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Serhii Andrushchenko

ORCID ID: <https://orcid.org/0000-0003-1209-3286>

National School of Judges of Ukraine

REGIME FOR SHIPS IN THE MARITIME PORTS OF UKRAINE: CURRENT STATE OF LEGAL REGULATION, TENDENCIES AND INNOVATIONS

The article is concerned with the legal principles of the public administration of the regime for ship in the maritime ports of Ukraine. The theoretical approaches to classification of “regime for ships in a maritime port” have been outlined. Legal framework of ship regimes in the maritime ports of Ukraine has been considered. The innovations, being implemented in the maritime ports of Ukraine on purpose to increase the competitive advantage in the maritime shipping market, have been analyzed. Modern arrangement defects have been defined in the public administration of the maritime port activities in Ukraine. The author suggests the ways of the sector restructuring by shifting away from the policy of ad-hoc changes, and insists both on determination of an effective mechanism to restructure the legal support of the sector in an integrated manner and on studying of the best practices of port activities and established regimes of the maritime ports of the Black Sea region and worldwide.

Keywords: maritime port, regime, legal regime, public administration, state of a port, Ukraine.

Category of regime is all-purpose and classical for the modern legal science. Both public and private doctrinal developments use it, specifying the certain regulatory impact on social relations by means of the public and powerful instruments. It is widely used in the regulations of the domestic laws, dedicated to the determination of action measures under adversity (the emergency situation regime, the military situation regime and so on), also when implementing different activities on the certain territories and water areas (the state border regime, the territorial sea regime, the maritime port regime, the contiguous zone regime etc.) and in the international agreements (the regime of passage through straits, the innocent passage regime, the exclusive economic zone regime and so on). Paying attention to the determinancy by law, such regime is usually defined as “legal”, but even if it doesn’t receive this concrete definition in the document body or scientific research results, than it won’t lose its legal essence anyway.

“Regime for ship in a port” is considered to be the classical category for the modern maritime law. Such regime is administrative and legal by its definition, but, in contrast with the established approaches to such regimes’ role and designation (to be a certain “response” of a state to the emergency situations), the regime for a ship in the maritime port belongs to the circle of the “positive” regulators. It is certainly not deprived of the enforcement instruments, but, nevertheless, it is to a considerable degree aimed at everyday usage in order to regulate social relations in regards to the legal objects of particular social importance. Thanks to precisely these regime rules, the state establishes the procedure of cooperation in the certain fields of social relations, the breach of which can cause essential damage for the interests of the state, the society and the individual¹.

Ukrainian lawyers (T.V. Averochkina, G.O. Antselovych, D.A. Bilenets, O.A. Bryzov, Y.Z. Drapailo, S.O. Kuznetsov, O.M. Shemiakin) as well as foreign lawyers (V.M. Gutsulyak, A.L. Kolodkin, G.G. Ivanov) are currently analyzing various aspects of functioning of legal regimes in the maritime areas in their study researches. The papers of the representatives of the basic jurisdiction (I.I. Liaskovsky, Y.M. Oborotov and so on), of the administrative and legal science (V.V. Belevtseva, E.V. Dodin, S.V. Kivalov, N.V. Kovalenko, B.A. Kormych, V.Y. Nastiuk, A.F. Nozdrachyov) and of the international law (A.H. Abashadze, Y. Brounly, I.I. Lukashuk and so on) serves as the framework of such researches. Upon that and taking into account considerable innovations, being introduced today in order to simplify and unify the regime rules of the

¹ Лясковский, И. И. (2016). Правовой режим как элемент правового регулирования. *Вестник Полоцкого государственного университета. Серия D «Экономические и юридические науки. Административное право. Конституционное право»*, 13, 142.

Ukrainian maritime ports, the latest practices, proposals and initiatives of the Ministry of Infrastructure of Ukraine, the Marine Administration and the Marine Port Authorities with regard to the increase in the competitiveness of the national ports; the established scientific approaches to the components, functions and peculiarities of the regime rule application in the Ukrainian maritime ports are in need of further theoretical investigations. It allows to reveal the most effective and positive improvements, and, taking into account the modern conditions of port activities, to suggest certain steps of their improvements and developments. Consequently, the purpose of the article is chosen to determine the modern practice of the legal support and outline tendencies and innovations to be applied in the maritime ports of Ukraine.

