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This article examines the concept of freedom of navigation and its role in contemporary maritime relations. The period from 2020 to 2025 has been marked by many challenges associated with the necessity to restrict communication between states for several reasons, from epidemiological to humanitarian. The ongoing tension in international relations implies that the increase in the number of armed conflicts may threaten the further implementation of freedom of navigation. At the same time, it may already be stated with confidence that the existing measures taken in connection with the invasion of Ukraine, as well as other conflicts, call into question the real implementation of freedom of navigation.

Keywords:

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MARE LIBERUM VS. MARE CLAUSUM: FREEDOM OF NAVIGATION IN THE CONTEXT OF THE EUROPEAN UNION RESTRICTIVE MEASURES

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Introduction

The relations formed within the framework of the international maritime law are complex and multidimensional, while this branch of law itself was formed for a considerable amount of time. A full-fledged legal system of maritime zones delimitation, as well as the procedure for their use, with establishment of rights and obligations of coastal states were formed as an act of international law only at the end of the XX century, when the United Nations Convention of the Law of the Sea (UNCLOS) was adopted. At the same time, the science of international law itself was formed much earlier, and attempts to create appropriate institutions, as well as to comprehend the role and belonging of maritime zones were made as early as in the XVI-XVII centuries.

Already from that moment, largely due to the activities of the Dutch philosopher Hugo Grotius, the concept of "free sea" – *mare liberum* – emerged. After that, the freedom of navigation as a principle was considered as an integral part of relations in marine traffic and navigation, while the World Ocean was perceived as *sui generis* condominium, the rights to which could not be claimed by separate states.

At the same time, history knows many examples when, in order to maintain public or state security, certain principles of international law, as well as the rights granted in accordance with these principles, were subject to restrictions. Despite this, the principle of freedom of navigation, as well as some subsidiary legal

institutions, such as, for example, the right of innocent passage, are subject to such restrictions only in emergency situations - for example, during the active phase of military operations in a water area that directly serves as a place of clashes between the belligerents.

However, the international escalation associated with the invasion of Ukraine, as well as a number of conflicts in the Middle East, prompted states to take certain measures that restrict freedom of navigation in its usual sense. Thus, the European Union and the United States have adopted a ban on entry into their ports for ships that are in one way or another affiliated with the Russian Federation, and have also adopted a number of other measures that significantly limit the possibility of free navigation by such ships. The peculiarity of these measures is that they can only be called "economic" (in the sense of EU legislation in the field of restrictive measures) with a high degree of conventionality. In turn, this peculiarity gives rise to a discussion regarding the justification for the use of such measures, as well as whether such measures contribute to the emergence of *mare clausum* to replace *mare liberum*.

Historical and political context of freedom of navigation emergence

The formation and understanding of freedom of navigation as a principle of international law began in the XVII century, and this process is inextricably linked with the name of the Dutch philosopher and lawyer Hugo Grotius. It should be noted that the period from the second half of the XVI to the beginning of the XVII century was characterized by significant changes in the social and political life of Europe. In 1566, the Dutch Revolution began, which received an alternative name in historiography – the Eighty Years' War. This conflict, which ended in 1648, involved not only the seventeen provinces of the Netherlands and the Spanish Empire, which sought to get rid of Spanish rule, but also many major European powers of the time – France, England, the Ottoman Empire, Portugal. Moreover, this process was part of such an existential phenomenon for international relations and the history of Europe as the Thirty Years' War. Almost all the states of the continent participated in a series of conflicts that make up the Thirty Years' War. The Treaty of Münster, which marked the end of the Dutch Revolution, together with the Treaty of Osnabrück, constitute the Peace of Westphalia. It was these agreements, which ended the main conflicts of the Thirty Years' War, that formed the basis of the Westphalian system of international relations. A number of principles of this system, including the principle of the balance of power, the inviolability of borders, and the recognition of national sovereignty, are still in force in international law today, having been enshrined in Article 2 of the UN Charter.

Hugo Grotius, being a contemporary of the events discussed above, was engaged in research in the field of international law, however, due to circumstances, he gave priority to international humanitarian law – he attempted to understand war as a legal and political phenomenon, put forward the concepts of just and unjust wars. Nevertheless, Grotius simultaneously practiced as a lawyer, and it was this circumstance that brought him closer to the problems of international maritime law.

