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# МОРСЬКЕ ПРАВО

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## ATTEMPT OF ANNEXATION THE CRIMEA AND MARITIME ADMINISTRATION: LEGAL ASPECTS OF ASYMMETRIC RESPONSE

## СПРОБА АНЕКСІЇ КРИМУ ТА АДМІНІСТРУВАННЯ МОРСЬКОЇ ГАЛУЗІ: ПРАВОВІ АСПЕКТИ АСИМЕТРИЧНОГО РЕАГУВАННЯ

### ABSTRACT

In this article the author analyzes certain systematic administration problems of the Ukrainian marine industry, which directly affect the ways and means of asymmetric response to challenges associated with the attempt of the annexation of the Crimea by the Russian Federation. The attention is focused on the uncertainty of subordination relations between respective Ukrainian state authorities, the transparency and effectiveness of state port control and the threat to lose the flag control functions. The issues of choice between Paris MoU and Black Sea MoU on port state control are discussed. Ukrainian maritime legislation and legislation in the field of inland water transport

remain obsolete and ineffective, which leads to a constant decreasing number of ships under Ukrainian flag. It is also accompanied with the regulation gap for the territorial sea and continental shelf so that almost no measures have been taken for recent years to protect national interests in these naval zones. The attention is paid to the poor sufficiency of legislation approximation efforts in accordance with the Association Agreement between Ukraine and EU. The author erects the Azov Sea fishery issues. The emphasizes is made on negative consequences of the Agreement on Fisheries in the Azov Sea signed between Ukraine and Russian Federation in 1993 and unreasonable actions of Ukrainian authorities within its frameworks. The author concludes that the most of the administration problems of Ukrainian marine sector are still far from being resolved, which has poor effect upon handling the Crimean crisis consequences.

*The key words:* Crimea, annexation, Russian aggression, the Azov Sea, the Black Sea, port state control, maritime administration.

## **Introduction**

Nowadays, Ukraine, as never before, faces the need to uphold and defend its status as a maritime state. Traditionally “the maritime activity”, as it was defined in the “Maritime Doctrine of Ukraine till 2035”, adopted by Governmental Ordinance № 1108 On Amending the Maritime Doctrine of Ukraine till 2035 of 18 December 2018 (Postanova, 2018), was perceived in our country as somewhat self-evident and natural. But the period “after 2014” which included the attempt of the annexation of the Crimean peninsula by the Russian Federation, Russian invasion in the Eastern Ukraine, building up the Russian actual control over the adjacent maritime areas, as well as arbitrary “regulation” of passing vessels through the Kerch Strait put on the agenda a significant range of issues that had been merely paid attention for decades.

The issues of the application of the law of the sea in relations between Ukraine and the Russian Federation have emerged in a leading category for periodicals, both in a scientific and in a political life. And the seizure of Ukrainian navy seamen has advanced this situation to the level of international courts under the UN Convention on the Law of the Sea, 1982 (UNCLOS’82). These issues have also attracted an interest of the world community to the bilateral crisis, as it may be considered at the first glance. The block of issues related to the present Black Sea problem have been discussed in Ukrainian scientific periodicals (Babin, Pleshko, 2017; Korotkyi, Hendel, 2018; Kuznetsov, Averochkina, 2017) attempting to provide both doctrinal and step-by-step practical advice on approach to this situation. However, most of the researches are dealing with the, let us

say, “front side” of the naval consequences of Crimean crisis. At the same time, there are number interior issues of Ukrainian maritime policy and legislation that have become the obstacles for prompt and effective actions towards, or even catalysts for Crimean crisis.

### **1. Attempt of the annexation of Crimea and Black Sea MoU**

The occupation of the Crimea and the effective control of the Russian fleet of most of the Ukrainian sea areas revealed a lot of problems in the Ukrainian state management of the marine industry. Most of such problems had arisen long before 2014, but in the conditions of the closure of the Crimean ports, the Kerch Strait blockade and the frontlines near Mariupol, they received a new sound. Nevertheless, none of these problems have been finally resolved. In 2018 the Maritime Administration of Ukraine – State Service for Marine and River Transport of Ukraine was established by the Governmental Ordinance № 1095, on September 6, 2017 (Postanova, 2017) and Prescript № 621 on August 22, 2018 (Rozporiadzhennia, 2018). It was to be a designated authority to carry port state control and control of the flag. However, the subordinated links between the profile Ministry of Infrastructure, the Maritime Administration, the Administration of Seaports of Ukraine and a number of state institutions and enterprises are still complicated and require clear legal regulations (Kivalov, 2019).

