorial sea and the EEZ, when the vessel is voluntarily within its ports

(2) The port state cannot initiate proceedings under paragraph 1 of art.218, unless requested by the flag state, the state affected or its own territory is affected by pollution because of such discharges

(3) The port states shall suspend the investigations and sent the reports of investigation, together with all evidences and financial security if any to the coastal state as the case may be. After the investigations, the port state shall give report to the flag state

Art.219 reads: Subject to the provisions of S.7, if pollution is proved, the port state may take administrative measures of detention from preventing the vessel to sail further, if not to the nearest repair yard until the deficiencies are cured
Similarly, UNCLOS recognizes competence of port states to prescribe port entry conditions in internal waters subject to its due publicity. When creating laws with regard to prevention, reduction and control of pollution, states are obligated to give effect to the ‘generally accepted international rules and standards, established through the competent international organization or general diplomatic conferences’.

**Legality of Port State Jurisdiction**

Maritime ports are a part of the internal waters of the coastal state and hence they come under its exclusive sovereignty. The classical or traditional approach to claims over internal waters is based on the theory of territorial sovereignty. The concept of territorial sea emerged in 1357 from the Latin term “territoio mari”. It was used to describe the 100 mile reach out into the ocean for the purposes of defense, customs and criminal jurisdictions. Even after centuries, the purposes for claiming territorial jurisdiction remain more or less the same. The territorial imperialism has nothing to do with conservation of resources, but it has always been the basis for claims over adjacent waters.

The principle, ‘land dominates the sea’ was virtually established in the *North Sea Continental Shelf Case*. The court had emphasized on the ‘natural prolongation’ of the land as a criteria in determining coastal state’s rights of exploration and exploitation in the continental shelf as opposed to the claims of other states.

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24 *Id.*, art.211

25 *Ibid*

26 UNCLOS III, art. 8 reads: “Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state”


29 *Id.*, p.51
While deciding the *Aegean Sea*\(^{30}\) dispute, the International Court of Justice\(^{31}\) held that rights such as the exploration of continental shelf are legally an emanation from and automatic adjunction of the territorial status of a coastal state and hence are subject to domestic reservations.

In the *Fisheries Jurisdiction Cases*\(^{32}\), the preferential rights of coastal states over fisheries zone were recognized as opposed to the claims of distant water fishing states. International law thus mandates the acquiescence of the state to pass over her territory. Judge Chagla in the Case of *Right of Passage over Indian Territory* had held\(^{33}\):

> “…I think it is equally indisputable that prima facie a State enjoying territorial sovereignty has the right to allow or to prohibit a right of passage or transit under such terms and conditions as she thinks proper.”

The International Law Commission had expressed important views\(^{34}\):

> “…in the interest of all States belonging to the community of nations that diplomatic relations between the various States should proceed in a normal manner and that in general, therefore, the third State should grant free passage to the member of a mission and to the diplomatic courier. It was pointed out, on the other hand, that a State was entitled to regulate access of foreigners to its territory”.

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\(^{30}\) *Greece v. Turkey*, reported in 73 *The American Journal of International Law* 502, (1979), para.88

\(^{31}\) Here in after referred to be as the ICJ


\(^{33}\) (1957) I.C.J. Reports 174

Similarly, a state’s authority to exclude *aliens* from the territory is also recognized by international law as an important aspect of her sovereignty.

E. Lauterpacht opined\(^{35}\):

“A State, it is said, is sovereign over its territory. If sovereignty means anything in this context, it must comprehend the right to exclude aliens or to prevent the construction or use of instrumentalities dedicated to the transit of persons or goods”.

Ports belong to internal waters and are the natural extensions of the land territory. As ports belong to the realm of internal waters and no right to innocent passage is recognized in this area, the port states are empowered to exclude any vessel from its territory, subject to customary and conventional laws. There is dispute regarding the exercise of port state jurisdiction over a foreign ship within a port when the peace and tranquility of the port are not affected. But, there is no doubt on the powers of port states to arrest a foreign ship in port regardless of the place where cause of action arose, when the peace, good order or tranquility of the coasts is disturbed.\(^{36}\)

In *Hogg v. Beerman*\(^{37}\), the U.S Court had held that,

“The oceans with its gulfs and bays belong to no nation. Jurisdiction is allowed to such a distance from shore, as the protection of that shore requires. This distance was fixed as a marine league at a time when no gun could

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\(^{37}\) *Id.*, (1884) Ohio State Reports, 81, p. 95
force a ball further. But over inland waters, the nations in which they lie may hold both as sovereigns and as proprietors”.

In *Alsos v. Kendell*\(^{38}\), the U.S. Supreme Court held:

“No rule of international law is more firmly established than that of a sovereign state includes the lakes, seas and rivers entirely enclosed within its limits”.

**Limitations of Port State Enforcement under the UNCLOS Regime**

The port states have no general power unilaterally to impose its own requirements on foreign ships relating to their construction, safety, equipment and crewing, which are to have effect on the high seas. Such a jurisdiction will apply only in case of vessels that are in a hazardous condition\(^{39}\).

The port states may initiate proceedings against foreign flag vessels for pollution incidents in high seas, which have effect on its coasts, provided the vessel is ‘voluntarily’ in its port for the time being\(^{40}\). Hence, if the incident occurs on the territorial waters of another state, the port state enforcement will be possible only upon the request of the flag state or the state where in which the incident of pollution happens. Also, the vessel should have been made a voluntary entry into the ports and not on distress.

No one can predict with utmost precision, where the effects of pollution may occur even if the incident happens in high seas. Ultimately, the pollutants may settle in port waters also. Hence, the port state enforcement for incidents on high seas is justified on the basis of two principles, the effects doctrine and

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\(^{38}\) *Id.*, (1924) Oregon 359, 369, 227, Pacific 286, 289


\(^{40}\) *Id.*, art.218
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the universality principle. Practically, it is impossible to establish a link between discharge on high seas and its pollution impact on the coasts.

The ‘effects principle’ was discussed in detail in the *Lotus case*\(^1\). The main issue in this case was the scope of criminal jurisdiction of the port state over a foreign vessel with respect to the events that had taken place on high seas. The flag of the ship follows it everywhere. Therefore, events happening on board of a vessel on high seas should be considered as events occurring in the flag territory. Similarly, if the events occurring on high seas had any ‘effects’ on the vessel of another flag state or on the territory of a state, no rule in international law would prevent those states from initiating legal proceedings against the transgressing vessels\(^2\). The *Lotus* case had expanded considerably the scope of port state jurisdiction.

To overcome the difficulty set by the Lotus decision, article 97 was inserted in UNCLOS III. Accordingly, in the event of collision or any other incident of navigation concerning a ship on high seas, the criminal jurisdiction of coastal states should not be exercised for penal or disciplinary responsibility over the master or any other person in service of the ship. This could be done only under the penal laws of the flag state or the state of which such person is a national.

\(^{1}\) *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p.25

\(^{2}\) *Id.*, The PCIJ said:

“[If], therefore, a guilty act committed on high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different states were concerned, and the conclusion must, therefore, be drawn that there is no rule of international law prohibiting the state to which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.”
UNCLOS III sets limitations of coastal states criminal jurisdiction on board a foreign ship, save “if the consequences of the crime extend to the coastal state; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the master requests for local help; if such measures are for suppressing illicit drug trafficking”\(^4\).

Reading together both these articles, it is clear that a coastal state may enforce its penal laws over foreign vessels beyond her territory only if “the effects have consequences or impacts on her territory or national interests”.

In matters of control of marine pollution and jurisdiction over the EEZ, coastal states are having undisputed extra territorial criminal jurisdiction on board a foreign vessel\(^4\).

The coastal state should not 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 ship\(^4\). In the case of civil proceedings, arrest of the foreign ship is permissible only against liabilities incurred by the vessel during its voyage through coastal waters\(^4\). Thus, when generally matters fall under the purview of “internal affairs of the ship”, coastal states should not interfere. The position is similar in Anglo-American jurisprudence also.

**State Practices on Jurisdiction over Internal Affairs of the Vessel**

In *Queen v. Anderson*\(^4\), Justice Blackburn had opined:

> “…A ship which bears a nation’s flag is to be treated as a part of the territory of that nation. A ship is a kind of

\(^{4}\) UNCLOS III, art. 27

\(^{4}\) *Id*, cl.5

\(^{4}\) *Id.*, art.28

\(^{4}\) *Ibid*

floating island. Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country”.

Thus, in the case of foreign merchant ships, a coastal state will be reluctant to exercise jurisdiction on matters pertaining to the internal affairs of the ship. If anything affects the peace, tranquility or good order of the port, the ‘vital interest’ theory will prevail and the sovereign power of the coastal state will extend even to the internal matters on board the vessel.

In *Cunard SteamShip Co.Ltd. v. Mellon*\(^{48}\), it was held that the coastal state’s jurisdiction over foreign merchant ships in ports is complete, but as a matter of policy, it may choose to forgo the exercise of jurisdiction.

In the *Wildenhus’ case*\(^ {49}\), where the jurisdiction of a state court over one charged with murder committed on board a foreign merchant vessel in a harbour of the state was sustained, Mr. Chief Justice Waite\(^ {50}\) held:

“…It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place, to which it goes unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. . . . From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards

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\(^{48}\) 262 U.S.100 (1923)

\(^{49}\) 120 U.S.1(1887)

\(^{50}\) Id., pp.11-12
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the vessel or among themselves. And so, by comity, it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment if the local tribunals see fit to assert their authority.”