Thus, in 1603, the Dutch Revolution was in its first phase, i.e. before the Twelve Years' Truce. Portugal, being an ally of Spain, was at war with the Netherlands, and Admiral Jacob van Heemskerck, captain of the Dutch East India Company, captured a Portuguese ship carrying Chinese porcelain in battle. The porcelain was brought to Amsterdam and sold for a significant sum of money – 3.5 million guilders (Wilson, 2009, p. 254). However, from a legal point of view, the situation was complicated by the fact that van Heemskerck was not authorized to attack the vessel and capture the cargo by either the Company's leadership or the Provincial government. The situation caused a split among both the Company's shareholders and society: some believed that the use of force was entirely justified, firstly, based on the state of war, and secondly, guided by the significant profit that had been made as a result of the capture of the Portuguese vessel. At the same time, many influential representatives of Dutch society, mainly Mennonites and members of other pacifist Protestant denominations, considered such actions not only illegal, but also immoral. Despite the fact that there were more supporters of the first approach, the situation risked turning into a major conflict, as a result

of which representatives of the Dutch East India Company turned to Hugo Grotius. At that time, he already enjoyed a reputation as a highly qualified lawyer, and this is why the Company counted on him to be able to justify the legality of the cargo's seizure.

It is important to realize that despite the fact of extreme abuses by the Spanish crown, expressed in particular in monstrous scale executions, the struggle against Protestantism by means of the Spanish Inquisition, reprisals against key figures of Dutch society, in international law and even in the philosophical thought of that time there was no concept of a war of national liberation, a struggle of peoples for self-determination. As a result, in the eyes of the European public, the Geuzen who rebelled in the Netherlands were only rebels who planned to split Spain and take away its legitimate territories (Ittersum, 2003, p. 516). To top it all off, the above-described capture of the Portuguese ship took place in the Strait of Malacca, i.e. in close proximity to the Portuguese colony of Malacca. Given these facts, Grotius faced an extremely difficult task, since in order to legitimize the seizure of the ship it was necessary to question and challenge the fundamental postulates of international law of that time.

The result of Grotius's efforts was the fundamental treatise *De Indis* ("On the Indies"). Beyond any expectations of its "customer", the Dutch East India Company, this treatise was focused not on the narrow goal of legitimizing privateering as such, but represented a much broader act of apology, in which such "sea hunting" was presented as a legal strategy for the struggle between the two hegemons – Spain and the Netherlands (Ibid, p. 524). The treatise "On the Indies" was not published during Grotius's lifetime – work on it was completed in 1605 and, probably, by this time the issue of legitimizing the actions of the Dutch East India Company was not so urgent. At the same time, in 1609, Chapter XII of the treatise was published as a pamphlet. It was called *Mare Liberum* (the Free Sea) and was dedicated to the fundamental philosophical concept of the treatise – the principle of the free sea.

The first argument that Grotius used to justify the attack on the Portuguese vessel concerned the issues of fairness of the hostilities conduct – as discussed earlier, according to Grotius, the ship was plundered by the Netherlands lawfully and fairly, since Portugal had previously carried out similar acts against Dutch ships, and in fact, the Dutch response was intended to stop such attempts. In turn, the second argument was intended to answer the main thesis of Portugal in this dispute. Thus, the Portuguese pointed out that the attack took place in the Strait of Malacca. This water area was adjacent to Malacca (the Malay Peninsula), which was a Portuguese colony. As a result, Portugal considered this water area as its own, and disputed not only the right of the Dutch ships to attack, but also the right to conduct trade in this area without the knowledge of Portugal as such.