Thus current Ukrainian public administration shows the reluctance to bring the basic order in matters of state port control (SPC). As a result Ukrainian ports have a constant bad reputation for the highest rate of SPC inspections and the associated corruption risks. For example due to Port State Control in Black Sea Region Annual Report 2018 the highest number of ship inspections as well as the highest percentage of ships inspected per ships visits is shared by Ukraine and Russian Federation (1544 and 1534 individual ships inspected; 67,40 and 69,85 individual ships inspected as per cent of individual ships visited respectively). At the same time Ukrainian SPC shows lowest figures for detention rate – 1.80 per cent and for inspections with deficiencies – 1.90 per cent, whilst the average figures for the Black Sea Region are 6.31 and 4.11 per cent respectively (Port State Control in Black Sea Region Annual Report 2018). Such low efficiency with a great number of inspections may not surprise representatives of the industry who are acknowledged with corruption issues in Ukrainian ports and a high “administrative” expenses, which even influence a freight costs.

The lack of political will of State authorities to increase transparency in PSC and to correspondingly reduce in the risk of corruption is also combined with maritime management, which still has not lost its Soviet heritage and pro-Moscow orientation. These two factors have significant influence either upon interior climate in the industry and upon Ukraine's foreign policy decisions on maritime issues. In particular, this concerns the fact that Ukraine is the only European country not being a party to Paris Memorandum of Mutual Understanding on Port State Control (Paris MoU), which systemizes the procedure for control of foreign ships in ports and makes it more transparent.

Instead, Ukraine has preferred the regional – the Black Sea Memorandum of Understanding on PSC (BS MoU) 2002, which operates only for the six basin states. Furthermore, BS MoU was in many respects an instrument for the Russian Federation to preserve and extend its influence in the region. For example, in the period from 2014 to 2018, the BS MoU practice was actually recognizing the fact of the illegal attempt of annexation of the Crimea identifying Crimean ports as “Russian” in certain data sets. Only the broad public response in Ukraine and the followed efforts of the Ukrainian delegation caused that only in April 2018 BS MoU authorities updated the data in Black Sea Information System (BSIS), according to which the Crimean ports (Feodosiia, Kerch, Sevastopol, Yalta, Evpatoriia) were finally identified in the BS MoU references as “closed ports located in the temporarily occupied territory of the Autonomous Republic of Crimea” (Information exchange, 2018). At the same time the data on Russian port state control activities done in 2014 – 2018 in Crimean ports as in Russian ones was available till 2018 on the BSIS web-site, but later any references on those illegal port controls were deleted from this online source and now the available last notice about Crimean ports as Ukrainian ones on this source is related to controls done before 15th of March 2014.

BSIS itself worth additional attention so far this information system for the Memorandum of Understanding on Port State Control in the Black Sea region, is “developed and hosted by the Russian Federation” (The Black Sea Information System). BSIS is aimed to collect Port State Control (PSC) inspection data from the BSMOU member Authorities and to provide information exchange by PSC data within the region. In this aspect, the position of Ukraine regarding the continued use of this system after 2014 is rather strange, especially concerning that for certain period according to BSIS data the occupied Crimean ports were marked as Russian ones.

The latter, of course, is not surprising if we recall that the BSIS servers are located in Novorossiysk and belong to the Ministry of Transport of the Russian Federation.

## **2. The maritime administration effectiveness as a key to asymmetric responses to the attempt of the annexation**

Another problem is Ukraine's loss of flag control functions. In fact, since 2015, the tonnage of merchant ships under Ukrainian flag has decreased even more than in 2014 when the Crimean port fleet and the fleet of "Chornomornaftogaz" were seized by Russia. Because national ship-owners prefer for their vessels any other than Ukrainian flag due to outdated, practically Soviet legislation and fantastic corruption in the field of registration of merchant ships. Even the remaining ships under Ukrainian flag are in particular in very poor condition. For example, according to the latest Paris MoU Annual Report 2019 Ukraine has been put on a "Black list" ranking 66 out of 73. Furthermore, due to developed four gradation criteria (from average to very high) for the risk of ships detention among the 13 blacklisted countries, ships under Ukraine flag are classified as the "high risk" category (White, Gray and Black List, 2019).