The French position may be theoretically different but for practical purpose, it is similar to the American practice. Local jurisdiction will be exercised when there is an imminent and potential threat to peace or good order of the port either literally or in a constructive sense. Thus, in the *Tempest*\(^5\), it was held that “some crimes, such as homicide had an intrinsic gravity, which apart from actual disturbance to the port resulting from their commission, warranted local intervention”.

The same view was followed in *People v. Wong Cheng*\(^6\). In this case, the appellant was accused of having illegally smoked opium, aboard the merchant vessel *Changsa* of English nationality while the said vessel was anchored in Manila Bay two and a half miles from the shores of the city. The


\(^6\) *Id.*, at p.46, (1922) Philippine R. 729
point at issue was whether the courts of the Philippines had jurisdiction over crime, committed aboard merchant vessels anchored in Philippine’s territorial waters. The verdict went in favour of the local jurisdiction. The court had held:

“…to smoke opium within our territorial limits, even though aboard a foreign merchant ship, is certainly a breach of the public order here established, because it causes such drug to produce its pernicious effects within our territory. It seriously contravenes the purpose that our Legislature has in mind in enacting the aforesaid repressive statute.”

In *Public Minister v. Jensen*\(^{53}\) (1894), there was a ship wreck due to master’s negligence. Local jurisdiction was asserted, although the tranquility of port was ever affected.

In the case of criminal jurisdiction over foreign merchant ships, coastal states will assert jurisdiction where it is requested by the master of the ship, or the Flag state Consulate. In the Belgian cases, *Watson* (1856) and *Sverre* (1907), the coastal state asserted jurisdiction for theft on board the vessel upon the request of the master\(^{54}\). Local jurisdiction is normally exercised in cases when a non-crew member is involved\(^{55}\).

Pollution, pilotage and navigational rules are strictly enforced in western European countries and in the U.S.A over foreign merchant ships.

In *United States v. Royal Caribbean Cruises Ltd.*\(^ {56}\), the defendant challenged the assertion of criminal enforcement jurisdiction for false

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\(^{53}\) Quoted in Philip C. Jessup, “Civil Jurisdiction over Ships in Innocent Passage”, *27 The American Journal of International Law* 4 (1933) at p. 165

\(^{54}\) *Id.*, at pp.159 & 160

\(^{55}\) Churchill and Lowe, Op. Cit., at p. 67,68, French case Cordoba in 1912 and Italian case the Redstart in 1895

\(^{56}\) 11.F.Supp.2d 1358 [1997]
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Indian Law on Control of Vessel Sourced Pollution in Maritime Ports

statements in oil record book\(^{57}\) of one of its vessels for a discharge that had occurred in Bahamian waters. The United States referred the matter to Liberia, the flag state. The flag state gave report in favour of a reasonable doubt of willful discharge of oil into the ocean in violation of MARPOL 73/78. Although the discharge happened outside the U.S territorial waters, local jurisdiction was asserted. The court said:

“...If the policy of the goal of a comprehensive regime of anti-pollution measures is to be achieved, it is necessary that domestic and international law work together to the extent possible to maximize enforcement. The discharge of oil in an improper manner is one crime; the failure to keep ORB as required by MARPOL and Act to Prevent Pollution from Ships\(^{58}\) is another; and the deliberate presentation of a false material writing to the U.S. Coast Guard is another.”

In the Republic of Panama on behalf of Compania de Navigacion Nacional v. The United States of America\(^{59}\), the issue was whether a foreign ship in innocent passage through territorial waters is subject to the civil jurisdiction of the littoral state, and, specifically, to civil arrest in a libel for collision? The Commission held:

“The general rule of the extension of sovereignty over the three mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this

\(^{57}\) Herein after to be referred to as the ORB

\(^{58}\) 33 U.S.C.1901-15

\(^{59}\) Supra n.36, at pp. 747-750
sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters. There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the Commission cannot say that a country may not, under the rules of international law, assert the right to arrest on civil process merchant ships passing through its territorial waters.\(^{60}\)

The law based on the existing admiralty practice is that:

“…a vessel which has been in a collision may be proceeded against wherever she is found. It is burden enough to the ship owner that his vessel may be libelled in any port of call. It would be a much more onerous burden if she could be pounced upon whenever she passed through the territorial waters of any state in the world. The admiralty bar would flourish in countries whose waters lie across any great mercantile trade route.\(^{61}\)”

In *Manchester v. Massachusetts*\(^ {62}\) and in *Carlson v. United New York Sandy Hook Pilots Association*\(^ {63}\), the U.S courts had applied this doctrine to fix extra territorial jurisdiction over foreign vessels and crew for maritime torts.

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\(^{60}\) *Id.*, p.748

\(^{61}\) *Id*

\(^{62}\) 139 U.S.240 (1891)

\(^{63}\) (1899) 93 Fed.468
In *Capri Marine Ltd. v. Chief State Prosecutor*\(^{64}\), a consolidated appeal of three cases, the Swedish Supreme Court decided that a Swedish administrative agency had jurisdiction to impose a pollution fee on the owner or operator of a vessel for pollution in Sweden's Exclusive Economic Zone, even if the vessel had not been asked to give information or been boarded or detained.

“The coastal states may and do exercise jurisdiction even beyond the territorial waters in order to prevent injury to their territory, to ensure self-preservation and to enforce their laws”.\(^{65}\) The ‘effects doctrine’ that was expounded in the *Lotus case* had expanded the scope of port state jurisdiction considerably, but, the concept attained a newer and qualified version under UNCLOS III and subsequent state practices.

The universality principle of port state enforcement has also been highly controversial because no international rule equalizes pollution incidents with maritime piracy or torture where universal prescription and enforcement becomes a necessity irrespective of the place of occurrence of the incident\(^{66}\).

The wordings of article 218 of the UNCLOS III as to whom it applies seem to be quite ambiguous. Whether a third party is bound by the terms is also debated. The negotiators of the treaty had hoped for wide spread acceptance of UNCLOS by all states, at least some of its provisions will be generally accepted by states giving it a customary status. Hence, there are terms like “many states, all states, every state”, across many provisions in the treaty which seems to be quite ambiguous. Article 218 stresses for ‘applicable


international rules and standards”. The port state enforcement is possible against a flag state even though it is not a party to UNCLOS III but only if it has accepted the international rules of discharge standards applied by the Port States.\textsuperscript{67}

“…where a Port State has ascertained that a vessel in one of its ports is in violation of ‘applicable international rules and standards’ relating to seaworthiness of vessels and thereby threatens damage to marine environment, administrative actions shall be taken to prevent the vessel from sailing until the causes of the violation have been removed or unless the vessel is going to the nearest repair yard”.\textsuperscript{68}

Now, what constitutes these applicable international rules, standards and practices? UNCLOS is an umbrella convention and its provisions cannot be implemented except by means of specific technical treaties on it.\textsuperscript{69} Hence, it cannot be considered to be binding upon a party who has signed UNCLOS but has not accepted a treaty which contains technical specifications like MARPOL. The IMO regulations cannot be said to be applicable international standards and practices from the perspective of state which is not a party to its treaties. Also, general guidelines by IMO on various maritime issues, unless incorporated in a treaty and signed by a party cannot bind them.

**Sovereign Immunity- A Limitation on Port State Jurisdiction**

A ‘warship’ for the purposes of the convention includes a “ship belonging to the armed forces of a State bearing the external marks

\textsuperscript{67} Id., at p.319

\textsuperscript{68} The UNCLOS III, art. 219

\textsuperscript{69} “Implications of the Entry into force of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, the IMO Study report, LEG/MISC/2, 6\textsuperscript{th} October 1997
distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. The coastal state may expel a warship from its territory, if it is not complying with the local laws. The flag state is responsible for the loss or damage caused by the warship to the coastal state. Warships and other government ships used for non-commercial purposes enjoy the privilege of sovereign immunity from civil and criminal jurisdiction of coastal states.

The traditional doctrine of ‘sovereign immunity’ exempts warships from the local jurisdiction in ports. In the Schooner Exchange v. Mac Fadden, the U.S Supreme Court had held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of tribunals while within a port of the United States.

Thus, warships when entering the ports of coastal states should not violate the local laws. They are immune from arrest, civil and criminal jurisdictions of coastal states. The coastal state may at the most escort warships to high seas. Damages may be claimed against the foreign sovereign at the courts in his country for destructions done to the port and the coastal environment.

The doctrine of sovereign immunity to government ships was discussed in detail in the Parliament Belge Case. In this case, a collision occurred between the Dover tug ‘Doring’ and the mail packet steamer ‘Parlement Belge’

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70 UNCLOS III, art.29
71 Id., art.30
72 Id., art.31
73 Id., art.32
74 11 U.S.116 (1812)
75 5 P.D. 197 (1880)
owned by the Belgian State. In allowing the motion, Brett L. J., after reviewing the earlier decisions including the *Schooner Exchange* extended sovereign immunity to “…public property of any State which is destined for public use”. Later in his judgment he stated that “…in the opinion of the Court the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity”\(^{76}\).

