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The Right of Entry into Maritime Ports in International Law

A. V. LOWE*

Sometimes it is asserted that as a matter of customary international law a right of entry exists for foreign merchant ships into a State's maritime ports. The Tribunal in the arbitration between the Saudi Arabian government and the Arabian American Oil

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Company (Aramco) stated: "According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require." This statement has become the leading authority for a right of entry. However, the Tribunal in the Aramco arbitration was mistaken in advancing this proposition of law. The passage cannot stand as authority for a right of entry.

This article will examine the Aramco arbitration together with the authorities upon which the Tribunal relied. It will also consider other authorities and sources of law which might offer the evidence in support of a right of entry. The second part of the article will attempt to define a right of entry, and it will discuss the sparse precedents of State practice. It will then review the arguments advanced by publicists concerning the right of entry. Finally a formulation of the current body of law will be attempted, suggesting that no right of entry has been established in customary international law.

THE ARAMCO ARBITRATION OF 1958

The Facts

At issue in the Aramco arbitration was the interpretation of a 1933 agreement between the Saudi Arabian government and Aramco. Article 1 of the agreement accorded Aramco "the exclusive right, for a period of sixty years . . . , to explore, prospect, drill for, extract, treat, manufacture, deal with, carry away and export petroleum." In 1954 the Saudi government concluded an agreement with A. S. Onassis which provided for the establishment of a fleet of tankers to sail under the Saudi Arabian flag. The fleet was to be operated by the Saudi Arabian Maritime Tankers Company Ltd. (Satco), a company formed by Onassis for this purpose. The 1954 agreement further provided that the Saudi Arabian government would compel all oil companies operating under concessions in Saudi Arabia to use Satco tankers when shipping their oil from Saudi Arabia. Included within this group was Aramco. However, Aramco argued that the priority right to transport given to Satco conflicted with the "exclusive right to carry away and export petroleum" which it had been granted in the 1933 agreement. The Saudi Arabian government denied the existence of any conflict, claiming that Aramco's exclusive rights extended only to the area

covered by the concession, not to the shipping of oil beyond Saudi Arabian territory.

The Award

The Tribunal held that the 1933 agreement applied to the distribution of oil both within and without the concession area. Thus, the enforcement of Satco's "priority right to transport" under the 1954 agreement amounted to a breach of the 1933 agreement for which the Saudi Arabian government was liable.\(^3\) This conclusion was all that was necessary for the resolution of the dispute. Nevertheless, the Tribunal went on to comment upon the right of entry into ports in customary international law. The Tribunal apparently embarked upon this topic on its own initiative. Aramco had not argued in either its written or its oral submissions that a right of entry to Saudi Arabian ports existed for their customers' ships. Rather, Aramco's counsel had relied upon the company's rights under the 1933 agreement.\(^4\) In fact, counsel for Aramco impliedly recognized that no general right of access existed. He contrasted the "ports of Saudi Arabia, which form part of Saudi Arabian territory, and over which His Majesty has full and unrestricted sovereignty" with "the territorial waters contiguous to the coast . . . over which the sovereignty extends subject to certain limitations generally acknowledged in International Law."\(^5\)

The Tribunal, though asserting that a general right of entry to maritime ports existed in customary international law, acknowledged that States had a right to supervise entry: "International case-law and doctrine unanimously admit that "for the purpose of

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3. The Tribunal noted that "Aramco can exercise this right of transport as it chooses, by such means and on such terms as Aramco may deem advisable, whether by tankers owned or chartered by it, or by the conclusion of maritime sales f.o.b. in which its buyers themselves undertake to supply the tankers and to effect the transportation, or by any other means at its discretion, with the only exception of transport by aeroplanes." \(\text{Id. at 227.}\)


5. \textit{Id.} at 333.
furthering its commercial, fiscal and political interests a State must be able to supervise all ships entering, leaving or anchoring in its territorial waters." Nevertheless, the Tribunal thought that:

"The territorial sovereignty of the State over its means of maritime communication is not unrestricted. It can only be exercised within the limits of customary international law, of the treaties the State has concluded and of the particular undertakings it has assumed.

According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require."

These statements demonstrate the Tribunal's belief that in addition to rights of entry established by treaty, a right of entry exists under customary international law. Thus the Tribunal concluded that:

"Freedom for foreign vessels to enter the ports of a State implies the right to load and unload goods. It follows that [Aramco], by virtue of the Law of Nations, is plainly entitled to sell its oil... to any purchasers it chooses, under such terms and conditions as are agreed upon with them, and thus to conclude f.o.b. sales, in which tankers are supplied by the buyers."

However, this conclusion had already been reached by construing the 1933 agreement. The discussion of a general right of access was superfluous. Nevertheless, the comments could be considered a correct statement of the law if in fact they accurately reflected the authority on the question.

What authority did the Tribunal cite for its great principle of public international law? First, it cited Guggenheim's *Traité de droit international public*. Second, it claimed that the principle was "clearly provided in Article 16 of the Statute on the international regime of maritime ports, of 9 December 1923," which was annexed to the Geneva Convention on the International Regime of Maritime Ports. Neither authority, both of which will be examined, lends support to the "great principle" which the Tribunal believed it had announced.

*The Authorities*

Guggenheim

The material passage of the Guggenheim work cited by the Tribunal is short and to the point:

6. Aramco Tribunal, supra note 2, at 212.
7. Id.
8. Id.
Seaports are ... integral parts of the territory of the State. They belong to its maritime ways. Nevertheless, customary international law, bilateral treaties, as well as the Statute on the Regulation of Maritime Ports of December 9, 1923 ... limit considerably the territorial sovereignty of the State.

