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Impact of COVID-19 on the freedom of the merchant ship's access to foreign ports

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ABSTRACT

Nowadays, merchant shipping is facing a new challenge in the context of COVID-19. The ships at sea may find themselves in need of immediate medical assistance relating to the crewmembers and/or passengers due to COVID-19. Besides, there is a problem with the change of ship crews in due time and their repatriation. Under international custom, coastal States keep their ports open for merchant shipping but may require the ship's master to take appropriate action to prevent a threat of danger. In cases of failure or urgency, the coastal State can exercise its authority in taking responsive action appropriate to the threat. The article analyzes the main issue - how reasonable are the actions of states that close their ports to foreign vessels in the light of COVID-19. In this paper, the practice of foreign and Russian ports in the context of the COVID-19 is assessed.

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1 Introduction

At the end of December 2019, the first cases of pneumonia of unknown origin appeared in the Chinese city of Wuhan. In a short time, they grew into a pandemic that suddenly flooded the whole of China. In February 2020, despite the persistent efforts of the Chinese authorities to take quarantine measures, the unknown disease quickly became global. The World Health Organization (WHO) has officially declared a pandemic of a new coronavirus infection – COVID-19 and on March 13, 2020, Europe became its center.

Under these circumstances, international shipping has fully experienced the negative consequences of the global pandemic, which has rapidly spread throughout the world. It is no exaggeration that COVID-19 has dealt a devastating blow to the shipping industry.

2 The primary victims

The first victims of COVID-19 were large cruise ships. The incident with the passenger liner *Diamond Princess*,

which was cruising on the Southeast Asia seas, got a big public response. Coronavirus infection was detected in one of the passengers, who went ashore in Hong Kong. After that, the liner was quarantined in Yokohama on February 4, with about 3,700 passengers and crew on board. Later 712 of them were infected, and 10 people died in Japanese hospitals. The passengers who were not found to be infected left the ship after quarantine, and the evacuation was completed on March 1, 2020.

Thus, the above passenger ship became the largest hotbed of the new virus. In this regard, the New York Times named the ship “a floating mini-version of Wuhan” [4].

The question arises: how justified and correct were the actions of the Yokohama port authorities, who put the huge ship in quarantine? It can be argued that it was the idea of quarantine with the simultaneous isolation of healthy and infected people on the same ship that led to the disaster. The enclosed spaces and the interlocking cabin air ventilation are probably the two main factors that led to the spread of the coronavirus on board the ship. It seems that under these circumstances, the most reasonable measures

would be the urgent evacuation of all passengers and crew with all precautions, the quarantining of the entire crew on the shore, and the complete disinfection of the ship.

Warships were no exception in the list of victims of COVID-19. So, the American aircraft carrier *Theodore Roosevelt* with more than 5,000 crew members onboard was affected at the end of March 2020, and around 600 people got sick. The commander was relieved of his duty.

Onboard the French warship *Charles de Gaulle* the coronavirus was detected in 1081 people out of 1,900 crew members.

In these circumstances, ports around the world have taken precautions that can be considered at least as controversial for their compliance with international law.

For example, on April 8, 2020, the Italian authorities refused to enter a ship of a German non-governmental organization with 145 rescued migrants on board, declaring that Italian ports can no longer be considered safe due to the coronavirus pandemic.

The American cruise ship *Westerdam* with 2,257 persons on board, was refused to disembark passengers in the ports of Taiwan, Japan, the Philippines, Guam, and Thailand. This is although that there were no coronavirus patients on board at all. It should be noted that only Thailand has declared that will assist any sick person on board and deliver food and water.

The Malaysian port of Penang has forbidden entry for the cruise ship *Costa Fortuna* with 2000 tourists on board, only because among them were 64 Italian citizens. The ship entered the port of Singapore, where all passengers were disembarked.

The passenger ship *Opera* was refused the port entry on Malta, despite that there were no suspected infections on board. The liner set a course to Sicily, where the tourists were allowed to disembark after the authorities made sure that the passengers and crew members did not have any COVID-19 symptoms.