The doctrine of sovereign immunity to public vessels became a practical difficulty when governments started involving in large scale commercial activities. Thus, the law was codified into the Convention for the Unification of Certain Rules Concerning the Immunity Of State-Owned Ships, 1926.

The Convention set the general rule that sea-going vessels owned or operated by states for commercial purposes shall be subject to the same rules of liability and to the same obligations as those applicable to privately owned vessels\(^{77}\). It also states that the enforcement of such liabilities and obligations shall be subject to the same rules of jurisdiction, the same right of action and the same procedure as in the case of privately-owned vessels\(^{78}\). These two articles are clear departure from the traditional doctrine of sovereign immunity under the English common law.

“Ships of war, state yachts, patrol vessels, hospital ships, fleet auxiliaries, supply and other vessels owned or operated by a State and being exclusively used at the time a cause of action arises on governmental and non-commercial service” are not subject to seizure, arrest or detention by any legal process or to proceedings in rem\(^{79}\).

\(^{76}\) *Id.*, at p.220

\(^{77}\) The Convention for the Unification of Certain Rules Concerning the Immunity Of State-Owned Ships, 1926, art.1

\(^{78}\) *Id.*, art.2

\(^{79}\) *Id.*, art.3
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The Judicial Approaches on Sovereign Immunity

In *Berizzi Brothers v. S.S. Pesaro*\(^8^0\), the U.S. Supreme Court took the view that sovereign immunity shall be extended to all government ships for a public purpose; even if it carries trade it should be given the same status of warships.

In *The Republic of Mexico v. S.S. Bajor California*\(^8^1\), the U.S. Supreme Court doubted the correctness of its decision in *Berizzi’s* case and apparently declined to follow it on proof that the *Bajor California* though owned by the American government was in the possession of and being traded by a privately owned Mexican Corporation.

The Swedish Court in *the Rigmar case* decided that a “State cannot claim immunity if it engages in carriage with no idea of profit but still for a purpose such as the provision of supplies for the population which does not entail precisely state activity per se.”

In *the Broadmayne*\(^8^2\), a privately owned vessel requisitioned by the crown on terms which amounted to a time charter, was granted freedom from arrest in respect of pre-requisition salvage claim. The ground of the immunity was the requisition.

In *the Porto Alexandre case*\(^8^3\), the Canadian Supreme Court had asserted that “governments are not to acquire the property of foreign sovereign as it is opposed to international courtesy and therefore, such issues should be solved by negotiations.”

\(^8^0\) 271 U.S. 562 (1925)
\(^8^1\) American Maritime Cases, 1945, p. 277
\(^8^2\) 32 The Times Law reports 304 (1916)
\(^8^3\) L. R. (1920) P. D. 30
In *the Christina* 84 it was held that the immunity to the foreign government would depend upon actual possession of the vessel, irrespective of the fact whether it is legally or wrongfully possessed and not on a claim to possession.

The United Kingdom and the United States of America were not parties to the 1926 convention and had not ratified it. Therefore, in these countries the right of an injured party to proceed against a foreign state-owned vessel had to be determined by the municipal law. Thus, a foreign State could successfully claim immunity from judicial arrest for all its state shipping irrespective of the nature of the service in these countries. Similar practices were followed by countries that followed the Anglo-American jurisprudence. This had created practical difficulties and the need for the restrictive application of the theory of sovereign immunity was felt.

**The Restrictive Approach on Sovereign Immunity**

The United States codified the restrictive approach to state immunity through the Foreign Sovereign Immunities Act, 1976. Two years later, the United Kingdom passed a similar legislation, the State Immunity Act, 1978. In addition to domestic law, efforts were undertaken to develop multilateral treaties governing foreign sovereign immunity issues. The Council of Europe adopted a European Convention on State Immunity and an Additional Protocol, 1976. The United Nations Convention on Jurisdictional Immunities of States and their Property was adopted in 2004. But it is not yet in force 85. After its entry into force, this Convention may serve as a new international norm in the field of state immunity.

This convention adopts the restricted law on immunity to government ships 86. Accordingly, government ships engaged in commercial activities

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84 1938 A.C. 485

85 The convention was adopted on 2nd December 2004

86 The United Nations Convention on Jurisdictional Immunities of States and their Property, 2004, art.16
cannot claim immunity. Sovereign immunity is granted on a reciprocal basis by parties to the convention. Warships, or naval auxiliaries and other vessels owned or operated by a state and used, for the time being, only on government non-commercial service are alone exempted from arrest and civil proceedings in the coastal state. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a state or cargo owned by a state, a certificate signed by a diplomatic representative or other competent authority of that state and communicated to the court would serve as evidence of the character of that ship or cargo.

State immunity is a critical issue in international litigation. Most of the countries have endorsed a restrictive form of sovereign immunity pursuant to which the “public acts” of foreign states are immune from jurisdiction in another state but the “private acts”, particularly commercial activity of the foreign state may be subject to jurisdiction in another state. The UN Convention, which was only recently approved by the General Assembly, may serve as an important multilateral treaty governing the field. Regardless of the legality of the UN Convention as a binding document, the legal framework for state immunity has experienced dramatic change in the last several decades both in India and internationally.

**Right to Access Ports under the Customary International Law**

There is no right to access to maritime ports under the customary international law. The prominent and single authority ever recorded on the existence of a customary right of entry to ports was the decision given by Aramco Tribunal in the arbitration between the Saudi Arabian government and the Arabian American Oil Company (Aramco) in 1958. The tribunal had asserted the existence of a general right of entry to ports in customary international law and acknowledged a sovereign state’s right to supervise such

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87 *Saudi Arabia v. Arabian American Oil Company Ltd.*, 27 I.L.R.117 (1963)
an entry. The tribunal had relied heavily on the writings of Guggenheim\textsuperscript{88} and the Statute of International Regime of Maritime Ports, 1923. But none of these documents is an authority on the topic. The tribunal had also relied on scholarly comments for establishing a customary right to port entry.

Hugo Grotius in 1609\textsuperscript{89} had advocated for the freedom of navigation and free access to ports. Later on, Grotius’s views were adopted by eminent scholars of the 17\textsuperscript{th} century\textsuperscript{90}. When exploring the thoughts of these eminent scholars, one would come to a conclusion that they have accepted in one way or other Grotius’ theory of freedom of navigation. In fact, most of them have deduced the ‘right to free access to ports’ as a minor premise of that freedom\textsuperscript{91}. A similar argument was put forth by the Netherlands and the United Kingdom delegations at the First United Nations Conference on the Law of the Sea\textsuperscript{92}. Most astonishingly, some authors have even accepted \textit{per se} customary right to

\textsuperscript{88} P. Guggenheim, \textit{Traite De Droit International Public}, Vol.1, Geneva (1953), p. 419


\textsuperscript{91} See Colombos, \textit{Supra.n.90}, at p. 129

\textsuperscript{92} The Netherlands delegate asserted that “it is insufficient to declare the high seas open to traffic without also guaranteeing the right into seaports.” The UK representative argued that, “passage was not impeded in waters which were essential to maritime communications. The main purpose of any maritime voyage was, after all, to arrive at a port of destination.” See, [UN Doc. A/CONF.13/L.52 (1958)]
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port access\(^93\). Apart from these commentaries, there is no custom that supports a right of access to ports.

**Right to Deny Access under Customary International Law**

On the contrary, there exist clear state practices on denial of port entry. The scholarly writings of Guggenheim\(^94\), Gidel\(^95\) and Ralston\(^96\) states a general presumption that the sea ports of a state may be open to international merchant fleet and should be closed only when it is contrary to the sovereign state’s interests. It is only a privilege or courtesy that ports should be kept open for trade and not an obligation. On the contrary, these writings acknowledge that there exists a customary right to close down ports to foreign merchant ships when the national interests are at stake\(^97\). The arbitral decisions in the *Orinoco*\(^98\), *Poggioli*\(^99\) and *Martini*, quotes the port state’s sovereign right to close down maritime ports. In these disputes, the parties had acknowledged this right without any objection.

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94 *Supra* n.88


97 Gidel, *supra* n.95, at p.664


The view that ports should be generally kept open for foreign vessels belongs to the contemporary school of international law. The modern scholars have adopted the view that there is no right to access ports whereas; there is a clear right to deny it on various occasions. The views of Degan\textsuperscript{100}, Hakaapa\textsuperscript{101} and Kasoulides\textsuperscript{102} are prominent on the right to deny access to ports. They acknowledge that it is desirable to keep open ports in order to facilitate trade.

The coastal states right to nominate and close down ports is a corollary of its right to deny access. These rights were recognized as early as in 1606 in the famous Bates Case\textsuperscript{103}. History also witnessed the closure of ports on occasions where the peace, safety and convenience of its citizens are affected\textsuperscript{104}. Prevention of coastal pollution was always considered as a major reason for closure of ports. For example, Kasoulides quotes\textsuperscript{105}, “...In 1971, the Dutch tanker Stella Maris was denied access to several European Ports as it carried toxic substances. In 1980, a Greek tanker was denied access to a port in Shetlands for environmental reasons”.