Seaports are in principle open to foreign commercial vessels and may be closed only when the vital interests of the State so require.9

Despite the clear wording of this passage, Guggenheim may not have intended to suggest the existence of a general right of access. In his observations on M. Castberg's draft report to the Institute of International Law on the distinction between the territorial sea and internal waters,10 Guggenheim wrote:

Authors who affirm that the coastal State does not have the right to declare a port closed to foreign commercial vessels do not state a rule consistent with positive law. It is a question of a presumption and not of an obligation. I held the same point of view in my Lehrbuch des Volkerrechts, volume 1, page 381, note 139.11

This viewpoint does not render impossible a rule forbidding closing of all the ports of a State or a rule forbidding closing except under special circumstances. However, Castberg, with whom Guggenheim expressly agreed, denied the existence of any residual right of entry in customary international law. Castberg noted that:

One may lay down as a principle that the access to the ports of a State is open to foreign vessels, on condition, however, that the State in question has not established regulations to the contrary. But it is a question here ... of a presumption and not of an obligation.12

9. Les ports de mer sont ... parties intégrantes du territoire de l'État. Ils appartiennent à ses voies de communications maritimes. Toutefois, le droit international coutumier, les traités bilatéraux, ainsi que le Statut sur le régime international des ports maritimes du 9 décembre 1923 ... limitent d'une façon appréciable la souveraineté territoriale de l'État.

Les ports de mer sont en principe ouverts aux navires de commerce étrangers. Leur fermeture n'est pas admissible que si les intérêts vitaux de l'État l'exigent.

GUGGENHEIM, supra note 1.


11. [L]es auteurs qui affirment que l'État riverain n'a pas la faculté de déclarer un port fermé aux navires de commerce étrangers n'enoncent pas une règle conforme au droit positif. Il s'agit en effet d'une présomption et non d'une obligation. J'ai soutenu le même point de vue que vous dans mon Lehrbuch des Volkerrechts, tome 1, p. 381, note 139.

12. "[I]l peut être posé en principe que l'accès des ports d'un État est ouvert aux navires étrangers, à condition toutefois que l'État en question
Even if it is assumed that Guggenheim asserted a right of access, his authority for such a right was inapposite. He cited Gidel and Ralston for the proposition in the last paragraph of his *Traité (supra)*, and in fact neither authority supports the proposition.

**Gidel**

Gidel began by noting the resolutions adopted by the Institute of International Law at its 1898 and 1928 sessions. The 1898 text provided that “[a]s a general rule access to ports . . . is presumed to be open to foreign vessels.” This was amended in the 1928 to read “[a]s a general rule access to ports . . . is open to foreign vessels.”

Gidel, who was the Rapporteur for the commission drafting the 1928 text, had noted that “[t]he text of 1898 posed only a presumption of openness . . . but it did not impose any obligation on the State to maintain its ports open . . . . The [1928] text, on the contrary, lays down this obligation.” Although the 1928 text was adopted by a large majority, it laid down a rule de lege ferenda. Gidel later wrote: “It cannot be denied that the progressive solution, clearly in accordance with doctrine—with which the Institute of International Law sided—is ahead of present day practice.” Thus, the 1928 text was without binding effect, and any value which it would have had as an exposition of the views of jurists was severely restricted because the text was not generally considered to reflect the state of the law.

Gidel also outlined State practice regarding admission to ports. He cited Fauchille’s note on the Portendick incident of the nineteenth century.

At the time (1834) the conflict which was to come to a head in the present arbitration rose, it was admitted without difficulty that a State could arbitrarily close its ports to foreign vessels. This is because commerce among States was considered not as a true right, accompanied by correlative duties, but as something discre-
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During the absolute master of its territory, every State was free either to establish relations with other nations, or to refuse to have any communication with them. This doctrine was clearly affirmed by all the authors who were authorities in the nineteenth century.17

Gidel also commented on the closure of Buenos Aires: "The same doctrine still prevailed at the time when the matter of the closing of the port of Buenos Aires was settled by arbitration (August 1, 1870)." He cited documents connected with the closure to support his argument.18

Although at one point Gidel seemed to assert a right to trade,19 his conclusion on the state of the law during the early twentieth century appears unambiguous: "[T]he rule which remains in force in general international law is that of the simple presumption of openness of ports to foreign vessels, but not of the obligation to open ports to those vessels."20 The same view of the law is implicit in Gidel's citation of the Orinoco arbitration21 and in his opinion that no right of innocent passage existed for foreign ships passing through territorial waters to ports.22 There could be no

dans le sens de la doctrine—à laquelle l'Institut de Droit International s'est rangé—est en avance sur la pratique actuelle." 2 GIDEL, supra note 13, at 41; cf. [1928] 35 ANNUAIRE 200-16, supra note 10.

17. A l'époque (1834) où s'éleva conflit qui devait aboutir a present arbitrage, il était admis sans difficulté qu'un Etat pourrait arbitrairement fermer ses ports aux navires étrangers. C'est que le commerce mutuel des Etats était considéré non comme un droit veritable, accompagné d'un devoir correlatif, mais comme un simple faculté. Maître absolu de son territoire, tout Etat était libre soit d'entrer en rapports avec les autres nations, soit de refuser toutes communications avec elles. Cette doctrine était nettement affirmé par tous les auteurs qui faisaient autorité du commencement du XIX° siècle.