The cruise vessel *Meraviglia* with 4,500 passengers and more than 1,600 crew members onboard was banned from the port entry of Ocho Rios in Jamaica and Georgetown in the Cayman Islands because the shipmaster has reported one sick man.

Thus, one of the factors that had hurt merchant shipping due to COVID-19 is the tendency to ban port entry for foreign ships, primarily for the passenger liners.

To evaluate the legality of the port authorities' actions during the COVID-19 pandemic, it's necessary first of all to consider the concept of freedom of ship's access to foreign ports and the port entry for ships in distress.

3 The concept of freedom of ship's access to foreign ports

The legal regime of seaports as an integral part of the internal sea waters of a coastal State is determined by its

legislation, of course, taking into account the international law regulations. Each state has the right to decide on the opening of certain ports of its own for the entry of foreign vessels. At the same time, the current practice shows that coastal States keep their ports open for international shipping in the interests of developing the economy and maintaining trade relations with other states. Today, there are no universal international treaties that provide for such obligations for States. This is one of the few ancient international legal customs that have been saved until now and can be considered as generally recognized.

As early as 1609, *Hugo Grotius*, the great Dutch legal scholar who is considered the "father of the international law", spoke out in support of the right of ship's access to foreign ports [5].

In medieval practice the free port entry became widespread. Perhaps the only exception was Japan, which pursued a policy of isolation for 250 years and kept all its ports closed to foreign shipping until 1868. In 2018, Japan celebrated the 150th anniversary of this event, which was a turning point in the country's history and marked the beginning of its establishment as the largest state in the world.

In 1923, the Convention and the Statute on the International Regime of Seaports were adopted in Geneva. Under their provisions, foreign sea vessels were granted the right to freedom of access to the seaports of the Contracting States.

Nevertheless, the attempt to conclude a universal international treaty established freedom of the port entry was not successful. The 1923 Convention and Statute were not widely supported.

Thus, attempts to translate the concept of freedom of ship's access to foreign ports into a treaty was failed. And now, within the framework of international law, this concept is reflected in the generally recognized legal custom according to which the seaports of coastal states are open to foreign ships in peacetime. This point is shared by most Russian and foreign scholars.

The concept of freedom of ship's access to foreign ports was studied in sufficient detail by Russian professor G. G. Ivanov. In his opinion, "it is now the custom to keep some sea commercial ports open for the entry of foreign merchant ships. Vessels of all countries should be allowed to enter these ports" [10]. It is impossible not to agree with this point, but at the same time to clarify that we are not talking about "some ports", but the overwhelming majority.

A proponent of the concept of ship's freedom of access to foreign ports is the well-known English scholar *D. J. Colombos*, who notes in his major book "The International Law of the Sea" that "in peacetime, commercial ports should be free for international communications; the freedom of access to ports granted to foreign ships includes the right to load and unload their goods, boarding and disembarking their passengers." [3].

The Finnish researcher *K. Hakapaa*, although critical of the freedom of access to ports, nevertheless noted that “most of the ports of the world are now open to international communication, and no doubt, this practice has a positive impact on the international community.” [12].

Some other scholars, in different forms, support the concept of ship’s freedom of access to foreign ports. Among them, in particular, *R. Laun*, *P. Guggenheim*, *A. Lowe*, etc.

Thus, as anyone can see that the concept of freedom of the ship’s access to foreign ports has been widely reflected in the doctrine of international law, represented by the studies of prominent legal scholars.

This concept is also reflected in domestic legislation. In this regard, *G. G. Ivanov* notes that it is not even a question of closing ports, but only of regulating the order of entry and the regime of the stay [10].

Russian legislation also contains provisions that provide for the freedom of entry of foreign vessels into Russian ports.

Thus, according to Article 6 of Federal Law N 155-FZ on 31.07.1998 “On Internal Sea Waters, the Territorial Sea and the Adjacent Zone of the Russian Federation” all foreign vessels, regardless of their purpose and form of ownership, may enter seaports open to foreign vessels. The only exceptions are warships and other State-owned vessels operated for non-commercial purposes.

By the Government Order of the Russian Federation N 1912-r on 29.09.2014 “On the opening of seaports for foreign ships”, 51 Russian ports are currently opened for international shipping.