Access has been denied on the grounds of protection of “…public health and safety, to ships carrying explosive, ships carrying nuclear goods, to ships carrying passengers with contagious diseases, to ships carrying hazardous

\textsuperscript{100} Quoted by C.G.Roelofsen, Grotius and International Law, Grotius Reader, L.E. Van Holk & C.G. Reolofsen eds. (1983), at p.12

\textsuperscript{101} K. Hakapaa, Marine Pollution in International Law: Material Obligations and Jurisdiction, Suomalainen Tiedeakatemia , Helsinki (1981), p.163

\textsuperscript{102} Kasoulides, Supra n. 21 at p.4-5

\textsuperscript{103} The case of Impositions ( Bates case), (1606) 2 St 371

\textsuperscript{104} Some major reasons to close down a port include security and good order on the shore, See, Tullio Treves, Laura Pineschi, The Law of the Sea: The European Union and its Member States, Martinus Nijhoff Publishers (1997), p. 97-125

\textsuperscript{105} Supra n.21, p.22
wastes, for general coastal pollution prevention, to sub-standard ships and ships producing hazards to maritime navigation\textsuperscript{106}.

Fayette also quotes specific instances of denying access to foreign ships. For example, in 1985, New Zealand denied access to American nuclear ship \textit{Savannah} into its ports. In the same year, Panama denied entry to a British ship carrying nuclear material. The European Union restricts the entry of oil, gas and chemical tankers into the community waters\textsuperscript{107}.

Another reason for closing down of ports seems to be political. France had adopted this practice quite a few times. For example, until 1923, France denied access to all its ports except for three vessels of USSR. Similarly, in 1947, France had closed Tunisian port to Egyptian vessel carrying food stuffs from Red Crescent Society purely on political considerations. The period of 1981-1984 saw closing of French ports to vessels of USSR for security reasons\textsuperscript{108}.

In the United Kingdom, denying access to ports is a practice that can be traced back to 1236, when no vessel was allowed to enter the port of Dover, except under the license from Henry III\textsuperscript{109}.

States generally deny access to vessels for violations of fishing regulations\textsuperscript{110}. In 1991 Chile had extended its local law, beyond its Exclusive

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{107} Directive 79/16/EEC, OJ No. L33, 08/02/79, p. 33.
    \item \textsuperscript{108} \textit{Supra} n. 21, p. 7.
    \item \textsuperscript{110} Under the High Sea Fisheries Enforcement Act, 1992, the U.S had denied access to foreign and domestic vessels engaged in drift net fishing and those conducting operations in the Central Bering Sea not on the basis of an international agreement.
\end{itemize}
\end{footnotesize}
Economic Zone for the conservation of swordfish. The European Community fishing vessels were denied access to Chilean ports since they failed to comply with the local law of Chile. The EU protested against this unilateral enforcement measures by Chile and the matter was finally settled through negotiations. The case is significant for it clearly shows the ambiguities in international law of the sea in defining the jurisdictional competence of coastal states over adjacent waters.

The above discussion shows that under customary international law there is no right of access to ports. Most states enjoy it as a privilege under the customary law and bilateral treaties. Whereas, there subsists a clear practice to deny entry of vessels when there is an imminent threat to the coastal environment. A coastal state can deny access to foreign ships, prescribe port entry conditions and nominate and close down ports by virtue of their sovereignty over internal waters. The customary international law makes it clear that every vessel in a port is under the complete sovereignty of the coastal state. This fact enables the local jurisdiction to compel the vessel to comply with local laws. Except for a few state practices stated above, states are generally reluctant to assert local jurisdiction over foreign merchant ships when the matter is coming under the internal affairs of the flag state. As a remedy, most states have made reservations by means of bilateral agreements, whereby the internal matters are left to the sole jurisdiction of flag states.

**Ships in Distress - An Exception to the Port State Denial**

The ancient regime of ship in distress suggested a customary practice of giving access to all leper ships on humanitarian grounds. The ancient regime of

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111 Herein after to be referred to as the EEZ

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places of refuge as explained by Jessup in the *Eleanor* follows that “the distress should be urgent and of grave necessity such as to cause apprehensions about danger in the minds of an honest and firm man. The necessity should not be a self-imposed one”.

In the *Creole arbitration* (1853), it was held that the coastal state had no right to release slaves on board a foreign ship driven into its ports by distress, although its laws prohibited slavery. Similar view was adopted in *Kate A.Hoff’s case* and the *Brig Concurd Case*. In these famous cases the view that ships in distress are excused from their inevitable entry into the place of refuge was recognized. In the Canadian case, *Cushin & Lewis v. R* , it was held that even ships in distress should comply with some of the local laws such as reporting of cargo at the arrival at port. In the French case, *Carlo Alberto* , it was held that vessels that are forced to seek refuge in the port of a state with an intentional unlawful entry enjoy no immunity from local jurisdiction.

Based on tradition and necessity, ships in distress have been enjoying immunity from coastal and port state jurisdictions especially regarding customs and revenue collection, trade laws in general, health issues and criminal

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114 *The Eleanor*, 165 ER 1058 (1809)
115 Quoted in Anthony Morrison, *Decisions of International Arbitral Bodies*, Brill/ Martinus Nijhoff Publishers (2012), Ch.4
116 *Kate A.Hoff v. The United Mexican States*, 23 The American Journal of International Law 4 (1929)
117 13 U.S.387 (1815)
119 Quoted in J. Colombos, *Supra* n.90, p.329
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matters. Both customary and conventional law imparts a general duty on port states to give access to a ship in distress on the basis of humanitarian grounds.

The *Erika* and *Castor* incidents have ignited the controversial debate on the coastal state’s duty to give access to ships in distress\(^{120}\). The reasons for the distress can be several; *force majeure* or even human actions like mutiny and piracy. The controversy is not regarding the entry of vessels into ports but their claim of immunity against local law on trade, customs, health, criminal and other matters. Coastal and Port states have respected this right of ships in distress under the customary international law, since time immemorial. The major issue is pertaining to scope of refuge in cases of potential threat to the port environment.

Does the vessel in distress have always the legal right to enter a safe port? If so, to what extent this right subsists? Does this right impart a corollary duty on coastal and port states to provide all necessary help to these vessels? What if the vessel is offering potential threat to coastal environment, health and security of the citizens? In that case, whether port state denial is permissible? What should be criteria when denying access to a vessel in distress? How should the coastal and port states and salvors act in such critical situations?

The right to enter ports in case of any emergency is an ‘exceptional right’ and not a ‘normal right’. Even in normal cases, there is no right to access ports either under customary international law or any other law for the time being in force. This general rule is applicable to vessels in distress. State practices suggest that access to ports by ships in distress can be justified only on humanitarian considerations\(^{121}\).

\(^{120}\) The local French port authority had denied access to the *Erika* and it sank in the Bay of Biscay in December 1999, causing catastrophic damage to the French Coastal community.

Right to Seek Place of Refuge under Contemporary International Law

Many jurists of the twentieth century clearly opine that a ship in distress does enjoy right to access ports. The distress could be due to threat of force majeure, mutiny, piracy and such other real and imminent dangers. O’Connell opines that this right was gained mainly by treaty practice and gives the example of a treaty between the United States and Spain in 1795 in this regard. The Jay treaty had provisions giving access for American vessels in distress to English ports. Similarly, friendship, commerce and navigation treaties between maritime countries normally vests with foreign vessels in distress, the right to access ports. The UK-OMAN Treaty, 1891 and the Black Sea Fisheries Convention, 1959 provide for unconditional access to ships in distress.

Hence, it is clearly established that under customary international law, there exists a duty on coastal states to give access to a ship in distress. Now, the state practices differ on the criteria to decide the ‘necessity’. In *Canada v.*
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Natalie\textsuperscript{125}, purchasing of ice for a fishing vessel was not considered as a necessity. Similarly, in Cashin v. Canada\textsuperscript{126}, entering a port under duress was not considered to be distress. In M.V. Kitano’s Case\textsuperscript{127}, the vessel was 15 nautical miles south of Halifax Harbour when a fire broke out. It was laden with containers carrying cigarettes and machinery. The port authorities denied access claiming that the vessel carried dangerous goods. In the case of M.V. Toledo\textsuperscript{128}, the Irish vessel was carrying potash and was on its journey from Canada to Denmark. It encountered heavy weather, access was denied to British Waters and finally the ship was beached on to the shores of the U.K. It was eventually towed out and scuttled. The court rejected the claim against the Irish Government and held:

“…the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognised practice among maritime states, to have proper regard to their own interests and those of their citizens in deciding whether to or not to accede to such request”.

In Long Lin’s Case\textsuperscript{129}, the Dutch Court held that the gravity of ship’s situation should be balanced against the threat that it offers to coastal state, when deciding whether to or not to give access.

\textsuperscript{125} Canada (Attorney- General) v. Natalie. (1932) EX.C.R.155

\textsuperscript{126} (1935) EX.C.R 103.52

\textsuperscript{127} Cited in Aldo E. Chircop & O. Linden, op.cit.121

\textsuperscript{128} ACT Shipping (OTE) Ltd. v. Minister for the Marine & Attorney General, Ireland (The M.V. Toledo) [1995] 2 Irish Law Reports Monthly.30

\textsuperscript{129} Nederlands Juristenblad (1995), No. 23, at 299. 74 G, ( 1995), Cited in Aldo E. Chircop & O. Linden, op.cit.127, Ch.10
Hence, the modern state practices suggest that there is no duty on the coastal state to give access, if human life is not involved. International Maritime Organization has been trying to codify the law on places of refuge. Resolutions of the IMO prescribe code of conduct for coastal states and ship owners in cases of seeking place of refuge and Maritime Assistance Service in coastal states\(^\text{130}\).

