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ENSURING MARITIME SAFETY: PSC, DUTIES OF THE FLAG STATE AND PRACTICE OF UKRAINE

This article defines the mechanism of the action of the norms of the international agreements on the safety of navigation in Ukraine. The legal basis of Port State Control is given and the national procedure for its implementation is indicated. The correlation connection and the effectiveness of the norms in the field of ensuring the safety of navigation are shown, mutually complementing the duties and the powers of the flag state of a ship and a port of a state of its calling. The author notes the necessity of creating an updated concept of state administration of ensuring the safety of navigation in Ukraine and in the world, the importance of innovative development of the relevant legal norms and the simplification of the procedures of their application.

Keywords: maritime safety, Port State Control, public administration of marine activity, control, supervision, merchant navigation, a flag state, a port state.

Ensuring the safety is the main principle of legal regulation of any kind of human activity. And navigation is not the exception. It can be even recognized as a “record-holder” in the matter of the legal, the technical, the operational, etc. regulation of security issues. But, the unpredictable natural conditions of this type of activity make special demands to ensure its safety. It is no coincidence that the safety issues are in the first place and indicate as the basis and the main purpose of the adoption of a document in the leading international maritime agreements. At present, various aspects of ensuring the safety of navigation occupy a prominent place in the domestic (T.V. Averochkina, G.P. Dudar, S.V. Kivalov, S.O. Kuznetsov, N.O. Fedchun, A.M. Shemyakin, etc.) and foreign (V.M. Gutsulyak, A.L. Kolodkin, M.A. Reshetov, J. Rajeev, I. Fikri, etc.) of legal investigation. Its research concerns both the theoretical and purely applied aspects, actualizing important vectors of the controlling influence of states and international institutions on the safety of world navigation. However, the current state of the Ukrainian law enforcement and normative practice indicates the need to continue research in this area and develop a new concept of state and supranational administration of ensuring the safety of navigation.

It should be recalled that the norms on the safety of navigation are contained in such “general” agreements as the Geneva Convention on the High Seas 1958¹ (the Articles 10, 12) and UNCLOS’82² (the Articles 94, 98, etc.). They are binding to Ukraine. These agreements regulate, in particular, the obligations of the flag State of a ship concerning the safety of navigation. There is mentioned that “3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; (c) the use of signals, the maintenance of communications and the prevention of collisions» (art. 94 “Duties of the flag State” UNCLOS’82).

A special role is also played by port States in ensuring such security, where Port State Control ships under foreign flags are carried out. This type of control, introduced at the end of the 20th century, and the practice of its implementation, proved to be very effective in counteracting substandard shipping and eliminating violations of norms of maritime conventions. Compared to the control of the sea by the flag state to ensure real communication, port state control has proved to be much more effective over the last 30 years. Such control is an international (initially – regional) initiative, to which an obligatory character

¹ *Convention on the High Seas* (adopted 29 April 1958, entered into force 30 September 1962). *UN official site*. <<https://treaties.un.org/doc/Publication/UNTS/Volume%20450/volume-450-I-6465-English.pdf>> (2019, July, 22).

² *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994). *UN official site*. <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> (2019, July, 22).

were given by the International Maritime Organization (IMO) in accordance with resolution A.787 (19) “Procedures for port state control” dated 23.11.1995¹.

The essence of port State control is to verify coastal States compliance of ships calling at their ports with the requirements of the international conventions. Its legal basis is the Paris Memorandum² and other regional memoranda adopted on its basis, as well as the documents of the IMO and some other international organizations. This database is complemented by the national legislation, which the national procedures of such control are detailed and adapted to the international standards.

The IMO Assembly Resolution A.1119 (30) dated December 6, 2017. Procedures for port state control³ contains the 14 international conventions regarding the fulfillment of requirements, which inspections are carried out in ports. The document contains a detailed description of the procedures for controlling ships, establishes requirements for inspectors and inspections, provides a definition to a substandard ship, determines the procedure for detention, correction of deficiencies and granting a permit to leave a ship. This Resolution reflected all changes to the new IMO documents that came into force after 2011. Thus, the definition of “valid certificates” has been changed in recognition of electronic certificates; the Annex 7 is supplemented with additional paragraphs on entrance to and closure of closed premises; the Annex 11 on certification of seafarers, crews and rest periods has been significantly amended.