Assuming the everyday usage and the detailed regulatory actions of individuals and legal persons as well as availability of scope of encouraging and stimulating rules, the following regimes that are in force in all kinds of water areas belong to the circle of “positive” regulators, and that is, namely, the internal waters, the territorial sea, the contiguous zone and the exclusive economic zone, at the continental shelf and in the maritime ports. The latter combines the regimes of dry land and water territories, port entry regime and the regime of a ship being in a port, the border control regime, the regime of customs inspection zone, the regime of border inspection post and etc. It also includes the following: search and rescue operations as well as ship raising operations, formalization of artificial structures and land plots, underwater cable and pipeline laying; investigations, explorations, developments (extracting) and protection of aquatic biological resources and other natural resources as well as the environment; regimes of marine scientific research (MSR), protection and conservation of the marine environment and natural resources, burial of waste and other materials, disposal of repugnant substances, protection of internal sea waters and their natural resources¹. Therefore, the maritime port regime is a specific system of legal regimes that are sandwiched with one another and function in an integrated manner. One of the elements of such regime is considered to be the regime of a ship in the maritime port. Broadly defined, the legal regime of a ship in a port is considered to be the law order that a ship shall obey when sheltering within the port, so that is the code of all rules regulating rights and duties of a ship when entering the port, while in and when leaving the port².

The rules, forming the essence of the established legal regimes in the maritime ports (in particular, regime for ships), combine both the internal national requirements and those ones, that are reached by agreement of wills of many world states and realized in the provisions of the international agreements. Such agreements determine the boundaries and possibilities of the state public administrative influence on regulated relations as quality standards. So, the regime rules for maritime areas, stipulated in UNCLOS’82³ or in 1958 Geneva Convention on the law of the sea⁴, are considered to be administrative and legal as they determine the way how the public administration of their activities is performed (at the widest approach to its interpretation as integral complex of all kinds of imperative influence on social relations). The rules of these international agreements define how at the state level the regulation and keeping of proper condition (regime) of everyday activity (navigation, fishing and so on) in the maritime areas are provided. And due to the formation of uniform versatile approaches (standards) and fundamental principles, necessary for the maritime activity effect of the conceptional identity of its basic legal regulation is achieved. Besides, thanks to the formation of the legal regimes of maritime areas and ports based on integrated global agreement, the development of the multinational administrative law takes place. Certainly, the rules of international agreements define the general basis of the public administration of the activity and legal regime of maritime areas. The basis is socialized by the states and the binding effect of the international agreement rules concerning a state is determined by its signing or acceding to it.

¹ Настюк, В. Я., Белєвцева, В. В. (2009). *Адміністративно-правові режими в Україні*. Харків: Право, 76.

² Жудро, А. К., Джавад, Х. М. (1974). *Морское право*. Москва: Транспорт, 164.

³ UN official site (1982). *United Nations Convention on the Law of the Sea* (entered into force 16 November 1994). <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> (2020, September, 22).

⁴ UN official site (1958). *Convention on the High Seas* (entered into force 30 September 1962).

<<https://treaties.un.org/doc/Publication/UNTS/Volume%20450/volume-450-I-6465-English.pdf>> (2020, September, 22);

UN official site (1958). *Convention on the Continental Shelf* (entered into force 10 June 1964)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%20499/volume-499-I-7302-English.pdf>> (2020, September, 22);

UN official site (1958). *Convention on the Territorial Sea and the Contiguous Zone* (entered into force 10 September 1964)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%20516/volume-516-I-7477-English.pdf>> (2020, September, 22);

UN official site (1958). *Convention on Fishing and Conservation of the Living Resources of the High Seas* (entered into force 20 March 1966). <<https://treaties.un.org/doc/Publication/UNTS/Volume%20559/volume-559-I-8164-English.pdf>> (2020, September, 22).

It is necessary to recall that the named international agreements describes certain components of the maritime port regime very concisely, but the only international agreement for the present moment, dedicated exactly to the maritime port regime, is 1923 Convention and Statute on the International Regime of Maritime Ports¹. However, the a.m. Agreement didn't get the world-wide support and is not considered to be compulsory for all². It proves the fact that the codified commonly-accepted rules, which would fully define the legal regime of ships in foreign ports, have not been formed yet. Still it doesn't mean that such legal regime doesn't rely on the certain system of the commonly-accepted provisions that more or less are equally interpreted in the legislation and contractual practice of most maritime world states the fundamental rights and duties (regime) of ships being in foreign ports. They usually have international agreements in force, compulsory for a port state, that determine the certain elements of maritime port regime. It is also necessary to remember that, when determining the legal regime of a ship in ports, those ports are meant that are open for foreign ships, conduct transportation services of goods and passengers for foreign connections, fishing and offshore operations, as well as open for the ships to be used with other economic (commercial) purpose³. Entering into bilateral agreements on merchant shipping is considered to be enough effective practice when determining regimes of maritime ports between states. Regime rules for ships, for their crews and so on, chosen by treaty states, find their representation exactly in these bilateral agreements. Such agreements can foresee providing either national regime or regime of maximum assistance for ships of treaty states, and in some cases combine elements of both regimes⁴. These regimes are established on the basis of the principle of reciprocity that was laid down by the Convention and Statute on the International Regime of Maritime Ports, dtd 1923. And as a result, the norms of the international agreement were put into practice and became the basis of formation of worldwide approach to the regulation of maritime port regimes.