Thus, under the established international legal custom and the domestic legislation of coastal States, a ship under the flag of all States, whether coastal or not have the right to exercise the freedom of entry into all open foreign ports.

Nonetheless, this conclusion requires some clarifications.

First of all, a coastal State, when opening its ports to foreign vessels, has the right to establish certain rules concerning the order of entering, the advance submission of information (e.g., ETA), the processing of relevant documents, etc.

As *R. Churchill* and *A. Lowe* emphasize, “coastal states have broad rights to establish conditions of access to their ports.” [2]. Central in this regard is the entrance procedure for the arriving ships carried out by the sanitary authorities of the port and is aimed at “the protection of public health” [8].

In the context of the spread of COVID-19, the port authorities of most countries of the world began to take additional measures regarding the order of entry for the foreign vessels. So, in many ports of the world, the Masters of incoming ships were required to take several measures before entering the port, including, in particular, daily two-time temperature control of each person on board, disinfection of ship, isolation of people with high temperatures,

etc. In some ports, the ships had to inform the port authorities about the state of health of all persons on board and provide a list of the ten previous ports of call.

Besides, in some ports, the landing of crew members and passengers of arriving ships was suspended for a period of usually two weeks. Such restrictions were introduced, for example, in several Russian ports (as mentioned above), Cyprus, Australia, China, Singapore, the Philippines, and other countries.

Such measures no doubt are reasonable from the point of sanitary and epidemiological protection of the population. If a coastal state introduces a regime of self-isolation for its citizens, then, apparently, similar measures will be legitimate for foreign citizens arriving at ports on the board of the sea vessels.

The validity of additional measures concerning the procedure of entering foreign ports is confirmed, in particular, by the provisions of the World Health Organization (WHO) Interim Guidance “Management of ill travelers at points of entry -international airports, seaports, and ground-crossings -in the context of the COVID-19 outbreak”, issued on March 19, 2020. This document will expire on March 19, 2022.

By the above Guidance, the country should establish and maintain a point of entry contingency plan, including the nomination of a coordinator and contact points for public health and other agencies (for example, maritime authorities) and services. All crew members and passengers onboard incoming vessels (travelers) should be assessed for the following: 1) Signs or symptoms of respiratory infection: a) fever greater than 38° C or feeling feverish; b) cough; c) breathing difficulties. 2) History of possible exposure to COVID-19: a) a history of travel to any country with ongoing transmission of COVID-19 within the last 14 days; b) a history of a visit to any health care facility in any country with ongoing transmission in the last 14 days; c) a history of contacts with a traveler with suspected or confirmed COVID-19 in the last 14 days.

The ship’s crew members and passengers suspected of having COVID-19 should be immediately isolated and referred to a pre-identified health care facility for additional evaluation. Public health authorities should also be notified.

If the Maritime Declaration of Health is not required for all arriving ships on an international voyage, the country may consider making its submission mandatory for international ships arriving from or passing through COVID-19 affected areas, as defined by the health authority.

It should be noted that the concept of freedom of ship’s access to foreign ports does not mean that a coastal State cannot declare some of its ports closed for international shipping. At the same time, such measures should be motivated, brought to the attention of the interested parties in advance, legally justified, and implemented as a non-discriminatory.

Information on any changes in the navigation situation, including the conditions of the port entry, is usually contained in the weekly "Notices to Mariners" published and distributed in Russian and English.

It should not be forgotten that a coastal State that takes unjustified actions concerning the entry of foreign vessels into a port may be subject to response measures by flag States. The possibility of such steps is provided for, for example, by Russian legislation. Thus, according to paragraph 2 of art.6 of the Federal Law 1998 "On Internal Sea Waters, the Territorial Sea and the Adjacent Zone of the Russian Federation" in respect of foreign vessels of States that have special restrictions on entry into their seaports in respect of Russian vessels, the Russian Government may impose retaliatory restrictions.

The judgments discussed above are valid for ordinary, routine calls to a foreign port, which in most cases involve the need to load/unload cargo or disembark / board passengers. However, the situation changes fundamentally when we have the port entry in distress.