In such conditions the fact that Law of Ukraine On the Contiguous Zone of Ukraine, № 2641-VIII, December 6, 2018 was finally approved after more than 25 years of discussions could be considered as a success (Zakon pro pryehlu zonu, 2018). However, the Ukrainian laws on the territorial sea and on the continental shelf today are still drafted, instead in the area of the inland water transport, Soviet subordinate act of the 1960s is still in force for Ukraine. And the draft law on joining the Maritime Labour Convention 2006 after five years approval processes of respective executive authorities has been rejected in May, 2018 by the Presidential Administration after consideration for more than a year (Babin, 2019).

Additionally, even the preparatory work on European integration in the maritime sector is rather simulated than is performed on schedule. For example the issue of the translation and publication of the EU Maritime Regulations and Directives, as the Association Agreement stipulates, has not yet been resolved. Random attempts to implement these acts at least at sub-legislative level did not yield results. They are still awaiting the implementation, including such acts as Regulation (EC) № 392/2009 of the European Parliament and of the Council of 23 April 2009 on passenger liability insurance for passengers in the event of accidents, Regulation

(EC) № 725/2004 of the European Parliament and the Council of 31 March 2004 on enhancing ship and port facility security, etc. A similar situation continues with a number of technical maritime conventions (such as International Convention for the Safety of Life at Sea 1974 and International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001), which changing is usually approved through simplified and fast procedures. However, Ukrainian maritime bureaucracy is reluctant even in the issues of translation and publishing.

Frankly speaking, the deficiencies of the legal regulation of the Ukrainian marine sector have been evident for a long time. However, for many years, no changes have been made to correct the situation.

At the same time, the Russian Federation has the updated maritime regulatory framework. Besides, the Russian Federation has a corrupt and bloated but at the same time capable management of the marine industry, which is accompanied with not so modern but generally effective merchant fleet under its own flag. In fact these two components have provided Russia with potential needed for Crimea seizure and provision, as well as for the building of the Kerch Bridge. Therefore, when Ukrainian leaders stipulate the choice of “not military, but political, legal and administrative” ways of confronting Russian aggression at sea, they shall honestly answer the question: do they generally acknowledge what have to be done on such paths?

### **3. Fisheries in the Sea of Azov: the programmed loss of control**

During the first years of Ukrainian independence a minority of forward-looking officials defended the idea to cease old soviet “internal” status of the Azov Sea. Both the generally accepted principles of freedom of navigation and the geography were on Ukrainian side. Most of the Azov Sea and the Kerch-Yenikalsky shipping channel in the Kerch Strait should remain under Ukrainian jurisdiction irrespectively from approaches to draw the base lines. However, in 1993 the Russian Federation managed to sign the interagency Agreement on Fishery Issues in Azov Sea, September 14, 1993 (Uhoda, 1993). This act permitted Ukrainian and Russian firms to fish throughout entire all the Azov Sea, including the Gulf of Sivash. The annual quotas should be allocated through the minutes of joint commission meetings, and then national authorities should distribute these quotas between the fishers. The authorities, which were parties of the agreement, have already ceased to exist (without proper succession). But the annual

meetings of Ukrainian-Russian Fisheries Commission has been kept holding under any authority and circumstances. For example, according to the order of the Ministry of Agrarian Policy of Ukraine of July 24, 2006 № 393 “On the Ukrainian-Russian Commission on Fisheries in the Sea of Azov”, the Director of its Fisheries Department was appointed by the Ukrainian side in the Ukrainian-Russian Fisheries Commission in the Azov Sea (Nakaz, 2006). As for now, according to the media, arrangements for the Commission’s meetings are carried out by the State Fisheries Agency of Ukraine, which has been entitled to allocate respective quotas by the Governmental Ordinance № 895 of September 30, 2015 (Postanova, 2015). However, any documents on the succession, as well as the current composition of the commission are currently absent.