With regard to the status and the regime of "open" or "closed" port, it is necessary to support the opinions, expressed in the books on specialized subjects, towards the existence of two categories of "closed port" and two categories of "open port" in the current legislation of Ukraine and the need to resolve the corresponding conflicts. As noted by O.A. Bryliov, the difference between these categories is not very understandable (especially for foreign subjects), if used only by their titles. In fact, two double categories are available that are nearly identical in titles but severely different by legal substance. Decision on each of these double categories has to be published in the Notices to Mariners, though foreigners can hardly understand what is the difference between "closed port" according to the Article 5 of the Law of Ukraine "On seaports of Ukraine"⁵ and "closed port" according to the Article 73 of the Merchant Shipping Code of Ukraine⁶ without additional explanations. The author believes on fully reasonable grounds that in accordance with the opinions received away back in the Soviet time, the ports were considered to be "closed" if all or certain categories of foreign flag ships were forbidden to enter it. It is compliant within the meaning to the Section 2, Article 73 of the Merchant Shipping Code of Ukraine. But the Article 5 of the Law of Ukraine "On seaports of Ukraine" refers to closing of ports not for entering of ships but with the purpose of their complete shutting down. And this is a bit different in the context but associated with their close for entering by foreign ships as general and partial: in fact, when closing a port completely a state cancels the possibility of entering any ship to it. And close of the Ukrainian Crimean ports that took place in 2014, became exactly the same, because they were recognized as those ports where it was impossible to render services for ships and passengers, to perform works on loading, transportation, forwarding and other works in this regard, to provide proper level of navigation safety, to comply with the requirements of International Agreements of Ukraine, to ensure environmental protection (the Preamble of the Ordinance of the Cabinet of Ministers N578-p dtd. 30.04.2014 "Some issues on functioning of the sea and the river transport"⁷).

¹ UN official site (1923). *Convention and Statute on the International Régime of Maritime Ports* (entered into force 26 July 1926). <<https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2058/v58.pdf>> (2020, September, 22).

² Андрущенко, С. В. (2019). До питання про розробку міжнародної угоди про режим морських портів. *Юридичний вісник*, 2, 102.

³ Жудро, А. К., Джавад, Х. М. (1974). *Морское право*. Москва: Транспорт, 164.

⁴ Милехина, Е. В. (2011). Открытие портов для захода иностранных торговых судов. *Общество и право*, 1 (33), 224-225.

⁵ *Закон про морські порти України, 2012* (Верховна Рада України). *Офіційний вісник України*, 45, 1729.

⁶ *Кодекс торговельного мореплавства України 1995* (Верховна Рада України). *Відомості Верховної Ради України*, 47, 349.

⁷ *Розпорядження про деякі питання функціонування морського та річкового транспорту 2014* (Кабінет Міністрів України). *Офіційний вісник України*, 51, 1347.

This ground is used in the Procedure for closing and opening the ports¹ (p. 6) approved by the Cabinet of Ministers of Ukraine in accordance with the Law “On seaports of Ukraine”. Consequently, as O.A. Bryliov reasonably admits, there were two separate procedures in the national maritime law. The first procedure is connected with construction and putting into operation of a maritime port (actually, such procedure didn't belong to the maritime law, it referred to the field of the civil or administrative law). And the second procedure is associated with the prohibition of entering foreign ships at the operating maritime port provided that such prohibition was reasonable according to the inshore authorities². But upon adoption of the Law of Ukraine “On seaports of Ukraine” this issue is regulated by the maritime law and for the present moment it is on the table for research and proposition developments with regard to the improvement of the legislation in force as to regulation by the mentioned Law of the procedures of opening/closing of seaports of Ukraine for foreign shipping and making amendments to it on the purpose to divide the double categories “closed port” and “open port”.