4 The port entry in distress

In practice, the shipmasters sometimes face the problems of the so-called port entry in distress, when the ship must immediately enter the port of a foreign state to avoid a particular danger. Most often, such calls are associated with adverse weather conditions, forcing the ship to go to the nearest port of refuge. At the same time, other extraordinary circumstances, such as the need to provide urgent medical care to the crew members and/or passengers of the ship, including those who are sick with COVID-19, may also be a factor forcing the ship to deviate from its course and enter the nearest foreign port.

The port entry in distress in contrast to the usual entry of a ship into a foreign port has some distinctive features.

On February 12, 2020, «*Russian Newspaper*» («*Rossiyskaya Gazeta*») reported on the refusal of several ports to call the cruise passenger ship *Westerdam*. In this regard, the Bloomberg news agency was quoted about a certain marine expert who stated that "a cruise ship can count on help if she is in distress or when she runs out of fuel, and people are missing vital things."

Despite some obvious flaws in the wording, it is clear that the expert was referring to the port entry in distress.

The right of an emergency call is one of the most ancient norms of international maritime law, which developed in ancient times in the form of custom. Even during the struggle of Rome and Carthage for supremacy in the Mediterranean Sea, a treaty was concluded between these states in 508 BC, according to which Roman ships were forbidden to go further than the cape located in the north of the Gulf of Carthage, except when these ships sought refuge from a natural disaster or the pursuit of the enemy [6].

This noble international legal custom was also confirmed in the judicial practice of the XIX century. Thus, in

1809, in the case of the ship *Eleanor*, Lord Stowell stated that real and insurmountable disasters should serve at all times as a kind of pass for people based on human laws. In 1832, the French Court of Cassation in the case of the ship *Carlo Alberto* ruled that a ship in distress is in the civilized world under the protection of good conscience, humanity, and generosity.

In this regard, *D. Colombos* writes that none of the ports can ever be closed to foreign ships seeking shelter from the storm or forced to call due to a disaster [3].

Thus, in the international legal doctrine and centuries-old practice, the right of the port entry in distress has never been disputed. This is indeed a custom, in the full sense of the word, sanctified by centuries.

The fundamental textbook "International Law", published by a team of German authors in 2007, states that "usually the right of refuge for ships in need of assistance is considered generally recognized" [9].

Professor Y. Beats also considers the customary right of entry for ships in distress [1].

It should be noted that the Soviet doctrine of International Law, as well as the Soviet legislation, always followed this international legal custom. Moreover, the Soviet Union, in its Draft International Convention on the Regime of Ships in Foreign Ports, submitted to the International Maritime Organization (IMO) in 1974, in particular in Article 4, proposed to include a provision on the port entry in distress, if a ship is in distress or is in danger of disaster, or there are no fuel, food or water supplies, or there is a need for urgent repairs or urgent medical care to any person on board this ship.

In the "Shipmaster's Guide", published in the Soviet Union, stated that the port is considered to be displaced in the presence of unforeseen circumstances that threaten the safety of the ship when it is forced to take refuge from the weather, to make the necessary repairs to make the missing rations or to put a seriously ill crew member in a medical institution [7].

According to Y. H. Javad, an emergency call means cases when a ship cannot be at sea due to such unforeseen circumstances as a serious deterioration in the weather (storm, ice, fog), an accident of the hull or mechanisms, a lack of fuel, water, and food supplies, and therefore is forced to call at a foreign port or on a foreign roadstead to take shelter from the bad weather, make necessary repairs, or take the missing supplies. It is also considered forced to enter a seriously ill crew member for placement in a coastal medical facility if the ship does not have the necessary means to provide medical care [11].

Outstanding Russian legal scholar A. L. Kolodkin admitted the possibility of refuge in case of disaster or threats, and if necessary, emergency medical care to any person on board a ship if the ship is not harmful to the normal operation of the port [13].

Russian legislation regulates the procedure for such entry in sufficient detail.