18. 2 GIDEL, supra note 13, at 43. "La même doctrine prevalait encore au moment où fut tranchée par arbitrage l'affaire de la fermeture du port de Buenos Ayres (1er aout 1870)." I A.G. LAPRADELLE & N.S. POlLiTS, RECEUd DES ARBItRAGES INTEnTioNALs 532 (1905) [hereinafter cited as LAPRADELLE-PoLliTS]. In fact the British government acknowledged the legality of the closure and claimed damages for injury flowing from the lack of notice of the closure. II id. at 664 (1924).

19. GIDEL, supra note 13, at 45.

20. "[L]a règle demeurant en vigueur dans le droit international général [est] celle de la simple présomption de l'ouverture des ports aux navires étrangers, mais non celle de l'obligation d'ouverture des ports à ces navires." Id. at 50.

21. See text accompanying note 24 infra.

22. 3 GIDEL, supra note 13, at 204. Gidel claimed that this was the generally accepted view.
general right of entry to ports without a right of access through territorial waters. Thus Gidel is not authority for the existence of a general right of entry.

Ralston

Ralston's\textsuperscript{23} views are so clearly opposed to Guggenheim's that it is difficult to imagine why Guggenheim cited him. The Ralston citation, which refers to the Orinoco case, reads as follows:

In the case of the Orinoco Steamship Company the umpire recognized [a Government's] "right to open and close, as a sovereign on its own territory, certain harbours, ports and rivers in order to prevent the trespassing of fiscal laws" and said that this right could not be denied, much less "when used in defence not only of some fiscal rights, but in defence of the very existence of the Government..."\textsuperscript{24}

If the most which can properly be said of this case is that it does not support the existence of a right of entry, Ralston's next paragraph more clearly presumes that no such right exists:

In the Poggioli case, damages having been claimed for the closing of a port with consequent injury to the commerce of the claimant, and it having been alleged that the reason for such closing was entirely insufficient, and that the port was closed simply as a matter of spite towards the claimants, the umpire remarked:

"This may have been the case, but the umpire has nothing whatever to do with the reasons inducing the government to close the port. The umpire assumes that it was within its police power to close it, and no contract existing between the Poggiolis and the Government (as in the Martini case), by virtue of which damages could be claimed, the power of the government must be regarded as plenary and the reasons for its exercise beyond question."\textsuperscript{25}

Ralston too is not supportive of a right of entry in customary law.

The Geneva Statute of 1923

Article 16 of the Geneva Statute of 1923,\textsuperscript{26} which the Tribunal cited as authority, does not deal with a right of entry. Rather, it deals with the right of parties to close their ports:

\begin{flushright}
\textsuperscript{23} J.H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (1926).  
\textsuperscript{24} Id. at 305.  
\textsuperscript{25} Id. at 306. In the Martini case the right to close the port was similarly upheld, but the consequent breach of a contract between Martini and the government entitled Martini to damages.  
\textsuperscript{26} Statute on the International Regime of Maritime Ports, annexed to the Convention on the International Regime of Maritime Ports, Geneva, 9 December 1923; 28 L.N.T.S. 115. The United States is not a party.
\end{flushright}
Article 16. Measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of Articles 2 to 7 inclusive, it being understood that the principles of the present Statute must be observed to the utmost possible extent.

The right of entry is provided in Articles 2 through 7 of the statute. The relevant provision is found in the first paragraph of Article 2:

Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

The purpose of the Geneva Convention was to secure equality of treatment for vessels in foreign ports, not to establish a general right of entry. As the preamble stated, the Convention intended to secure “in the fullest measure possible . . . freedom of communications . . . by guaranteeing in the maritime ports under [the] sovereignty or authority [of the Parties] and for the purposes of international trade equality of treatment between the ships of all the Contracting States, their cargoes and passengers.” In other words, the Convention regulated the conditions of entry rather than the right of entry.

It might still be argued that the limitations on the closure of ports expressed in Article 16 implied a general right of access. However, such a right would be binding only upon parties to the Convention. In order to bind non-signatories, a right of entry would also have to be a part of customary international law. This situation could occur only if the Convention had codified an existing right of entry or had generated a right of entry which later passed into customary law.\(^\text{27}\) The Tribunal did not produce evidence that there was any preexisting rule. In fact Gidel's comments and the evidence of State practice suggest that no such rule existed. Similarly, no

evidence was proffered to show that the rule had passed into customary law. Indeed, it is doubtful whether such a rule could pass into customary law. Article 2 of the 1923 Convention imposes a condition of reciprocity. Article 8 allows States to limit access of ships whose flag States do not effectively apply provisions of the statute in their own ports. Thus, it is questionable if the provision had the "fundamentally norm-creating character" necessary to form the basis of a general rule of law. In the North Sea Continental Shelf cases the International Court of Justice deemed this character a prerequisite for the transformation of conventional rules into customary law.\textsuperscript{28}

Neither the Geneva Statute of 1923 nor the other authorities cited by the Aramco Tribunal support the existence of a rule of customary international law giving merchant ships a right of access to foreign maritime ports. Thus, the Tribunal could not properly assert that a "great principle of public international law" existed which provided for a right to entry. Nevertheless, is there a satisfactory basis which can be found in customary law for such a principle?

**THE POSITION IN CUSTOMARY INTERNATIONAL LAW**

*The Scope of a Right of Entry*

Before attempting to discover the position of international law concerning the right of entry, it is necessary to define the scope of the inquiry by disposing of those aspects of the general problem of entry to ports with which the central issue is sometimes confused.