Today, these and some other documents constitute an international legal basis for Port State Control. We have to admit that strengthening the control of ships by the state of the port encourages the flag states to take care of the qualitative state of a merchant fleet. This stimulus is not so much legal, as socio-economic, political or even psychological. Indeed, the country’s presence in the “Black List” of the Paris Memorandum has a negative impact on the image of the country’s fleet, does not contribute to the strengthening the international authority of the flag state, and causes frequent and thorough, lengthy and burdensome inspections of the merchant fleet⁴. But, we have to point out that, as the control in public side is powered by the flag state control and PSC, their existence is closely related and complementary. Their relationship is when one control is stricter, it will help another. The problem arises when the proportion of PSC is more than flag state control, or when PSC is more powerful than flag state control. This might be an unhealthy relationship since the ultimate control is flag state, for no reason that PSC can replace the power of flag state. The atmosphere of recent control must be gradually shifted to proper position. It does not solely mean that PSC is less needed than flag state control, but there should be a development of a joint framework between port state and flag state, where the sharing of responsibilities is shared proportionally⁵.

Regarding the port state control, we must note S.O. Kuznetsova, that, first, using the term “port state control” is carried out verbatim translation of the “Port State Control (PSC)” adopted in the international documents; secondly, using this phrase means the activities of the competent authorities, directed at ships for which the port state is not a flag state; thirdly, the spatial scope of the PSC is limited to the boundary of the port (maritime terminal) and is carried out when a ship is parked at a mooring (on roads). In this regard, the researcher notes the administratively-supervisory nature of this control and proposes that it be viewed as administrative supervision rather than control and proposes the following definition: “Port State control is a distinct form of systematic activity of persons who are in the public service and have appropriate authorities of the coastal state government to exclusively on this type of activity, which is carried out in the order (procedure) and volume (content) established by the international agreements, with respect to ships (their equipment, supplies, making up of the crew), operation and procedures performed, which aims to ensure

¹ Resolution A. 787(19) Procedures for port state control (adopted 23 November 1995). IMO official site.

<[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.787\(19\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.787(19).pdf)> (2019, July, 19).

² Paris Memorandum of Understanding on Port State Control (adopted 26 January 1982, entered into force 1 July 1982). Paris Memorandum official site. <<https://www.parismou.org/system/files/Paris%20MoU%2C%20including%2041st%20amendment.pdf>> (2019, July, 21).

³ Resolution A.1119(30) Procedures for port state control (adopted 6 December 2017). IMO official site. <<http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1119%2830%29.pdf>> (2019, July, 20).

⁴ Дударь, А.П. (2011). Право контроля государства порта за соблюдением исполнения некоторых международных соглашений (Port State Control). *Актуальні проблеми держави і права*, 57, 416.

⁵ Fikri, I. (2007). Flag state control: an overview and its relationship with port state control. *World Maritime University Dissertations*, 78-79.

the safety of a ship, people and the environment with the use, in exceptional cases, measures that restrict freedom of movement of a ship”¹. However, in our opinion, discussions around the terminology of the control of the port state are valuable only at the national theoretical level, taking into account the fact that foreign law and relevant documents of the international organizations do not take into account and operate it only to refer to this activity by the word “control”.

In Ukraine, in compliance with the international obligations undertaken in the field of navigation and ensuring its safety (in particular with regard to port state control), the Rules for controlling ships have been approved in order to ensure the safety of navigation². Section 2.2 of the Rules especially specifies the control of the port state (foreign ships) and specifies the regional agreement, on the basis of which it is implemented in Ukraine, namely the Memorandum of Understanding on Port State Control in the Black Sea Region in 2000³. Although there are some critical remarks regarding the organizational mechanism of the action of this Memorandum⁴, it continues to operate with a gradual correlation of practical activities in line with the current socio-political conditions of a region.

In accordance with clause 2.2.2 of the Rules, foreign ships are subject to port state control by a port state control inspector while staying in Ukrainian ports. He is a State Inspector of the Maritime Administration (State Service of Marine and River Transport of Ukraine), who has been certified in accordance with the established procedure to accomplishment control over observance the norms of the international conventions of Ukraine on foreign ships. The survey of ships is carried out in the following cases: 1) selectively, in accordance with the procedures of the Black Sea Memorandum, taking into account that the annual total number of inspections should cover at least not less than 15% of the total number of foreign merchant ships visiting the ports of Ukraine; 2) on the basis of the information of seaport captain’s service on the need for a more detailed inspection; 3) upon receipt of a notification from a foreign inspection of control of the flag State on the following to a port of Ukraine of a substandard ship or a ship, in which the found deficiencies were not removed in the previous port; 4) upon receipt of information from crew members or other persons about the ship’s non-compliance with the requirements of the international conventions, about the pollution of the environment by a ship or the violation of the conditions of transportation of goods and passengers, etc.