The law on places of refuge also requires a harmonious development. The rights of coastal and port states need to be protected. At the same time these states also have a duty to assist the ships in calamity by defining specific salvage laws. With the development of international law on port state jurisdiction and port state control, the coastal states do have a duty to provide, better contingency planning, risk assessment methods and supporting infrastructure facilities for those vessels which are in peril.

**American Practice of Regulating Access to Foreign Vessels**

The American Restatement states that ‘right to access to foreign port’ is reflective of customary law and that ‘in general, maritime ports are open to foreign ships on conditions of reciprocity’\(^\text{131}\). It also asserts that a state may deny access, ‘temporarily’ and in ‘exceptional cases’, for imperative reasons, such as security of nation and public health.

The U.S Ports and Waterways Safety Act\(^\text{132}\) and the Regulations under the Deep Water Ports Act, 1974\(^\text{133}\) vests with the United States Government the power to deny entry to foreign vessels. Under the Regulation\(^\text{134}\), there are a number of cases when the U.S had denied access to its ports even in the

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132 46 USC 391.a (1972)

133 USC 1501-24 (1974)

134 The Deep Water Ports Act, 1974, reg. 19(c)
absence of an agreement. For example, in the *Khedivial Line SAE v. Seafarers International Union*\(^\text{135}\), the court opined:

“Except in a situation involving force majeure, a licensee of a deep water port shall not permit a vessel, registered in or flying the flag of a foreign state, to call at, or otherwise utilize a deep water port”.

In addition to this, even in the absence of specific regulations, the U.S Coast guard had denied access to foreign vessels on the ground of national security under the Special Interest Vessel Program\(^\text{136}\). Hence, it is to be understood that American Jurisprudence on regulating access to vessels is a clear depiction of the country’s unilateral enforcement measures.

Generally, the port state’s power of prescriptive restrictions on equipment, design, manning and construction of vessels is limited under international law. Any contravention is considered as an ‘abuse of right’ by many scholars\(^\text{137}\).

Yet, the American law prescribes construction design equipment and manning\(^\text{138}\) standards for entry into that country’s ports. In *Stevens v. Premier Cruises Inc.*\(^\text{139}\), the U.S circuit Court held that the construction and design of the cruise ship has to comply with the U.S. Disabilities Act\(^\text{140}\). Recently, a new legislation specifying the design, equipment, manning and construction of cruise vessels was enacted in U.S.A. The Cruise Vessel Security and Safety Act 2010,

\(^{135}\) 278 F.2d 49, 52 (1960)

\(^{136}\) Cited in de la Fayette, *Supra* n.98, at p.8.

\(^{137}\) The UNCLOS III, art.21(2); *See*, Erik Jaap Molenaar, *Competing Norms in the Marine Environmental Protection- Focus on ship safety and Pollution Prevention*, Henrik Ringbom ed., Kluwer Law International, The Hague (1997), pp.208-211

\(^{138}\) Here in after to be referred to as the CDEM Standards

\(^{139}\) 215 F.3d 1237 (2000)

\(^{140}\) 46 U.S.C.A 3703a (1996)
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imposes substantial requirements on such ships that carry over 250 passengers on international voyages which call at any US port. They concern design and construction, medical facilities, passenger and crew information, training and measures to report and combat crime. Non-compliance of any requirement can result in denial of entry to US ports and imposition of penalties. All cruise ships must meet certain design and construction standards and should maintain log book which may be inspected by port state control officers at the U.S. ports.

In the Shrimp/Turtle dispute, the GATT Appellate Body had supported the United States decision to inflict trade embargo over shrimps imported from countries not implementing the Turtle Excluder Device. Background of the case is that, the United States prohibited the importation of any shrimp harvested using commercial fishing technologies that might harm sea turtles, unless the exporting country is certified by the U.S. administration as having a regulatory program to prevent incidental turtle deaths comparable to that of the United States or is certified as having a fishing environment that does not pose risks to sea turtles from shrimping. The Third world countries including India considered this as an assault over their national sovereignty and the right to free trade, whereas the U.S. based its argument on Article XX of the GATT.

The advantages of double hull requirement for oil-tankers were a highly debated issue until recent past. The Americans were the first to give this

141 Civil penalties up to $50,000 per violation and criminal penalties up to $250,000 and/or one year’s imprisonment.
143 Article XX of the GATT provides exceptions for measures that are “necessary” to protect human and animal life and health and that are “in relation to” the “conservation of exhaustible natural resources”
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requirement a legislative status under the OPA\textsuperscript{144} and the Federal Water Pollution Control Act\textsuperscript{145} even before its inclusion under MARPOL amendments.

**Chinese Practice on Regulating Access to Foreign Vessels**

China’s traditional approach to territorial sovereignty was imperialistic. From 1976, China has been following economic reforms and ‘open door policy’. Today, the country has emerged as a maritime giant extensively legislating on shipping keeping in tune with the international regime. Of these, the Law on the Territorial Sea and Contiguous Zone, 1992 establishes the territorial sea limits of China to 12 nautical miles\textsuperscript{146}. Merchant ships enjoy complete right of innocent passage through China’s territorial sea but foreign warships require prior permission. In order to conduct marine scientific research, marine operations or such other activities in China’s territorial limits, any foreign institution, international organization or individual would require approval and compliance of Chinese laws and regulations\textsuperscript{147}. In cases of violations, the law empowers the authorities the right to hot pursuit\textsuperscript{148}. This legislation is a general declaration of sovereignty over the traditional maritime zones of China as per the international law.

One step ahead, China has established a typical zone, ‘coastal waters’ or ‘jurisdictional waters’ which includes ports along the sea coast, internal waters,

\textsuperscript{144} The Oil Pollution Act, 1990, 46 U.S.C.A 3703a (1996)

\textsuperscript{145} 33 U.S.C 1321(b) (1) (2001). But the OPA does not define a ‘double hull’ but leaves it for the discretion of U.S Coast Guard. IMO issues technical regulations based upon the study of working groups but leaves the discretion member nations to formulate legal ruminations.

\textsuperscript{146} Hereinafter to be referred to as nm

\textsuperscript{147} The Law on the Territorial Sea and Contiguous Zone, 1992, art.11

\textsuperscript{148} Id., art.14
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terриториal sea and other water areas under China’s jurisdiction. The major legislations controlling vessel movements in China’s Jurisdictional waters are the Regulations Governing Supervision and Control of Foreign Vessels, 1979 and the Law of Maritime Traffic Safety, 1983.

Accordingly, foreign vessels have to obey Chinese laws and regulations in ports and should not be acting against national security or general interests of the country. The law also makes strict compliance of regulations governing straits, internal waterways, and water bodies used for navigation. The Harbour Superintendence Administration can detain the foreign vessel, stop it from sailing, and ask it to change the route or return to the port for violations of Chinese laws and regulations, marine casualties, failure to pay port dues and securities.

One week before entering the port, the vessel’s port agent has to submit required forms for approval and compulsory intimation should be given 24 hours prior to its arrival in port. The vessel should also comply with the Compulsory Pilotage Regulation and the Law on Maritime Traffic Safety, 1983, the Regulations on Management of Maritime Navigational Notices, 1992 and the Provisions on Safety and Supervision of the Vessel Communication Management System, 1997. After entering the port, the foreign vessel should at the earliest submit the entry report, ship’s papers and documents. There should not be any arms and ammunitions on board, if at all anything is there, it has to be sealed up. Emergency signals should be used only when the necessity demands. Water sports, fishing, shooting and fireworks are strictly prohibited.

All orders of the Harbour Superintendence Administration regarding safety and


150 The Regulations on Supervision and Control of Foreign Vessels, 1979, art.9

151 Id., art.8
security of the port have to be complied immediately.\textsuperscript{152} The Law on Marine Environment Protection prohibits transfer of hazardous wastes in China’s jurisdictional waters.\textsuperscript{153}

The Regulations Concerning Navigational Marks, 1995 prescribe vessel traffic control systems and on any occasion of damage to navigational marks or traffic signals, report should be given to Harbour Superintendence Administration at the earliest.

All foreign vessels should comply with regulations relating to marine environmental protection. Deliberate discharges of oil, oily mixtures or harmful pollutants are strictly prohibited within the port area and coastal waters. In cases of accidental discharge, the facts should be reported in the oil book and it has to be furnished to the Harbour Superintendence Administration. China also has regulations concerning the Prevention of Pollution of Sea Areas by Vessels, 1985.

In order to combat the catastrophic effects of maritime accidents, China has legislated on the topic. Important legislations in this regard are the Regulations Governing Investigation and Settlement of Maritime Traffic Accidents, 1990, the Regulations on the Inspection of Ships and Offshore Installations, 1993 and the Provisions on Safety Inspection of Vessels, 1997.