*The Right to Nominate Maritime Ports*

A State has the generally recognized right to decide which of its ports are to be open to international maritime commerce. No author has proposed a right of access to all those places along a State's coast which might be called ports. The rule ascribing this right of port nomination to the coastal State has been well established in State practice from the earliest times to the present day.\textsuperscript{29}

\textsuperscript{28} [1969] I.C.J. 41-43. The comments of the court on the extreme caution to be observed in claiming that conventional rules have passed into customary law are also much in point.

Its acceptance is reflected in the writings of many jurists.  

The Right to Close Ports in Cases of Necessity

It is also generally accepted that under certain circumstances States are entitled to close those ports which are normally open to international traffic. The right of closure for national security is well established. Additionally, some evidence supports the view advanced by many writers that the right of closure extends to a wide variety of circumstances in which the coastal State deems closure “necessary to the peace, safety and convenience of its own citizens.” In this connection it may be mentioned that no doubt exists that warships may be denied entry to maritime ports. Because a coastal State could suspend passage through its territorial sea for want of innocence when that passage was prejudicial to the State’s “peace, good order, or security,” it could also in effect deny entry to its ports when the same interests are prejudiced.

30. See, e.g., C. Baldoni, Il Mare Territoriale nel Diritto Internazionale Commune 99 (1934); Hyde, supra note 1, at 582; II Moore, supra note 1, at 270; IV Kiss, Repertoire de la Pratique Francaise 39 (1962); Verzill, supra note 1, at pt. III, at 240.
32. E.g., Gugenheim, supra note 1, at 419; Latour, supra note 1, at 41; Laun, supra note 1, at 30; L.M. Hydeman & W.H. Berman, International Control of Nuclear Maritime Activities 133-34 (1960); Rousseau, supra note 1, at 431.
33. Per Duffield, umpire, in the Faber case, supra note 31.
34. See the incidents cited at 64 RGDIP, supra note 31, at 809 (1960).
The Duty to Give Notice of Closure

Some commentators have suggested that an additional rule applies in all cases of port closure. This rule posits that the port State is responsible for any damage caused by insufficient notice of the closure.36 The State’s liability would, however, depend upon the lack of notice and not upon the fact of closure. Therefore, even if such a rule did exist, it would not be relevant to the existence of a right of entry in customary law.

The Right to Regulate Entry

A coastal State has a wide right to regulate entry to its ports. This right has long been established as a rule of customary international law and is not questioned by any of the leading authorities.37 However, the right of regulation is not unlimited. It may not be exercised to deny any right of entry which may exist to the ports of the State.38 The commentary to Draft Article 3 in the text adopted by the committee at the 1930 Hague conference provides that “as regards access to ports . . . . , any facilities the State may have granted in virtue of international obligations concerning free access to ports . . . . , may not be restricted by measures taken in those portions of the territorial sea which may be regarded as approaches to the said ports or navigable waterways.”39 The same principle clearly applies to action taken in internal waters. It may be difficult, however, in any particular case to decide whether a regulation is so onerous as to amount to a denial of the right of entry.40

The Question of the Recognition of the Flag

Some commentators have suggested that any right of access which does exist may be limited to ships flying the flags of States

36. See the Portendick affair discussed in text accompanying note 17 supra; the Buenos Aires affair, id.; the Faber case, supra note 31; the Martini case, supra note 25 and accompanying text; Gidel, [1928] 35 ANNUAIRE, supra note 10, at 211; Verzele, supra note 1, at pt. III, at 240.
37. See, e.g., Aznini, supra note 1, at 286; de Cussy, id., titre II.
40. For example, how far would the adoption of systems of certification at variance with those agreed by IMCO and WHO be permissible? Cf. the Convention on the Facilitation of Maritime Traffic, 9 April 1965, 591 U.N.T.S. 265.
recognized by the port State. This view was expressed by M. Niboyet in his 1926 report to the International Law Association. Included in the report was a Draft Article which provided "Ships flying flags of a recognized State are granted access to ports."\(^4\) Niboyet did not explain the origin of or the reasons for this principle. When the United States government was confronted with the possible entry into its ports of ships sailing under the unrecognized Manchukuan flag, it was apparently unsure of its position in international law. Assistant Secretary of State Monroe wrote:

Regardless of the question whether as a matter of law we could definitely forbid the entry of such a vessel we are entitled to say to anyone concerned that we should regard with disfavour any attempt at such entry and that we would prefer that the attempt be not made and the legal issues be not raised.\(^4\)\(^2\)

A different view was expressed four years later by Hackworth. He wrote:

The question of political recognition is a matter of intention, and I know of no theory by which it could successfully be contended that a State must refuse to allow a merchant ship of a non-recognised State to come into its ports in order to avoid such recognition.\(^4\)\(^3\)

Monroe was unsure of the law but sought to exclude such ships, while Hackworth saw no obstacle to their admission. However, their main concern was the effect of admission on recognition, rather than of recognition on admission.

A clearer position was taken by the government of the People's Republic of China. In 1950 the Chinese government promulgated the Provisional Rules Governing the Entry of Merchant Vessels . . . of States Having No Diplomatic Relations with the Republic of China.\(^4\)\(^4\) These regulations required such merchant ships to obtain special permits from the government before entering its ports. The rights of ships sailing under the flags of unrecognized States or of States having unrecognized governments are not altogether clear and are beyond the scope of this article.

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42. Printed in 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 601 (1963) [hereinafter cited as WHITEMAN].
43. II G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 207 (1941).
44. U.N. Doc. ST/LEG/SER.B/6, at 112.
All merchant ships in distress have a right to enter the ports of a foreign State. This right is grounded upon humanitarian considerations. It therefore attaches to the distressed boat rather than to its flag State and is not affected by questions of recognition.