Per article 9 of the 1993 Law of the Russian Federation "On the State Border of the Russian Federation" is not a violation of the rules of crossing the State border, in particular, the entry of foreign vessels, carried out by force: an accident or natural disaster, a severe storm, ice drift or ice conditions that threaten the safety of the ship; towing a damaged ship; delivering rescued people; providing urgent medical assistance to a crew member or passengers, as well as due to other emergency circumstances.

As we can see, the need to provide urgent medical assistance to the crew or passengers, including in cases of coronavirus infection, may be the basis for the forced crossing of the State border, which is not a violation of the law.

Moreover, it follows from the cited article that the list of extraordinary circumstances that give rise to such a forced crossing of the State Border is not exhaustive and can be expanded.

According to the provisions of this Law, in the event of a forced crossing of the state border, a vessel must immediately inform the Russian authorities and continue to act according to their instructions.

The Law does not specify the method of transmitting such a message, usually in such cases, VHF communication is used.

The procedure of entry in the disaster was further developed and specified in 1998 Federal Law "On the internal Sea waters, the territorial sea and the adjacent zone of the Russian Federation".

Article 9 of this Federal Law largely duplicates the relevant provisions of the previously cited Law of the Russian Federation "On the State Border of the Russian Federation", but at the same time contains a very important addition, which, in particular, states that all foreign vessels enjoy the right of the entry in distress without any discrimination under International Law.

Upon termination of the circumstances that caused the entry in distress, the foreign vessel is obliged to leave the waters of the coastal state after obtaining permission to leave.

Can the authorities of the Russian port refuse an entry in distress to a ship if there are patients with COVID-19 coronavirus infection on board? According to paragraph 7 of the above-mentioned Article 9 of the Federal Law, only emergency foreign vessels with nuclear engines or foreign vessels carrying nuclear or other dangerous or toxic substances or materials may be denied the right of entry in distress.

Moreover, the decision to refuse to exercise the right of entry in distress is made not at the local, but the federal level. This is authorized by an official of the federal executive authority for security (that is, the Federal Security Service of Russia), who can make such a decision independently or in consultation with an official of the seaport.

Therefore, if a foreign vessel carrying patients with COVID-19 coronavirus infection makes a call at a Russian port, it cannot be denied such a right.

Moreover, the need for such a call may not necessarily be due to the presence of coronavirus patients on board, who require urgent medical care and cannot be provided in ship conditions. It may be an entry due to the lack of food, potable water, or fuel.

It should be noted that a similar approach is reflected in the foreign maritime legislation of most coastal States. For example, the US Code of Federal Regulations states that every foreign vessel arriving at an American port must notify the port master at least 24 hours in advance, except in cases where the call is caused by the direct result of force majeure.

In New Zealand, under the Harbors Act 1950, ships entering any port in the event of a disaster or storm, to replenish water or food, must be exempt from all mandatory port charges, except for the actual services rendered.

The legislation of many coastal States specifies the conditions under which foreign vessels may be denied entry in distress, but most often in this case we are talking about ships with a nuclear power plant or carrying nuclear and other dangerous or toxic substances.

The port entry in distress due to a threat to human life is perhaps the most indisputable. Every year, more than 200 thousand people lost their lives at sea, and the international community takes all possible organizational and legal measures to save human lives. Even in the context of a pandemic, the coastal State's ban on port entry in distress is contrary to both international law and the principles of humanity.

5 The recent practice of Russian seaports to prevent COVID-19

On March 16, 2020, the Governor of the Murmansk region have signed a Decree "On measures to counter the spread on the territory of the Murmansk region new coronavirus infection (2019-nCoV)", under which it was forbidden to go ashore to crewmembers of all ships arriving from foreign countries to the ports of Murmansk and Kandalaksha if the date of arrival of the ship in ports and the moment of its contact with the shore of a foreign state was less than 14 calendar days. The Harbour Masters of Murmansk and Kandalaksha were responsible for ensuring this requirement.

This ban caused a sharp protest from the Russian Professional Union of Seafarers, which regarded this measure as discriminatory and encroaching on the labor rights of Russian seafarers in terms of the working and rest regime, as well as contrary to the Government Order of the Russian Federation on 16.03.2020 No. 635-r, according to which the restriction on entry into the Russian Federation does not apply to crew members of the sea and river vessels. Besides, the Chairman of the Russian Federation of Maritime Transport Workers referred to the practice of the port of Ust-Luga, where within a few hours the arrival of the vessel was registered in compliance with all quaran-

tine rules and there were no problems with changing the crew, unlike the Murmansk seaport.