The enforcement agency for these regulations is the Chinese Maritime Bureau working under the Ministry of Communications. Almost twenty local maritime branches work under the ministry.\textsuperscript{154} The functions of the Bureau include implementation of the Marine Traffic Regulations by foreign ships, to authorize entry and departure of foreign vessels in ports, to facilitate

\textsuperscript{152} Id., art.22

\textsuperscript{153} Id., art.39

compulsory pilotage, to maintain traffic order and safety, and to investigate and settle disputes arising from marine accidents.

**Indian Law on Regulating Access to Ships**

The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976\(^{155}\) establishes India’s sovereignty over territorial waters. The Government of India under a notification had declared waters within the baseline, around the Indian coastal line, including the Lakshadweep and Andaman and Nicobar islands as “internal waters”\(^{156}\). The Ministry of Shipping in another notification had renamed the zone as “inland waters” thereby extending the provisions of the Inland Vessels Act, 1917 and the provisions of Merchant Shipping Act, 1958 to the same zone\(^{157}\). Hence, the jurisdictions of the Inland Water Authority of India, State Maritime Boards and the Director General of Shipping will be applicable in the ports to ensure safety in shipping. This is a superior piece of legislation when compared to that of other countries as it clearly establishes ‘sovereignty’ and not ‘jurisdiction’ over the inland waters\(^{158}\). Whether India has fully exploited the scope of this Act for the conservation of maritime ports and marine resources is a substantial issue.

The Central government can upon the permission from both houses of the parliament, change the limits of the territorial waters in accordance with

\(^{155}\) Here in after to be referred to as the MZA 1976

\(^{156}\) The Ministry of External Affair, Government of India, Notification No. SO 1197 (E) , dated 1\(^{st}\) September 2009, on baseline system in India

\(^{157}\) The Ministry of Shipping, Government of India, D.G. Shipping Order No. 19, 2013, dated 16\(^{th}\) September 2013

\(^{158}\) The MZA, 1976, Section 3(1) and (2) reads, “The sovereignty of India shall extend to the territorial waters of India and to seabed and subsoil underlying and airspace, over such waters. The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.
international law and state practices\textsuperscript{159}. The Act thus confines with the Union of India sovereignty to prescribe laws for the territorial waters and to alter its limits. The Act also authorizes to extend the jurisdictional limits by means of official notification in order to facilitate freedom of navigation, which is not prejudicial to India’s interests. By means of the notification of the Ministry of Home Affairs, the extra territorial criminal jurisdiction of India shall extend up to the Exclusive Economic Zone\textsuperscript{160}. India’s coastal state jurisdiction can be extended for criminal offences happening beyond the territorial waters. Hence, the sovereignty of India to prescribe laws for preserving the coasts can be extended beyond the territorial waters.

Under the Act, all foreign ships except warships and submarines enjoy innocent passage through the territorial waters, unless such passage is prejudicial to the peace, good order or security of the country\textsuperscript{161}. Foreign warships and submarines may enter or pass through the territorial waters of India only after giving prior notice to the Central government. All submarines and underwater vessels should navigate only through the surface of the territorial sea and should show their flag during the passage\textsuperscript{162}.

The Act gives the central government sovereignty to deny access to all or any class of vessel, if the voyage is a threat to the peace, good order or security of India\textsuperscript{163}. Under the Act, ‘any person committing an offence under this Act or any rules made thereunder or under any of the enactments extended under this Act or under the rules made thereunder may be tried for the offence in any place in which he may be found or in such other place as the Central

\textsuperscript{159} Id., s.4

\textsuperscript{160} Ministry of Home Affairs, Government of India, Notification No. SO 671 (E ), dated 27\textsuperscript{th} August 1981

\textsuperscript{161} The MZA, 1976, s.4

\textsuperscript{162} Id., s.4(2)

\textsuperscript{163} Id., s.4(3)
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Government may, by general or special order, published in the Official Gazette, direct in this behalf. A combined reading of the provisions suggests that India’s sovereignty is not strictly confined to territorial limits and access may be denied to any class of vessel, if the voyage is a threat to peace, security and good order of the country.

Whether a coastal state is entitled to exercise criminal enforcement jurisdiction over foreign ships beyond the territorial waters is highly controversial. The dynamism in shipping operations like the emergence of super tankers, cruise lines carrying over 3000 people of various nationalities passing very near to the coasts, increased mining and economic activities in the Exclusive Economic Zone, erection of offshore oil platforms and defence activities supports the coastal state’s concerns on the claims over the adjacent waters and unilateral prescriptions for the zone. Many countries have thus extended criminal jurisdiction beyond the territorial waters for protecting their interests. Often, their claims are considered legitimate under the protective and passive personality principles of the international law.

For example, the passive personality principle has been used by Australia to provide justice to Australian victims of crime, regardless of the place of occurrence. The American and the French laws have corresponding provisions.

The United States of America, the United Kingdom, and the European community of nations have made radical changes to their laws regulating access to ports. Similarly, if the events occurring on high seas had any ‘effects’ on the vessel of another flag state or on the territory of a state, no rule in international law would prevent those states from initiating legal

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164 Id., s.13

165 The Australian Criminal Code Act, 1995

166 The U.S Ports and Waterways Safety Act, 1972 and the Regulations under the Deep Water Ports Act, 1974 vests with the United States Government the power to deny entry to foreign vessels
proceedings against the transgressing vessels\textsuperscript{167}. No country other than the United States would have applied this ‘vital interest theory’ or ‘effects doctrine’, very intensely to secure its national interests\textsuperscript{168}.

The Constitution of India permits extraterritorial application of laws, if a reasonable nexus is established between the subject matter of the law and the Indian coast\textsuperscript{169}.

Hence, if the ‘effects’ of the maritime casualty is felt upon the Indian coast, the extra territorial application of criminal jurisdiction of India as a coastal state may be invoked legitimately under the MZA 1976 and other domestic shipping laws. The Act is therefore a superior piece of legislation conferring sovereignty and extension of the Union’s sovereign rights up to the EEZ to protect national interests.

The MZA imposes three years rigorous imprisonment for its violation\textsuperscript{170}. The Act requires the enforcement authority to seek prior consent from the Central Government before taking action against a transgressing vessel\textsuperscript{171}.

The Central Government is the authority to frame rules for the enforcement of the provisions in the Act. Seven rules have been so far framed

\begin{itemize}
\item \textsuperscript{167} *The Lotus* (1927), PCIJ, Ser.A, No.10, P.25
\item \textsuperscript{168} In *U.S. v. Aluminium Co. of America*, 148 F.2d 416 (1945), the American court has made the classic statement: “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”
\item \textsuperscript{169} The Constitution of India, art.245(2)
\item \textsuperscript{170} The MZA, 1976, s.11
\item \textsuperscript{171} *Id.*, s.14 reads that, “No prosecution shall be instituted against any person in respect of any offence under this Act or the rules made there under without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf.”
\end{itemize}
under this Act, of which two are pertaining to ‘designated areas’. Hardly are there any reported cases under the MZA 1976, where India has exercised protective jurisdiction to preserve its ports.

**Legal Constraints for India’s Port State Enforcement**

In spite of the wide powers to restrict the entry of polluting vessels, many of such vessels find easy access to Indian ports and navigate freely through the territorial waters of India. The reason is that the MZA, 1976 and the rules thereunder set no clear criteria for denying the access. Hence, what constitutes a threat to peace, good order or security of India is often a political consideration rather than a question of law.

This legal crisis is quite often used by the Ship breaking industry for illegal benefits. This is a major industry giving employment opportunities to many millions and generating immense revenue for the governments. Yet, it operates under substandard conditions in India. If, the provisions of MZA, 1976 had clearly laid down the criteria for denying access to ports, India would not have become the junkyard of “ghost ships” of the western world. Consequently, judicial approaches on whether to allow access for these ships to Indian ports remain conflicting. In September 2012, the notorious *Exxon Valdez*, which had caused catastrophic effects on the U.S. Coasts in 1989 and

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172 These rules declared oil platforms, including the ONGC Oil platforms near Mumbai as restricted zones for the entry of foreign merchant ships


174 Ghost Ships are very old and vulnerable ships to breaking up due to their fragile nature, usually containing huge amount of toxins. Viola Blayre Campbel, Ghost Ships and Recycling Pollution: Sending America’s Trash to Europe, 12*Tulsa Journal of Comparative and International law* (2004)

175 On March 24, 1989, the 987-foot tank vessel *Exxon Valdez* struck Bligh Reef in Prince William Sound, Alaska, causing the largest oil spill in the history of United States. The oil slick has spread over 3,000 square miles and onto over 350 miles of beaches in
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had changed its name five times since then, the latest being ‘Oriental Nicety’ was allowed to be dismantled in Alang against the Gujarat Maritime Board’s orders. An NGO named Toxic Waste Alliance points out that since 1982 almost 5924 ships were given entry to Alang for dismantling; many of them imported without de-toxification in violation of the Basel convention requirements.

For example, in the Clemenceau case\(^\text{176}\), the French warship at the time of its phasing out had 130 tons of asbestos and other toxic wastes on board. It was not given access to ports worldwide\(^\text{177}\). In December 2005, it left for Alang, in India for ship breaking. In January 2006, owing to huge public appraisal and media attention, a petition came up before the Supreme Court of India and the Court had issued a temporary order prohibiting the vessel’s entry to the Alang port. The court had expressed a strong view to strike a balance between economic development and environmental protection.