In turn, *in Mare Liberum* Grotius substantiates the opposite point of view. At the beginning of the pamphlet, he develops the ideas expressed by Francisco de Vitoria and other representatives of the Salamanca School and concerning the right to communication and human society – *jus communicationis et societatis humanae*. Thus, Grotius notes that the ocean was given by God to all the peoples of the world, and even the earliest provisions of the law of peoples, *jus gentium*, enshrined in numerous digests and institutions, supported this point of view. In this regard, the ocean can be used by all the peoples of the world without any restrictions and cannot belong to a specific state, since such a distribution of water areas would make trade and other interactions between societies impossible. Therefore, Grotius considers the World Ocean as a kind of "condominium", the rights to which are equally held by all countries of the world. At the same time, the philosopher does not deny that the coastal state has the right to the waters adjacent to its territory, but points out that the width of these waters must be limited to reasonable limits and correspond to the ability of the coastal state to exercise effective control over it (Grotius, 2004, p. 13).

The concept put forward in The Free Sea was extremely useful for the Netherlands. At the beginning of the 17th century, the Netherlands entered into an active struggle for colonies, and considering the World Ocean as a common space allowed free movement between different continents, subjugating certain territories through the institutions of "soft power" – missionary activity, trade, etc. At the

same time, the emerging colonial empire had many rivals: in addition to the traditional enemy in the person of Spain, England also had certain interests that conflicted with the interests of the Netherlands. The confrontation took place not only in the military (there were three Anglo-Dutch wars in the XVII century), but also in the philosophical field. Thus, in 1635, the English lawyer and politician John Selden presented the treatise "The Closed Sea" (*Mare Clausum*). Drawing on the same doctrines and concepts as Grotius, namely the law of nations and natural law, he argued that the sea could not be considered the common property of mankind, since it essentially had the same legal characteristics as land. In other words, part of the oceans could also belong to a state, a company or an individual. In turn, the sea could only be "free" if the vessel passing through it did not threaten the national interests of the state in question, and if its passage was agreed upon with that state (Chisholm, 1911, p. 600). Such rhetoric was dictated, as in the case of Grotius's work, by material considerations – at the time of writing, England owned virtually the entire northern part of the Atlantic Ocean. In this regard, it was important for the English crown not only to hold on to these waters, but also to provide a justification for owning them.

However, it was Grotius's concept that ultimately prevailed. The main source of international maritime law, namely the UNCLOS, established such concepts as the high seas – the maritime space located beyond the territorial waters and other maritime spaces of states (UNCLOS, Art. 87), and the international seabed area – the part of the seabed beyond national shelves, i.e. under the high seas (Ibid, Art. 133). It was stated that these spaces constitute the common heritage of mankind, and no state can claim sovereignty and sovereign rights with respect to these zones or their resources.

In addition, the Convention introduces the concept of innocent passage. It is understood as the continuous and rapid crossing of the territorial sea of another state by a foreign vessel. At the same time, the vessel has no right to carry out any activity in the territorial sea and must use it exclusively for the purpose of movement (Ibid, Art. 19). The coastal state has the right to take measures to ensure the safety of innocent passage and even restrict it in the event of threats to security, but does not have the right to completely prohibit it or introduce a permit procedure for its implementation.

Thus, at the beginning of the XXI century, freedom of navigation has transformed from a custom into a codified norm of international law, to which most states of the world are subject. The delimitation of maritime spaces, the principle of freedom of navigation, the right of innocent passage and the established width of the territorial sea of 12 nautical miles have become commonplace, a rule that enjoys authority in international relations.

Restrictive measures of the European Union concerning the exercise of freedom of navigation

As already noted, relations in the sphere of international navigation are characterized by a high degree of interdependence of the subjects. Before the development of a unified legal framework in this sphere, namely the UNCLOS, the rules for determining maritime spaces, as well as the procedure for passage through these spaces, were often established by states independently. Such an arbitrary approach led to the violation of the rights of other states to access the maritime spaces and resources of the World Ocean. The system of maritime spaces provided for in the Convention contributed significantly to the solution of this problem.

Thus, one of the most fundamental rights that a vessel of any state has is the right of innocent passage through the territorial sea of another state. Innocent passage can be carried out for two purposes

1) rapid non-stop crossing of the territorial sea,
2) entry into or exit from a port.

At the same time, a coastal state can restrict innocent passage. Such a restriction must be justified by security considerations.