Later, the Governor of the Murmansk Region canceled his Decree, but in the same edition, it “migrated” to the Decree of the Murmansk Region Government. Only the mention of the Harbour Masters was excluded. The Governor was informed that he did not have the right to give any instructions to the Harbour Masters, who is directly subordinate to the Federal Agency for Sea and River Transport.

The Arkhangelsk Region authorities followed the same way. The prohibition to go ashore to crewmembers is reproduced in the Arkhangelsk Region Governor’s Decree (The Arkhangelsk Region Governor’s Decree N 28-u on March 17, 2020 “On the coming into force of high alert to prevent the spread of new coronavirus infection (COVID-2019) in the Arkhangelsk region.”).

However, the Harbour Master of the port of Arkhangelsk was only recommended to ensure the implementation of this ban.

The Sakhalin Region Governor’s Decree (The Sakhalin Region Governor’s Decree N 16 on March 18, 2020 “On the coming into force of high alert to prevent the spread of new coronavirus infection (COVID-2019) in the Sakhalin region.”) recommended that the ship owners, the sea vessels visited the country where cases of the new coronavirus infection, when calling at ports of the Sakhalin region to leave the ships in quarantine for 14 days.

According to the TV company “Vladivostok” on March 20, 2020, the Harbour Master of the port of Vladivostok banned the entry of the cruise liner *Costa Neoromantica* due to order of the Federal service for supervision in the sphere of consumer’s rights protection and human welfare (Rospotrebnadzor).

Out of more than 60 seaports in Russia, this is the only port that has banned the entry of a foreign vessel. In most Russian ports, however, the adoption of non-contact thermometry of crew members and passengers and/or compliance with the mask regime was limited.

Thus, the analysis shows that the practice of both foreign and Russian ports regarding the entry and stay of ships during the COVID-19 pandemic varies significantly. In some seaports, a relatively liberal regime has been introduced, which provides, in particular, for the advance submission of additional sanitary and epidemiological information by the ship, the implementation of non-contact thermometry of crew members and passengers, the requirement to wear medical masks, etc. Other ports generally refuse port entry to foreign vessels, or the vessels are quarantined, and crew members and passengers are forbidden to go ashore for 14 days.

6 Conclusion

Based on the above, we can come to the following conclusions:

1. The issue of the freedom of ship’s access to the foreign ports is not a purely theoretical or doctrinal debate but the solution to a practical problem in a recent situation with COVID-19.
2. It is now a generally accepted international legal custom according to which the States keep the vast majority of their seaports open for foreign vessels.
3. The freedom of access of merchant ships to foreign ports is not absolute. The coastal State, when opening its ports, has the right to demand compliance with the established rules, and in the context of a pandemic, may impose additional restrictive measures concerning the entry of ships and the regime of stay.
4. The ships at sea may find themselves in need of immediate medical assistance relating to the crewmember’s and/or passenger’s safety of life due to COVID-19. In such a situation, the above-mentioned ships may be considered as a vessel in distress.
5. The coastal State should not refuse entry to ships in distress. When permission to access a port is requested, the coastal State should grant it, but also weigh all the factors and risks in a balanced manner.
6. A coastal State may declare some of its ports closed to international shipping. At the same time, such measures should be motivated, communicated to the interested parties in advance, legally justified, and implemented on a non-discriminatory basis. Failure to comply with the above may result in retaliatory restrictive measures (response measures) are an act perpetrated by one nation upon another in retaliation for a similar act perpetrated by the other nation.
7. The shipmaster performing the port entry in distress should be ready to justify the legality of such a call and carefully weigh all the risks associated with this decision.
8. One of the main problems that have emerged in the context of the COVID-19 pandemic is the lack of coordination between the port authorities and shipowners.
9. The experience gained during the coronavirus pandemic should be reflected in the relevant amendments to the national legislation.

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