The preceding paragraphs have narrowed the scope of the investigation. The question which emerges for examination may now be reformulated: In the absence of exceptional circumstances in the port State, and apart from treaty, is there a right of entry to the designated maritime ports of a State for ships sailing under recognized foreign flags, when those ships are not in distress?

State Practice Concerning the Right of Entry

At least since the 1930 Hague codification conference, the right of innocent passage through the territorial sea has extended to ships making for internal waters; however, innocent passage does not necessarily entail a right to enter those waters. It does, nevertheless, permit the possibility of a right of entry under customary law—a right which would not be possible if the definition of innocent passage excluded voyages into internal waters.

Practice Suggesting that a Right of Entry Exists

Practice suggesting that a right of entry exists is rare. In addition to the ill-founded remarks of the Aramco arbitration, two examples of claimed right of entry should be noted. The first concerned the right of entry of Italian warships into Ottoman ports. These remarks would also apply a fortiori to merchant ships. The Italian government asserted that “[t]he free access of our ships to the ports of the Empire is a right assured in fact by treaties as well as by international usage.” However, no precedent or authority was cited.


47. “Le libre accès de nos navires dans les ports de l’Empire est un droit assuré en effet par les traités aussi bien que par l’usage international.” II LA FRASSI ITALIANA, supra note 1, at 777.
The second example involves a decision by the Spanish government to forbid the United States' ship Crescent City to enter Cuban ports. The decision was prompted by the presence on board of a purser, William Smith, who had previously slandered the Spanish government. The American representative was instructed to protest the decision.

You will state that the Government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports. That, nevertheless, those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations. That those usages are well known and long established, and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation.48

The American view was that in the absence of recognized justification, a coastal State may not close its ports to foreign shipping. This view was later modified when the British government attempted to utilize the same doctrine to prevent the application of American liquor laws to foreign ships in U.S. waters. The United States replied that it "did not admit that the case which arose in 1852 forms a serviceable precedent in the present day situation, more especially as due notice was given of the coming into force of the recent Supreme Court decision and of the Treasury regulations framed thereunder."49

The extent of the modification of the 1852 opinion is unclear, but it does represent a shift toward the broader right of a coastal State to close its ports when it chooses. Undoubtedly, other examples of the advancement of the right of entry could be found, but such examples are certainly not prominent in the practice of States.50

**Practice Suggesting that no Right of Entry Exists**

The practice of denying the right of entry, grounded in the concept of sovereignty, dates back many centuries. In early English practice the King often regulated trade by limiting or denying

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48. II Moore, supra note 1, at 269 (1852).


50. However, much practice which appears to acknowledge a right of entry may be concerned only with the right of nationals. See, e.g., 7 Hansbury's Laws of England para. 1014 (1974).
access to English ports. For example, on 12 March 1236, Henry III promulgated the order “Let no foreigner from greater France, or other power, go to England without license from the King.” The order instructed the Constable of Dover “If any such person lands within your jurisdiction, other than with our license or our mandate, then he should immediately be turned back.”

The same principle is prevalent in modern practice. For example, a Bulgarian Decree of 10 October 1951 asserted that “[t]he ports of Stalin and Sozopol are declared closed to navigation by foreign ships. Other ports . . . may be declared closed to navigation by foreign ships by order of the Council of Ministers.” No limitations on this power are prescribed by the Decree. However, such powers are often restrictively interpreted in order to be consistent with the State’s view of international law. This is especially true when the powers are exercised by the highest political and legal officers of a State.

In China no foreign ship is allowed to enter or leave a port or harbor on a boundary river “except in accordance with the agreement on commercial navigation signed between the Government of China and the country to which the ship belongs, or with the approval of the Chinese Government.”

Article 5 of the Roumanian Decree No. 39 of 28 January 1956 provides that the port of Mangalia and a designated zone of Roumanian waters are closed to foreign ships. Additionally, it states that “[o]nly a decision of the Council of Ministers may forbid access by foreign vessels to other ports or other zones of the Popular Republic of Roumania.” The same comments are applicable to this power as to Article 7 of the Bulgarian Decree of 1951. In the United Kingdom the Law Officers of the Crown issued an unequivocal opinion in 1912 which stated as a matter of international law that “a sovereign State has complete control over its ports and harbours and . . . it may either exclude foreign vessels altogether from

51. “Ne quis extraneus de Francia magnas, vel potens, applicet in Anglia sine licentia Regis. . . . [S]i aliquem talem in balliva tua, sine licentia nostra, vel mandato nostro, de caetero contigerit applicare, scire et facias, quod statim revertatur.” I RYMER, FOEDERA 225 (1816). Cf. id. at 137, 182, 231, 468; Hale, supra note 29.
52. U.N. Doc. ST/LEG/SER.B/6, at 81.
entering them for the purposes of trade, or may admit them upon such terms and conditions as it may choose.\textsuperscript{56}

The United States Supreme Court in the case of \textit{Patterson v. Bark Eudora} anticipated the Law Officers’ terminology. Speaking of foreign merchant ships, the Court stated that “the implied consent to permit them to enter our harbors may be withdrawn, and if this consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose.”\textsuperscript{57} This view was followed in later decisions\textsuperscript{58} and represents the prevailing opinion in the United States.