If we continue the thesis statement, expressed in the beginning of this research, as to belonging of ship regime in a seaport to the varieties of the administrative and legal regimes, it is necessary to specify the following. The regimes, operating in maritime areas and ports, are characterized by classical features of administrative and legal regimes, and namely: determination of behavior of physical persons, office holders and legal entities by special legal norms; detailed regulatory actions of public authorities; implementation of some additional rules or the exception from the obligatory legal norms; establishment of specific control of the proper compliance with the legal order in the field of regime activity and accepting of the necessary restrictive measures³. They are always tracked by the state control imperative that becomes obvious in establishment exactly by the state (by the bodies authorized by it) of all applied regime rules and undertaking of the support duties exactly by the state. They have always in place the following: accept and realization of the legal acts, norms and other decisions under the “order instruction – execution” principle, availability of multiple prohibitions, beliefs and compulsions⁴. And this remarkable role of state in the public administration activity in the contiguous water areas and ports is determined by the norms of the International Agreement in force, in particular 1958 Geneva Conventions and UNCLOS'82. Weighed state policy is of great importance here.

At present the regime of maritime ports of Ukraine, keeping the regulatedness by the norms of international (bilateral) agreements, national (domestic) legislation and the local adjustment acts (compulsory regulations) and guides to port, experience the significant influences of the new policy of the Ministry of Infrastructure of Ukraine, Marine Administration and Administration of seaports as to the improvement of their competitive ability. In this connection in November of the current year, the Ministry of Infrastructure of Ukraine shortened the time for preparing a ship to enter in maritime ports from 14-18 hours to 8-9 hours. Such entries at present are formalized day-and-night at e-mail of the State Service for Marine and River Transport (Marine Administration). In time the Ministry plans to implement an individual system for processing of a ship entry and that is as follows: no need for personal submission of documents by a ship agent to the Frontier Service and Marine Dispatcher Control; minimum processing time makes up to four hours; creation of Unified Register of ship entries into ports of Ukraine; improvement of Control system for ship entries; substantial decrease in corruption risks⁵. All above mentioned is considered to be long-expected steps that should have been introduced long before, this is because the effective activities of maritime ports in Ukraine plays a great role in the functioning of the state, regarded as an important factor of pumping up the state budget as well as provision of work places for a large number of people.

¹ *Постанова про затвердження Порядку відкриття та закриття морських портів 2013* (Кабінет Міністрів України). *Офіційний вісник України*, 54, 1970.

² Брильов, О. А. (2020). Закриті порти: проблеми визначення статусів. *Українське право*. <https://ukrainepravo.com/scientific-thought/legal_analyst/zakryti-porty-problemy-vyznachennya-statusiv/> (2020, September, 29).

³ Снігур, В.М. (2008). *Міграційний режим в Україні*. Київ, 8.

⁴ Соколова, І. (2015). Публічно-правовий режим як правова категорія: загальна характеристика, ознаки, види. *Вісник Національної академії правових наук України*, 4 (83), 35.

⁵ Бизнес-цензор (2020). Украина сократила время на оформление захода судов в порты в 2 раза. <https://biz.censor.net/news/3229060/ukraina_sokratila_vremya_na_oformlenie_zahoda_sudov_v_porty_v_2_raza_minfrastruktury_infografika> (2020, November, 29); Порты Украины (2020). *Морская администрация начала оформлять судозаходы через интернет* <<https://ports.ua/morskaya-administracziya-nacala-oformlyat-sudozahody-cherez-internet/?fbclid=IwAR3rX207fWOs3wCr0ef6HfHcUzW-fhRfxyDG-d73gUWBK7sPX7bdESXrFpE>> (2020, November, 04).

Presented in November, 2020, Audit of the Ukrainian economy and Vectors of economic development until 2030 noted the crisis condition of port sector and its excessive over-regulation. In particular, it was mentioned that the regulation in the field of maritime transport was ineffective, misuse of port dues led to the fact that the Ukrainian ports were at the same time both the most expensive and the most ineffective. During last 5 years the average annual payments of the Administration of maritime ports of Ukraine to the state's advantage exceeded the rate of capital investments three times. It resulted in considerable destroying of the port and inshore infrastructure. According to the Quality Index of Port Infrastructure of the World Economic Forum, the Ukrainian port infrastructure is rated as satisfactory. According to the port infrastructure quality, Ukraine has 3.5 points from possible 7 points that is much lower than the figures of its neighbors and EU average point (4.8/7)¹.