Also, the Rules contain a description of the procedures for the control of the flag State (control of the Ukrainian ships by the Maritime Administration and the State Agency of Fisheries of Ukraine). Inspection of Ukrainian ships by the Maritime Administration (State Agency of Fisheries of Ukraine) is carried out to ensure that these ships comply with the requirements of the current legislation, navigation rules and the international conventions of Ukraine; the ship’s documents meet the established requirements and the actual state of a ship, its equipment, supplies and security management systems. The Maritime Administration inspects ships, sailed under the state flag of Ukraine, except for fishing fleet ships inspected by the State Agency of Fisheries of Ukraine.

The grounds for inspection of Ukrainian ships as a whole reproduce the grounds for the PSC, but they also contain some differences due to the peculiarities of maintaining a real connection between a ship and a flag State. In particular, they may be carried out: 1) on the basis of a statement by a shipowner; 2) if during the inspection of a shipping company there were identified deficiencies in the management of the safe operation of ships.

Particularly valuable and principled, in our opinion, is the final provisions of the Rules, which contain the general basic aspects of the control carried out for the purpose of ensuring the safety of navigation. Thus, during the control of ships, all necessary measures should be taken to avoid unreasonable detention or unjustified postponement of a ship’s departure at sea. It should be borne in mind that the main purpose of controlling ships is to prevent a ship from putting sea if it is dangerous or poses an excessive

¹ Кузнецов, С. (2003). Контроль государства порта – определение и правовая природа. *Юридический вестник*, 1, 87.

² *Наказ про затвердження правил контролю суден з метою забезпечення безпеки мореплавства 2003* (Міністерство транспорту України). *Офіційний вісник України*, 2004, 13, 915.

³ *Меморандум про взаєморозуміння щодо контролю державою порту у Чорноморському регіоні 2000* (Україна, Болгарія, Грузія, Румунія, Російська Федерація, Туреччина). *Офіційний вісник України*, 2010, 96, 3428.

⁴ Babin, B. (2019). Attempt of annexation the Crimea and maritime administration: legal aspects of asymmetric response. *Lex Portus*, 3, 9-10. <<https://doi.org/10.26886/2524-101X.3.2019.1>> (2019, July, 20).

threat of damage to the marine environment. The state inspector must use professional knowledge to determine whether a ship should be delayed until the deficiencies are rectified or allowed to put sea with certain deficiencies, taking into account the specific conditions of the planned passage. It should be understood that any equipment may fail, and the receipt of spare parts or replacement parts may be difficult. In such cases, a ship's putting should not be unreasonably postponed if, in the opinion of the inspector, alternative security measures are taken. If a ship is unreasonably delayed or unreasonably postponed to sea, it is entitled to compensation for any damage or damage caused thereby. The shipowner or his representative has the right to appeal against the detention carried out by the state inspector. The appeal itself can not be the reason for the cancellation of the detention. The state inspector must duly notify the master of the ship of the right of appeal.

According to the data released by the Maritime Administration for 2018, it has been held a control for the protocols of port State Control 660 foreign ships, 8 of which were detained for various violations¹. Taking into account the short-term work of the body (from August 2018), this index is quite indicative, testifying the effectiveness of the newly created body. Although there are still some uncertainties in other aspects of its activities and a continuing systemic crisis².

Thus, we must state that the standards and procedures (protocols) of the implementation of the PSC and the control of the safety of navigation by the flag State today are sufficiently secured by the mandatory international and national legal requirements. At their simultaneous application, the necessary level of navigation safety will be achieved in the future. However, even with the effective practice of the PSC, the continued need for the United Nations Convention on Conditions for Registration of Ships 1986 is still in force, which, in our opinion, will help to "start working" better and increase the effectiveness of the actual connection between a ship and a state of its registration.

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¹ Морская администрация: итоги 2018 года (2019). *Офіційний сайт Державної служби морського та річкового транспорту України*. <<https://marad.gov.ua/ua/news/morskaya-administraciya-itogi-2018-goda>> (2019, July, 23).

² Ківалов, С.В. (2019) Капітани та служби капітанів морських портів України: законодавча та інституційна криза. *Lex Portus*, 2, 7-26. <<https://doi.org/10.26886/2524-101X.2.2019.1>>; Ильницький, К. (2019). Куда ведет отрасль Морская администрация Украины? *Офіційний сайт журналу «Порты Украины»*. <https://ports.com.ua/opinions/kuda-vedet-otrasl-morskaya-administratsiya-ukrainy?fbclid=IwAR2RHndfqdz-2z_qIuUjh6kkarujLzjdzcbEV5C0CBrt9rsfqH-TfkCyEo> (2019, July, 23).

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