Current American law provides that vessels belonging to or operating under the jurisdiction of a foreign flag which unlawfully use the American flag “shall be denied for a period of three months the right to enter the ports or territorial waters of the United States except in cases of force majeure.”\textsuperscript{59} This law apparently presumes that such ships enjoy no right of entry. The denial of entry would therefore amount to an act of retorsion rather than reprisal. However, because the provision applies both to ships which have a right of entry conceded under treaty and to territorial waters in which there is an unquestioned right of innocent passage, it is not entirely clear that this statute implies a denial of the right of entry.

In \textit{Khedivial Line S.A.E. v. Seafarers International Union},\textsuperscript{60} the rejection of a right of entry is quite unequivocal. In that case the denial of access to the port of New York was caused by the picketing of the defendant unions. The plaintiff alleged that the denial was contrary to international law. However, the court held that:

\begin{quote}
Plaintiff concedes that there is no treaty between the United States and the United Arab Republic granting the latter’s vessels free access to United States ports. Plaintiff has presented no precedents or arguments to show . . . that the law of nations accords an unre-
\end{quote}

\begin{footnotes}
\item 56. Report of 15 March 1912.
\item 57. 190 U.S. 169, 178 (1903).
\item 58. Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923); Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920).
\item 60. 278 F.2d 49 (2d Cir. 1960).
\end{footnotes}
stricted right of access to harbors by vessels of all nations . . . .
In any event the law of nations would not require more than com-
ity to the ships of a foreign nation, and here the very cause of the
picketing is a harassment of American shipping and seamen
by the United Arab Republic that is not denied.61

The 1974 Deepwater Ports Act62 of the United States lends
further support to the conclusion that no customary right of entry
exists. Section 19(c) of the Act provides:

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 deepwater
port licensed under this Act unless (1) the foreign State involved,
by specific agreement with the United States, has agreed to recog-
nize the jurisdiction of the United States over the vessel and its
personnel . . . while the vessel is located within the safety zone
[around the port].

This section does not merely regulate entry, but requires as a
condition precedent to entry the conclusion of an international
agreement. Although by definition deepwater ports are outside
the territorial seas of the United States, the same principle denying
entry would apply a fortiori to ports situated in internal waters
under the sovereignty of the United States.

A final example of American practice is the Agreement of 19 June
1964 concerning the Use of United Kingdom Ports and Territorial
Waters by the Nuclear Ship Savannah. The agreement provided
that "[e]ntry of N.S. Savannah into any port in United Kingdom
territory shall be subject to the prior approval of the Government
of the United Kingdom."63 The agreement clearly denies the right
of nuclear ships to enter ports. Although the denial of the right
of entry was by express agreement, no reservation was made
protecting the parties' rights under customary law.64 It may well
be that the parties did not consider such ships to have a right of
entry. However, this agreement might be considered an example
of the right to deny entry in order to secure the safety of the coastal
State. Such an interpretation is supported by the existence of
legislation enacted in Spain which excepts the passage of nuclear
ships from the concept of innocent passage.65

A similar classification problem arises over the assertion of the
power to prohibit navigation in the territorial sea. The existence

61. Id. at 52.
63. Exchange of Notes between the United States and United Kingdom
Governments, II NEW DIRECTIONS, supra note 29, at 654.
64. The "Liquor Treaties" of 1923 included such reservations. See
COLOMBOS supra note 1, at 97.
of such a power implies a fortiori the power to deny entry to internal waters. For example, Italy, Greece, and Korea66 have claimed this power for defense purposes. In this type of situation, denying entry can be classified as an example of the right to deny non-innocent passage. In a case in which actual entry into the port is concerned, the denial of entry can be considered as the exercise of the right to deny entry when necessary for coastal security. However, legislation such as the Soviet Proclamation Regarding Prohibited Areas of Navigation and Anchoring of 1966 is difficult to classify in this manner. The proclamation provides:

Sometimes it is necessary to prohibit the navigation and anchoring of vessels in the waters of certain coastal areas of the USSR. . . . These waters shall be announced as prohibited for a definite period of time, temporarily as a rule, and shall be termed "areas temporarily prohibited for navigation."67

The Proclamation does not limit the right to deny passage to cases in which the denial is necessary for security, but the orders appear to have been limited to fortified zones. The Leningrad Notice To Mariners, No. 265, of 20 September 1924, states that "[s]pecial regulations for the passage of merchant vessels of the USSR and also foreign vessels through the zone of firing of coastal batteries may be introduced only in cases of special military necessity."68 It is doubtful whether this limitation was regarded as dictated by international law especially in view of the "strict respect for the sovereignty of States" which is an essential element of the Soviet view of international law.69 Thus, the practice of prohibiting navigation in the territorial sea may evidence a belief in a right to deny access to ports.

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66. The Italian Law No. 612, 16 June 1912, U.N. ST/LEG/SER.B/6, at 81; the Greek Law, No. 4141, 26 March 1913, id. at 78; the Korean Marine Defence Act, 2 March 1950, id. at 175.


Support for the denial of a right of entry in customary law also exists in multilateral treaty practice. For example, both Article XVII of the Convention on the Liability of Operators of Nuclear Powered Ships, 1962, and Article 5(3) of the International Convention for the Prevention of Pollution from Ships, 1973, seem to presume a right to deny entry. Again, however, it might be argued that these are simply examples of treaty arrangements or of the right to deny entry in special circumstances.

Finally, there are a number of cases in which vessels are allowed port entry but are denied the use of facilities in port. These cases are tantamount to a denial of entry because entry under these circumstances would be pointless. Most cases in which the use of facilities was denied based the denial on security grounds. Some cases have involved denial founded solely on political considerations.