It is true that excessive tariffs of port dues, their wide range and unconformity to the world practices are maintained in Ukraine². So, the amount of port dues for capsized ship entry (ship, up to 100000 tons) to the Ukrainian maritime port "Pivdennyi" is two times bigger than to the biggest European port, namely Rotterdam, and handymax ship entry (up to 50000 tons) to Mykolayiv port is 4,1 times bigger than to Konstanz³. Administration of maritime ports of Ukraine places emphasis upon impossibility to decrease tariffs of port dues for the reason that 50% of them are profits of the State fund of Ukraine. Considering it, the European Business Association applied to the authorities of Ukraine with a request to initiate decreasing of the tariffs of the port dues from 2021 and reducing assignments of the distributed profits of the Administration of sea ports of Ukraine to the State Budget. As per calculations of the companies-members of the Logistics Association Committee, even with the decrease of port dues by 20% one can expect that Ukraine will keep its main export-oriented fields and, in the future, it will increase annual goods traffic in maritime ports up to 190 mln. tons within 2021-2025. As estimated by the specialists of the World Bank, reduction potential of the port dues in Ukraine amounts to 63%. It will have serious economic effect at cost of attraction of the goods traffic to the Ukrainian ports. For example, reduction of the port dues from January, 1, 2018, by 20% allowed to increase goods traffic in the Ukrainian ports by 21% and to reach the level of 160 mln. tons in 2019. At present, the reduction potential of the port dues remains at the level of 40%-50% for increasing the competitive ability of the national ports⁴.

Taking into account that the port dues are substantial source of the State Budget income, their reduction is not always estimated as definitely approving. The criminal proceeding was even commenced against the former minister of the Ministry of Infrastructure of Ukraine because of the breach of the established reduction order of one of the port dues⁵. It proves the lack of weighed restructuring concept of the maritime sector of Ukraine, inconsequence and situational approach of the measures applied. Unfortunately, such situation is taking place under the conditions when the documents of long-term strategic planning of maritime sector remain in force in Ukraine, when international audits of national safety system of maritime branch have been successfully undergone, when the specialized maritime branch authorities have been established and are now functioning. But the flip and flop policy as well as prevailing "consumer" attitude has brought it almost into decay, and that is impermissible, taking into account its role in the state economy.

Therefore, in our opinion, at present the perspective switch to public administration of the maritime and, in particular, the port sector in Ukraine is urgently important. Therein one should shift away from the policy of ad-hoc changes. The agenda is focused on development of essential complex restructuring mechanism of legal support of the sector, investigation of the best practices of port activity and established regimes of maritime ports in the Black Sea region and worldwide. Unquestionably, one should state that

¹ Судоходство (2020). «Українські порти являються одночасно найбільш дорогими в світі і найбільш неефективними»: «Аудит економіки України». <<https://sudohodstvo.org/ukrainskie-porty-yavlyayutsya-odnovenno-samyimi-dorogimi-v-mire-i-naibolee-neeftivnymi-audit-ekonomiki-ukrainy/?fbclid=IwAR2BfThZUynE7ySHUMFpshHgkVjRXJ-W3sPUXeN2tRIYHyIE2x5Iaplyds>> (2020, November, 04)

² Ківалов, С. В. (2017). Портові збори в Україні: пошук оптимальної моделі конкурентної тарифної політики, *Lex Portus*, 1 (17), 5-21.

³ AgroNews. Головні аграрні новини (2020). *Вартість заходу суден до порту «Південний» в 2,3 рази вища, ніж у найбільшому порту Європи* <<https://agronews.ua/news/vartist-zakhodu-suden-do-portu-pivdennyu-v-2-3-razy-vyshcha-nizh-u-naybilshomu-portu-yevropy/>> (2020, November, 04)

⁴ Бізнес (2020). *Зниження портових зборів може стимулювати економічний розвиток під час пандемії – ЕВА*. <<https://business.ua/uk/node/11121>> (2020, November, 04)

⁵ Укрінформ (2020). *НАБУ виклало матеріали справи Омеляна про портові збори* <<https://www.ukrinform.ua/rubric-economy/3050551-nabu-viklalo-materiali-spravi-omelana-pro-portovi-zbori.html>> (2020, November, 20).

the taken steps are considered to be appreciative, but delayed and mainly aimed at restructuring only specific elements of the legal regime of maritime ports that requires at present for much significant improvements for reduction of corruption risks and renewal of operation concept based on advanced information technologies.

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