In the Blue Lady Case\(^\text{178}\), the major issue in question was whether Alang had technological sophistication for safe ship dismantling. Ignoring the opinion of the High Level Expert Committee that Alang never had the technology sophistication to dismantle vessels in an eco-friendly manner, the Supreme Court of India ordered for the entry of the vessel into Alang and allowed its dismantling. According to court, sustainable development also means balancing ‘the priorities of economic development and environmental protection’.

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\(^{176}\) Research Foundation for Science v. Union of India, 2007 (8) S.C.C 583

\(^{177}\) The green peace fact sheet, Retrieved from http://www.greenpeace.org, last accessed in March 2014

\(^{178}\) See Research Foundation for Science Technology and Natural Resource Policy v. Union of India and Others, A.I.R 2007 SC 3118

Prince William Sound, one of the most pristine and magnificent natural areas in the country.
Defects in the Indian Admiralty Law

The Indian legislature has not taken notice of the day to day dynamism in maritime operations and the modernization of admiralty jurisdiction in other countries. The British Statute (Application to India) Repeal Act, 1960 abolished over 250 British statutes but the Admiralty law remained untouched. The Government of India, following the Law Commission Reports\textsuperscript{179}, the Parveen Singh Committee\textsuperscript{180} and pressures from all stake holders in the industry had introduced the Admiralty Bill in 2005. No concrete efforts towards consolidating the admiralty law in India had happened after that. As such there are serious vacuums and ambiguities in admiralty law especially on adjudication of maritime claims as to safety and pollution control in ports, wreck removal, salvage, planning, preparedness and response in case of maritime casualties, the Coast Guard’s powers to implement the contingency planning, surveillance and monitoring of vessels, civil liability in case of oil spills and giving access to vessels in distress etc.

Yet another critical issue is that India is not having a consolidated law on admiralty jurisdiction. The admiralty jurisdiction in India is still governed by a few colonial legislations; the Admiralty Court Act, 1861, the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891. It can be said that the Admiralty jurisdiction of India is a consolidated effect of the Articles 372, 225, 226 & 227 of the Constitution of India, section 443 of the Merchant Shipping Act and the decision in M.V.

\textsuperscript{179} Thirteenth Law Commission of India, in its 151st report dated August 1995, had expressed the view that “…legislation in admiralty law was imperative; both as a matter of prestige and a necessity.”

\textsuperscript{180} In 1986, the Ministry of Surface Transport had appointed the Parveen Singh committee under the chairmanship of the Director General shipping, Sri. Parveen Singh, to study about the prospective changes that are needed in admiralty law in India. The committee had recommended for the consolidation of Admiralty Courts Act
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Elizabeth’s case\textsuperscript{181}. In that case, the Supreme Court of India had expressed its deep anguish over application of colonial laws to Indian cases of admiralty.

The vagueness in the substantive law has created a situation where judges are forced to rely on procedural rules. This has caused serious deterioration in the standards of adjudication of maritime disputes in India. A handful of shipping legislations confer civil and criminal jurisdiction in admiralty matters to the Magistrate courts. This has created issues of overlapping jurisdictions. Ultimately, port state jurisdiction and the enforcement regime of Indian administration have become all bark and no bite. The Enrica Lexie\textsuperscript{182} is the latest case on this point.

Indian Practice on Sovereign Immunity and Other Limitations Set by International Law

“\textquote{A sovereign prince or other person representing an independent state is not liable to be sued in the courts of the land unless he submits to its jurisdiction}”\textsuperscript{183}. This is an obsolete British common law principle. Since, the Indian government has not reacted and codified the ruling of the Supreme Court; determination of sovereign immunity is still done on a case to case basis. In a series of cases, the doctrine of sovereign immunity was applied taking into consideration whether the act involved was sovereign or non-sovereign\textsuperscript{184}. Later

\textsuperscript{181} M.V. Elisabeth and Ors. v. Harwan Investment and Trading, 1993 A.I.R 1014, 1992 SCR (1)1003

\textsuperscript{182} Republic of Italy v. Republic of India., Writ Petition (Civil) No 135 of 2012, The Supreme Court of India(decision pending); Massimilano Latorre v. Union of India (2012) 252 KLR 794;Republic of Italy thr. Ambassador v. Union of India (UOI), Special Leave Petition (Civil) No. 135 of 2012, reported in Manupatra.

\textsuperscript{183} The Christina (1938) AC 483

on this dichotomy of sovereign or non-sovereign functions got a major twist. In a majority of cases, the governmental function was interpreted as non-sovereign\textsuperscript{185} and the government was held liable for torts. In certain other cases, the doctrine was ignored completely and the state was held liable\textsuperscript{186}.

The principle of sovereign immunity is engrossed in the Code of Civil Procedure, 1908\textsuperscript{187}.

In \textit{Mirza Ali Akbar Kashani v. The United Arab Republic}\textsuperscript{188}, the Apex Court had held,

“…The effect of the provisions of section 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed

\begin{footnotesize}

\textsuperscript{186} \textit{Saheli, a Women’s Resources Centre v. Commissioner of Police}, Delhi, A.I.R 1990 (SC) 513; \textit{Common Cause, A Registered Society v. Union of India}, A.I.R 1999 SC 2979

\textsuperscript{187} The Civil Procedure Code, 1908, Section 86(1), reads, “No [* * *] foreign State may be sued in any Court otherwise competent to try the suit except with consent of the Central Government certified in writing by a Secretary to that Government. Provided that a person may, as a tenant of immovable property sue without such consent as aforesaid [a foreign State] from whom he holds or claims to hold the property”.

\textsuperscript{188} MANU/SC/0050/1965, Para 30
\end{footnotesize}
that every sovereign state is competent to make its own
laws in relation to the rights and liabilities of foreign
States to be sued within its own municipal courts. Just
as an independent sovereign state may statutorily
provide for its own rights and liabilities to sue and be
sued, so can it provide for the rights and liabilities of
foreign states to sue and be sued in its municipal courts.
That being so, it would be legitimate to hold that the
effect of section 86(1) is to modify to a certain extent
the doctrine of immunity recognised by International
Law. This section provides that foreign states can be
sued within the municipal courts of India with the
consent of the Central Government and when such
consent is granted as required by section 86(1), it would
not be open to a foreign state to rely on the doctrine of
immunity under International Law, because the
municipal courts in India would be bound by the
statutory provisions, such as those contained in the
Code of Civil Procedure. In substance, section 86(1) is
not merely procedural; it is in a sense a counter-part of
section 84. Whereas section 84 confers a right on a
foreign State to sue, section 86(1) in substance imposes
a liability on foreign States to be sued, though this
liability is circumscribed and safeguarded by the
limitations prescribed by it ..."
This restrictive approach was followed in several subsequent cases\textsuperscript{189}, where in sovereign immunity with respect to a commercial transaction by foreign governments were not allowed by the apex court and High Courts in India.

In India, absolute sovereign immunity is still a presumption; since the foreign sovereign can be sued in the specified circumstances with the consent of the Central Government. In the controversial case the \textit{Enrica Lexie}\textsuperscript{190}, the High Court of Kerala had held that “…the extent of immunity to forces would depend upon the circumstances under which they are admitted by the territorial state and upon any agreement between India and Italy on the terms and conditions as to the entry of forces into the coastal territory”\textsuperscript{191}. “[T]here might be exceptions to the rule on immunity \textit{ratione materiae}, where an international agreement constituted a \textit{lex specialis} for certain crimes or in respect of criminal proceedings for acts committed on the territory of the forum State”\textsuperscript{192}. India has signed but not ratified the U.N. Convention on Jurisdictional Immunities\textsuperscript{193}. There was also no treaty existing as to free entry of forces into coastal waters between India and Italy, which would give a qualified exemption for the marines from India’s criminal justice system. Therefore, the court held that the entry of marines into India’s


\textsuperscript{190} \textit{Supra} n.181

\textsuperscript{191} \textit{Id}, Para.82

\textsuperscript{192} Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session, prepared by the Secretariat,UN Doc A/CN.4/657, 18 January 2013, para. 35

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territorial waters was illegal and against the sovereignty of the country. Their merciless gun shots cannot be taken as an act in self-defence or an ‘official act’ or in defence of the ship. It was purely a ‘private, illegal and criminal act, which may not be an act in sovereign capacity’. Thereby, the plea of sovereign immunity for the Marines by the Republic of Italy was rejected. Thereafter the Supreme Court had also reiterated the same views in the appeal. The judgment underscores the recognition of objective territoriality principle, passive personality and protective principles under the international law and also the restrictions imposed there under.

In the United States of America and other developed countries, the admiralty Jurisdiction is well developed and is actively supported by criminal laws of the land. This is not the case in India. Under the Merchant Shipping Act 1958194, a magistrate is required to make only a formal enquiry into a maritime casualty and forward the case to the proper court. In the Enrica Lexie case, the crime was primarily charged under the Indian Penal Code. Had the offence been charged also under the admiralty law, the families of the deceased seamen could have claimed proper compensation? As long as the admiralty law is not consolidated and ambiguity continues, it will be very difficult to adjudicate such cases and fix liability under the civil liability regime. The government has failed to address to these issues.