The Right of Entry in the Writings of Publicists

Two types of arguments are used to support a right of entry into maritime ports. One argument attempts to deduce a right of entry from a wider right in international law, usually a right to trade. The other attempts to establish a right of entry based on State practice.

Deductive Arguments in Favor of a Right of Entry

A distinguished list of practitioners including Wolff, de Cussy, Fauchille, Laun, Politis, Hyde, and Columbos has supported a right of entry based upon a right of trade or commercial intercourse. The argument began as a statement of natural law. Wolff wrote that “Since nations are bound to facilitate commerce, since, moreover, ports tend to facilitate commerce by sea, nations are bound to make ports for the sake of maritime commerce and fortify them, in order that they can be defended against a hostile force, and security thus be furnished to merchants.” A similar argument was advanced by Mr. Secretary Monroe in 1816. He argued that “It is consistent with just principles, as it is with the interests of the United States to receive the vessels of all countries into their

71. IMCO Doc. MP/Conf/W.P. 35.
72. See, e.g., 73 RGDIP, supra note 31, at 449 (Japan), at 767 (UK), (1969); 74 id. at 453 (1970).
ports, to whatever party belonging and under whatever flag sailing..."74

The right of commerce later evolved into a more precise formula which denied the right of any State to isolate itself from commercial intercourse. Politis expounded the principle in this form during his lectures at the Hague in 1925.75 A similar argument was expressed by Hyde when he stated:

[A]s no State appears to be regarded as having the right to isolate itself wholly from the outside world, or to remain aloof from all commercial or economic intercourse with it, there would seem to be a corresponding obligation imposed upon maritime powers not to deprive foreign vessels of commerce of access to all its ports.76

Perhaps surprisingly these arguments never enjoyed widespread support from jurists. Even writers like Pufendorf and Vattel, who were close to the natural law tradition and accepted the broad principle of freedom of commerce, felt constrained by the principle of coastal sovereignty over ports to qualify that freedom. Thus, Vattel wrote that "it is clear that it is for each Nation to decide whether it will carry on commerce with another or not."77 The principle of free commerce never made the transition from a principle of foreign policy to a rule of law. The only instances of its application cited by recent writers relate to the opening up of Japan in the 1850's and of China early in the twentieth century. Both instances, however, resulted in the establishment of a right of commerce by treaty. It is doubtful whether China or Japan accepted the principle of freedom of commerce as a rule of law.78 The principle was, rather, an attempt to force juridical foundations under the existing structure of colonial policy.

The distinction between the principle of foreign policy, which is admitted, and the rule of law, which is not, is evident in the English Law Officers Report of 28 December 1896: "There is no principle of international law imposing upon any State (apart from Treaty)

74. II MOORE, supra note 1, at 269.
75. I HAGUE RECEUIL, 1925 at 32-35.
76. HYDE, supra note 1, at 582. But see id. at 676.
78. See, e.g., POLITIS, supra note 1; 1 FAUCHILLE, id. at 483-87.
the duty of permitting commercial intercourse. It would, however, be a violation of international comity and of right conduct as between civilised States to forbid such intercourse without some adequate reason."\textsuperscript{79}

There is not sufficient evidence to support the proposition that the principle of free commerce has become a rule of customary international law. Thus, no right of entry can be deduced, even if such a right were thought to be implicit in a right to free commerce. This is not to say that the exigencies of international relations do not in fact constitute a principle which effectively prohibits economic isolation; this principle simply is not a rule of law.

Lapradelle argued that a right of entry could be deduced from the general right of navigation on the seas.\textsuperscript{80} He expounded the view that the juridical regime of all parts of the seas, including territorial waters and ports, should assume a basic principle of freedom of navigation. Although Lapradelle's theory received some support, it never gained general acceptance.

By the close of the 1930 Hague Conference, the principle of coastal sovereignty over coastal waters, although limited by rights of passage, was generally accepted. There is absolutely no basis in State practice for interpreting the principle of the freedom of the seas to include a right of entry to maritime ports.

\textit{Inductive Arguments in Favor of a Right of Entry}

The second type of argument claims that, by inductive reasoning, a right of entry can be established on the basis of State practice. With the exception of those authors who cite the Aramco decision, leading authorities cite only treaties as evidence of State practice which supports a right of entry in customary international law. Laun, for example, argues that because rights of entry exist under treaty in the great majority of ports in the world

\begin{quote}
this liberal regime can hardly be considered as exceptional in the law of nations any longer: Rather, there is reason to admit that it is an international juridical point of view which is universally shared. Thus, it can be stated, according to the juridical opinion prevailing at the moment, that free access to seaports is guaranteed to vessels of all States members of the family of nations, even if this right is not based upon a special treaty.
\end{quote}

\textsuperscript{79} Cited in I A. McNair, \textit{International Law Opinions} 338-43 (1956). \textit{See also} Laun Lauterpacht, Oppenheim's \textit{International Law} 321 & 675 (1956); 1 Op. ATT'Y GEN. 659 (1852).

\textsuperscript{80} Cf. XXIII \textit{Annuaire}, supra note 10, at 111 (1910); 5 \textit{RGDIP}, supra note 31, at 264-84, 309-47 (1898).