Thus, the UNCLOS left certain authorities to coastal states in terms of restricting the right of innocent passage. However, any such restriction must be based on specific threats to the security of the coastal state and must be applied without any kind of discrimination. In other words, this right is not absolute, but any restrictions must be based on objective circumstances.

The tense political situation that has developed in recent decades has contributed to the reduction of opportunities for the exercise of freedoms that are an integral part of maritime law, in particular the right of innocent passage. Often this is a direct consequence of a conflict, as a result of which the use of certain waters becomes unsafe. At the same time, some restrictions arise as a result of the above-mentioned clause in the UNCLOS, which allows coastal states to independently limit the right of innocent passage due to the presence of a security threat. Each of these situations poses a direct threat to the fundamental principle of the maritime law – the freedom of navigation, and also contributes to the destabilization of international relations in the field of navigation. In connection with the significance of the consequences of such restrictions, the restrictive measures taken by the European Union against the Russian Federation are of particular interest.

The EU-RF foreign policy relations have been deteriorating significantly since March 2014. On 31 July 2014, the EU Council adopted Regulation No. 833/2014. The act was adopted in accordance with Article 215 of the Treaty on the Functioning of the EU (TFEU), which provides for the possibility of introducing restrictive measures against natural or legal persons, groups, non-state entities, as well as the suspension or reduction of economic and financial relations with third countries (TFEU, 2012, Art. 215).

In its original version, the Regulation provided for targeted restrictions, mainly related to the provision of dual-use goods or technologies to individuals, legal entities, organizations and state authorities of the Russian Federation. However, in February 2022, the situation changed significantly: the EU began to supplement Regulation No. 833/2014 with new restrictive measures. Initially, the EU maintained a targeted approach, but with the escalation of the conflict in Ukraine, the EU began to introduce restrictions affecting certain sectors of the Russian economy.

As part of the fifth package of restrictions, Article 3ea was added to Regulation No. 833/2014. This article provided for a ban on access to ports in the EU for any vessel registered in the Russian register of ships and flying the flag of the Russian Federation. At the same time, this restriction also applied to vessels that changed their flag to the flag of any other state after 24 February 2022.

First of all, it should be noted that initially Regulation No. 833/2014, as well as the EU sanctions policy, had a clear economic nature. Thus, the explanations of the European Commission directly indicated that the main goal of the sanctions restrictions was to weaken the Russian economy, since this measure would result in Russia's inability to finance military operations (Consolidated FAQs, 2022, p. 7).

At the same time, it seems that the measure that provides for a ban on access to ports for ships that fly a certain flag is not economic in nature. This fact significantly distinguishes this measure from other restrictive measures that the EU has taken against Russia. In addition, its unclear focus raises many doubts about its actual effectiveness. For example, Regulation No. 833/2014 contains many other measures that were directed against the Russian fleet - in particular, European companies were prohibited from supplying spare parts, servicing or bunkering ships under the Russian flag. This measure is objectively economic, unlike the usual ban on entry into ports.

In addition, identifying a vessel under the Russian flag with the Russian Federation as such raises significant doubts. It is no secret that ship owners from various countries of the world can use the flag of any other state at their own discretion. As a rule, this is done to optimize port and other fees or simplify work in the region. A vessel with the Russian flag may belong to a ship owner from any other state, while the crew of this vessel may be citizens of a third state. Based on this, the idea of determining the affiliation of a vessel by its flag does not seem rational.

It should also be noted that the Regulation in question lacks specifics regarding what exactly should be classified as vessels. First of all, attention should be paid to the definition of a vessel, as set out in paragraph 3 of Article 3ea of the Regulation. Thus, a vessel in the context of restrictive measures should be understood as "a ship falling within the scope of the relevant international conventions" (Regulation 833, 2014, Art. 3ea). This definition does not indicate a specific convention, the provisions of which should be followed. In the clarifications of the European Commission on this issue, it

was stated that "relevant international conventions" should be understood as the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Convention on Load Lines. At the same time, the European Commission indicated that the restrictions in any case apply to a ship with a gross tonnage of more than 500 register tons used for commercial purposes in international transport (Consolidated FAQs, 2022, p. 307).