Issues Regarding Giving Access to Ships in Distress

As per the provisions of the SAR Convention, 1979195, when a maritime accident occurs, the rescue of persons in distress will be co-ordinated by a SAR agency on the shores. Wide co-operation is expected from coastal states on this behalf to save human lives. Although the right to seek place of refuge was well recognized under the International law- both customary and treaty196, there was

194 The Merchant Shipping Act, 1958, s.361
195 The International Convention on Maritime Search and Rescue, 1979
196 The SOLAS, 1974
no system covering search and rescue operations until the adoption of SAR Convention. Accordingly, world’s ocean are divided into 13 SAR regions, up on which every country participating has got specific region to monitor. The provisions of the convention if implemented properly would give the coastal states early information as to maritime accidents. They can take preventive measures against pollution.

India is a signatory to the SAR Convention 1979. With effect from 1st February 2003, the Indian Coast Guard\(^{197}\) has brought into supplementary ship Reporting system called the “Indian Ship Reporting System”\(^{198}\). The search and rescue operations under this system are co-ordinated through the Maritime Rescue Co-Ordination Centre\(^{199}\) at Mumbai. All Indian ships of 100 GRT or above and all foreign ships above 300 GRT are to participate and co-operate with this system when in transit through the Indian Search and Rescue Region\(^{200}\). All ships above 100 GRT irrespective of the flag carrying nuclear or hazardous cargo are also required to participate in this reporting system. All ships irrespective of the flag above 20 years are said to send the relevant report to INDSAR at ISRR. The format of the ship reporting shall be in accordance with IMO Resolution\(^{201}\) and special edition of Indian notices to mariners\(^{202}\).

\(^{197}\) Here in after to be referred to as the ICG  
\(^{198}\) Herein after to be referred to as the INDSAR  
\(^{199}\) Hereinafter to be referred to as the MRCC  
\(^{200}\) Herein after to be referred to as the ISRR. The Merchant Shipping Notice No. 7 of 2010, published under the MSA 1958. Section 355 of the Merchant Shipping Act, 1958 reads on the obligation and procedures to render assistance on receiving signal of distress  
\(^{201}\) The IMO resolution A.851 (20), General Principles for Ship Reporting Systems, 1997  
With effect from 1st November 1986, the Indian Navy, in co-ordination with the D.G. Shipping has introduced an Indian Ship Position and Reporting System\(^{203}\) for the safety of vessels navigating through the Indian Ocean and the Arabian Sea. This is co-ordinated through the Indian Naval Communication Centres\(^{204}\) at Mumbai and Vishakapatnam. All Indian vessels above 100 GRT and all foreign vessels about 300 GRT are to send report to these agencies as to the position to ensure maritime safety.

Majority of Indian ports lack the infrastructural and response systems as designed under the international conventions. As a result, an Indian port of safe heaven may be a distant dream for any vessel encountering distress in the coastal waters of the country. The safest option in the present situations in Indian port may be either to tow the vessel out from the port area or to deny the port entry.

**Weak Port State Control Regime**

India is a member of the Indian Ocean Memorandum of Understanding on Port State Control\(^{205}\). The Port State Control Officers\(^{206}\) inspect foreign ships in national ports to verify the compliance of international conventions on shipping.

In the year 2012, out of the total 5051 inspections carried out by the member states, India had done around 634, out of which 518 inspections were identified with deficiencies. The total number of detentions was just 119\(^{207}\).

The number of detentions is less primarily because of the weak enforcement of environmental regulations in ports. There is neither dedicated department nor sufficient officers for PSC. Its functioning is included under the Mercantile Marine Department which has several other duties to perform under its wing. So they are unable to effectively perform its role as PSC Authority.

\(^{203}\) Herein after to be referred to as the INSPIRES

\(^{204}\) Herein after to be referred to as the COMCENs

\(^{205}\) Herein after to be referred to as the IMOU

\(^{206}\) Herein after to be referred to as the PSCOs

\(^{207}\) The IMOU Annual report for the year 2012, Retrieved from www.imou.org, last accessed in March 2014
The far-reaching changes made in the international conventions on vessel safety and pollution control are merely repeated verbatim in the rules framed under the Merchant Shipping Act and by means of circulars issued by the Director General of Shipping in India. The Indian Ports Act, 1908 is obsolete and does not incorporate these changes into the port regulations. Considering the urgency and critical nature of the issue, the Indian Ports Bill 2011 is under consideration. As such, the Indian standards of PSC are very mediocre and the inspections conducted by Indian PSCOs are definitely below the target specified under the international law. This has facilitated the hassle free entry of unseaworthy vessels and increased pollution incidents in Ports.

Segregation of Enforcement Powers on Various Ministries and Departments- Ambiguity as to the Powers of the Indian Coast Guard

In India, provisions to ensure sustainable shipping lay scattered in a handful of legislation making it difficult to co-ordinate the enforcement under a single agency, especially in cases of marine pollution. The Coast Guard Act authorizes the ICG, to ensure the security of maritime zones of India, which includes control of marine pollution. The Coast Guard has the responsibility to prevent and protect the marine environment of the country and ensure safety in territorial waters.

Under the provisions of the Indian Ports Act, 1908 and the Major Port Trust Act, 1963, the Port Trust acting through the Conservator of Ports has to ensure safety and pollution control within the Port area. The Conservator, Deputy Conservator and Harbour Master are to enforce rules framed under the Act. The Act empowers the above mentioned officers to deny port clearance unless the

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208 No. PR-14019/14/20110-PG dated the 21/07/2011, See http://www.prsindia.org/uploads/media/draft/Draft%20Indian%20Ports%20Bill%202011.pdf, Once enacted this new Act will replace the Indian Ports Act 1908 and the Major Port Trust Act 1963

209 The Indian Coast Guard Act, 1978, Ch. II, s.4

210 Id., s.14 (1) and (2)
charges for violation of these rules are levied\(^{211}\). Therefore, the above mentioned authorities can prescribe port entry conditions and refuse to grant port clearance for transgressing vessels. In addition to these measures, criminal prosecution can be made against master and owner of the vessel for violations of port rules.

At present the ICG is exercising its functional responsibilities such as surveillance, combating oil spills, central co-ordination of the National Oil Spill Disaster Contingency Plan\(^ {212}\), inspection of vessels to ensure seaworthiness and detention of violators of anti-pollution provisions\(^ {213}\) only beyond the port limits\(^ {214}\). Hence, the Port conservator should get sufficient information from the ICG before taking any action against the violators. Unless this process is well co-ordinated and fast, timely detentions and control measures may not be effective. The Ministry of Environment and Forest also has functional responsibility to monitor and take remedial action in the event of marine pollution along the coastal side or beaches\(^ {215}\).

Omissions in clearly defining the powers of authorities have made the enforcement mechanism under the Act weak. For example, poaching by foreign fishing vessels in Indian waters is a common issue and the Act is totally inept when initiating criminal trial against offenders. It is not that poaching was not detected but in most cases, there was dilemma among enforcement agencies in fixing the authority so as to initiate proceedings against such vessels. Due to surveillance constraints and lacunae in legislation, not many cases are reported on violations of MZA. If at all, these prosecutions are against small ‘Dhows’, whose owners are never known and left to defend themselves. Thus, illegal fishing

\(^{211}\) The Indian Ports Act, 1908, s.43

\(^{212}\) Herein after to be referred to as the NOS-DCP plan

\(^{213}\) The MSA, 1958, s.356(g)(1)

\(^{214}\) The Allocation of Business Rules, 1961, Functional Responsibilities Allocated to Ministries/ Department as per Decision Taken at a Meeting of the Committee of Secretaries on 04 Nov 93, Retrieved from http://www.indiancoastguard.nic.in/ Indian Coast Guard/NOSDCP/Contingency%20Plan/DHQ%202.pdf

\(^{215}\) \textit{Ibid}
became a prominent issue and it is necessary to enact a more comprehensive legislation to deal with it so as to protect India’s maritime interests. Subsequently, the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981\(^{216}\) was enacted to resist illegal poaching by foreign fishing vessels.

The situations became even worst after the enactment of MZI, 1981. Often, violations of MZA were registered under the Indian Penal Code, Customs Act and the Passport Act. It created overlapping jurisdiction among the state police, customs and the coast guard. Thus, simultaneous proceedings were initiated under the Indian Penal Code, Customs Act and Indian Coast Guard Act respectively.

By clearly defining the role and hierarchy of enforcement agencies and by streamlining their activities under a central agency, i.e. the ICG, the enforcement regime could be made more efficient. The Indian Coast Guard Act should be revised so as to confer definite powers to ICG as the nodal agency to monitor, survey, enforce and punish the offenders contributing to pollution in the Indian waters instead of demarcating the same under different laws upon a handful of bureaucratic agencies.

**Conclusions**

The Maritime Policy of India aims at sustainable development of the shipping industry. The Indian admiralty law is not in pace with the dynamism in shipping operations. Unless, the law is consolidated and well defined, India’s port state jurisdiction will not be effective and in tune with the international regime. The port state control should be made an independent arm of the port authority which can solely dedicate its manpower and resources to control and monitor the vessels calling at Indian waters thereby increasing its effectiveness. If the entry of inferior quality ships is not regulated judiciously, it may question the very existence of the ports and the trade and economic prospects of the country will be in turmoil.

\(^{216}\) Herein after MZI, 1981