\textsuperscript{81} [O]n ne peut plus guère considérer ce régime liberal comme un régime particulier en droit des gens: il y a plutôt lieu d'admettre qu'il y a là une manière de voir juridique internationale, qui est universellement partagée. C'est pourquoi l'on peut dire que, d'après la conviction juridique
No evidence exists that States regard the right of entry as a principle of preexisting or customary law, although a right of entry is included in many hundreds of bilateral treaties. Because the provisions of such treaties lack the "fundamentally norm-creating character" necessary for the transition, the mere repetition of rights of entry in these treaties could not constitute a rule of customary law.\textsuperscript{82}

The writers who deny the existence of a right of entry have an easier task. They have only to assert that ports are subject to the sovereignty of the coastal State, that limitations upon that sovereignty cannot be presumed, and that no relevant limitations have been established. This, essentially, is what they have done.\textsuperscript{83}

\textbf{Conclusions Concerning the Customary Law}

The available evidence concerning customary law is sparse and often equivocal. Although the law appears to indicate that no right of entry exists, no positive rule of customary international law can be established. Thus, the question can be phrased only as a presumption—that is, should the doubt be resolved in favor of the right of the coastal State to deny entry or instead in favor of a right of entry for foreign ships?

Clearly the presumption lies in favor of the right of the coastal State to deny entry. The sovereignty of States over their ports and the fundamental rule of international law that limitations upon sovereignty must be established by those claiming their existence.\textsuperscript{84}


require this conclusion. Consequently, the burden of proof is upon those asserting the right of entry. It has been argued that this burden has not been discharged and that recognized sources of law have created no exception to the sovereignty of States over ports which would give a right of entry to foreign ships.

If the sovereignty of the port State were inherently limited, the operation of this presumption could be avoided. In his opinion in the Anglo-Norwegian Fisheries case, Judge Alvarez cast doubt upon the validity of arguments based on presumptions arising from the sovereignty of States. Referring to the right of States to do everything not expressly forbidden by international law, he stated:

This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States, but also by other factors . . . which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibitions of abus de droit.85

Early in the twentieth century the idea of limited coastal State sovereignty over the territorial sea was widely argued. The idea was also mooted in debates leading to the conclusion of the Geneva Conventions on the Law of the Sea. However, no limitation obliging States to admit foreign merchant ships to their ports was established in international law. Furthermore, no suggestion was made that limitations on sovereignty might arise from sources other than those recognized as creating international law and obligations. Indeed, such novel sources could not limit sovereignty if, as Alvarez admits, there was a time when absolute sovereignty and the concomitant presumption of liberty were once the rule, for the ability of agencies of the “new international law” to prescribe limitations on sovereignty must itself have been established by the agreement of States. No evidence exists that such a far-reaching principle was ever accepted by States. However, undoubtedly the factors which Alvarez mentions exert a powerful influence on the policies of States. But, even if his argument were correct, there is no obvious source of an obligation to admit foreign merchant ships to a State’s ports. There are, however, many strong reaffirmations of States’ sovereignty over their territory.86

Interdepartmental Committee reported that “the closing of a port on the national territory is a legitimate exercise of the sovereignty of the State.” PRO, supra note 49, Foreign Office file T9446/61/337 (1928).

86. See, e.g., the Declaration on Principles of International Law, annexed 25 U.N.G.A. Res. 2855.
Clearly, the "great principle of public international law" set forth in the Aramco case had no substantive basis, and customary law establishes no basis for a right of entry into maritime ports. In other words, a coastal State may close its ports to foreign shipping whenever it chooses, subject only to any rights of entry granted under treaty.

Qualifications to the Right to Close Ports

Some may argue that the right to deny entry is limited by the principle of abuse of rights. This principle does not affect the present argument because a right to deny entry must exist before it can be abused. It is tempting to speculate that the right would be held to have been abused if it were exercised in circumstances other than those in which a right to close on grounds of necessity had already been clearly established. However if the right to close were established, the onus would be upon those asserting the abuse. They would have to prove that the right was so limited. It has been argued that such a limitation on the right to close cannot be found as a rule of customary international law. However, two principles qualify the right.

At various points in this article, opinions have been cited which suggest that although there is no obligation to allow entry to ports, there is a presumption in favor of entry which exists absent some indication to the contrary. Additionally, the opinions expressed in the case of the Exchange v. McFaddon and in the United States' Restatement of the Law of Foreign Relations support the presumption of an open port. The court in the Exchange case found that "[u]nless closed by local law the ports of a friendly nation are considered as open to the public ships of all powers with which it is at peace." The argument applies with equal force to merchant ships. The Restatement provides that "[i]n the case of vessels not in military service, the ports of a State are open to their visit without any prior notification, except where the State has expressly provided otherwise." The presumption that ports are open is reasonable because it corresponds to the practice of States.

87. See text accompanying notes 11-15, 20, & 57.
88. 11 U.S. (7 Cranch) 287 (1813).
89. Id. at 2.
90. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 50 (1965).
This presumption is one of fact which does not affect the right to close ports.

A second qualification is the 1896 suggestion by the British Law Officers that to forbid foreign merchant ships to enter maritime ports would be a breach of international comity. This suggestion may also be accepted as an accurate reflection of the expectations of States. However it does not prejudice their legal rights.

CONCLUSION

The conclusions of this article can be summarized by attempting to formulate the law concerning the entry of foreign merchant ships into maritime ports. These conclusions must be considered in the light of comments on matters peripheral to the right of entry. First, the ports of a State which are designated for international trade are, in the absence of express provisions to the contrary made by a port State, presumed to be open to the merchant ships of all States. Second, such ports should not be closed to foreign merchant ships except when the peace, good order, or security of the coastal State necessitates closure.

91. See note 78 supra.

92. A precedent for the inclusion of a rule of comity in a convention will be found in Art. 19(1) of the 1958 Territorial Sea Convention, supra note 29.