This explanation appears contradictory. The conventions cited by the Commission contain substantially different definitions of a vessel. Thus, the provisions of SOLAS do not apply to warships and cargo ships of less than 500 gross register tons, ships without mechanical means of propulsion, wooden ships of primitive construction, fishing vessels and pleasure yachts (SOLAS, 1974, Rule 3). The Load Line Convention similarly does not apply to warships, fishing vessels and pleasure yachts, but for cargo ships there is a limit of 150 gross register tons (CLL, 1966, Art. 5). According to the provisions of MARPOL, a vessel is any type of vessel operating in the marine environment (MARPOL, 1973, Art. 2).

The existing contradiction has given rise to practical problems. Thus, at the time the restrictions were introduced, the Shtandart vessel, a replica of the frigate of the same name from the time of Peter the Great, Emperor of the Russian Empire, was navigating through EU waters. Despite the restrictions, the frigate continued to sail between EU ports. This caused discontent among many groups in the EU, who tried to extend the ban on entry into EU ports to the vessel. An appeal was initiated to the International Maritime Organization (IMO) with the question of whether the Shtandart falls under the scope of "relevant international conventions" (Grua, 2023). IMO representatives avoided a direct answer, referring to SOLAS Rule 3 and called for the use of this convention, since other conventions are industry-specific. At the same time, according to SOLAS Rule 3, "wooden ships of primitive construction" are not covered by this convention.

However, in April 2022, the vessel was banned from entering EU waters. In an attempt to circumvent the ban, the shipowner changed the flag of Shtandart to the Cook Islands, but in June 2024, the definition of a vessel in the Regulation was expanded to mean "a ship falling within the scope of the relevant international conventions, including replicas of historical ships".

Such an amendment seems to be extremely casuistic, since it regulates in detail relations of private significance, to the detriment of general principles and relations subject to legal regulation. But even abstracting from a detailed legal analysis of this provision, it becomes obvious that the European legislator deliberately chose the path of completely closing the EU waters to ships that are in any way related to Russia – even if such a relation is indirect, as in the case of Shtandart. At the same time, it is difficult to say with certainty that this restriction is dictated by security requirements or is connected with the EU's desire to deprive Russia of income. Given this circumstance, it becomes obvious that this provision was added to Article 3ea for purely political reasons.

Conclusion

The restrictive measures related to the ban on entry into EU ports of ships flying the Russian flag do not, in a narrow sense, constitute an unconditional violation of freedom of navigation as a principle – it is obvious that these ports are part of the territorial waters of the EU, and the relevant states, as well as the EU as a whole, have the right to independently determine the rules for admitting foreign ships into them. This idea does not contradict the concept of the free sea, since Hugo Grotius himself insisted that states should be granted broad autonomy in the territorial sea, and in a political sense this concept is a manifestation of the sovereignty of states. At the same time, it seems that in a broad sense the concept of the free sea, as well as freedom of navigation as such, stems from the concept of *jus communicationis et societatis humanae*, based on which representatives of humanity should enjoy the right to interact with other societies, and it is for this purpose that the Ocean should be reserved from any legal claims of states. In turn, restrictive measures aimed only at banning entry into ports for ships under a certain flag clearly contradict this idea. In addition, such a measure does not contribute to the declared goal of a

fair response to aggression – it is doubtful that "replicas of historical ships" pose a threat to the security of Ukraine, the EU or in any way contribute to ending the conflict.

Thus, it is premature to call the ban on the entry of Russian ships into European ports the enthronement of the *mare clausum* concept. At the same time, it should be considered that any measures taken by the EU are perceived by the world community and may also be used in other circumstances by other subjects of international relations. With the growing number of armed conflicts and even simple political tensions, the isolation of the seas may become a common measure taken against hostile states – hostile not in the sense of participation in a general armed conflict, but in the sense of political relations. If such a trend is accepted, the World Ocean risks being divided into zones of influence, and then it will be possible to state a transition to closed seas. Moreover, given the perception of this approach at the international level, this measure could backfire on the EU – if it were applied, for example, by China, which disapproves of EU companies operating in its waters. It seems that in order to avoid such a situation, any actor in the restrictive measures regime shall apply a targeted approach and treat the introduction of any measures within the framework of this regime with reasonableness.

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