After Russia’s escalation of the Tuzla plain conflict, Ukrainian authorities almost surrendered on the Azov issue and agreed to sign the notorious Agreement On the Cooperation for Usage the Azov Sea and the Kerch Strait, 2003 (Dohovir, 2003), that was determined as “internal waters” of the two states (Article 1). This preserved the Soviet approach both to the sea and to the economic activity on it. Russia received the veto for passage of military ships of third countries to the Azov and, of course, did not fulfill the terms of the agreement regarding the delimitation of the naval zones in the Azov until occupation of Crimea.

Not surprisingly, Russia started building up its forces in the Azov Sea started at least a year before the Crimean annexation, which immediately converted that area into a “hot spot”. In 2013 Russian border guards sank the Ukrainian fishing boat, ending up with four casualties and the only surviving crewmember taken hostage (Rosiiski prykordonnyky, 2013). The latter was accused with poaching at the demonstrative trial in Russia. Ukrainian authorities of that time showed almost silent reaction to the incident and even started its own investigation of poaching. Only due to publicity of the situation at the national and international level forced Russian authorities to hand over the hostage. After 2014 the issue was almost forgotten.

The occupation of Crimea and, by the Russian proxies, of the coastal Novoazovsk district of Donetsk Oblast in 2014 have not changed anything for Azov fishery negotiations. Respective Ukrainian-Russian commission meets since annually adapting protocols, which in fact, permits much more than merely fishery. Those protocols also permit Russia to perform scientific researches and permit FSB board guards ships to escort Russian fishing vessels to any point of the Azov Sea.

Certain difficulties arose only after the Ukrainian border guards had detained fishing vessel “Nord” under Russian flag. The issue was that the “Nord” was Ukrainian vessel seized in Crimea, and its crew was Crimean locals, formally with Ukrainian citizenship (Arest “Norda”, 2018). That revealed that seized vessel with crew violating rules for cross passing administrative border with occupied Crimea were fishing within the limits of quotas and permits formed as a result of joint decisions of the bilateral fishery commission. After this incident the Russian Federation and its agents of influence in Ukraine have applied enormous efforts to minimize consequences of “Nord” detention and to undermine relevant administrative and criminal proceedings and to evacuate the Crimean crew from Ukrainian territory (Sibircev, 2019). That was crucial for Russian aggressive tactics in Azov. According to the agreements of 1993 and 2003 Ukrainian border guards and Ukrainian Navy have a right to stop and detain any fishing vessel in the Azov Sea. A possible court ruling on “Nord” case might have created a precedent for further detaining the fishery vessels from Crimea.

That was the reason for Russia to take unprecedented steps resolving the issue. The FSB ships with the support of Russian Black Sea Fleet during the period of May-September 2018 seized at least three Ukrainian fishers crews from Berdyansk, Ochakyv and Vilkovo (Antypenko, 2019; Lentsev, 2018). We have to highlight that such actions took place in the areas located close to mainland Ukraine with additional emphasis on Russians capabilities to perform actual control throughout both Azov and Black Seas. Russian officials did not even hide the purpose of their actions, which consisted in the accumulation of Ukrainian hostages for pressure on Ukraine in order to stop the trial on “Nord” crew. The Ombudsman of the Russian Federation Mrs. Moskalkova expressed direct demands to exchange captured Ukrainian fishermen for “Nord” crew (Moskal’kova poprosila Denisovu, 2018; Semeryh morjakov, 2018).

It is possible to suppose that a partial deal was made in October 2018, when the most “Nord” crew was taken from the Russian embassy in Kiev (where that Ukrainian citizens were detained for half a year) and evacuated in Crimea through Ukrainian check-points. At the same time Russian authorities released from Crimea two of three kidnapped crews (the ones from Ochakyv and Vylkovo, except the captain of the Ochakyv vessel).

The further “progress” was almost halted due to political actions within Ukraine. A few Members of Ukrainian Parliament disrupted the annual

meeting of Ukrainian-Russian Azov fishery commission in the fall of 2018 where a new fishery protocol was supposed to be signed (Do sytuatsii na XXX sesii Komisii, 2018). Moreover it was revealed that Russian members of commission took part in actions of occupational administration and the seizure of Ukrainian property in Crimea and thus were to be subject to criminal responsibility. Only pretty strange position of higher Ukrainian authorities let those members of commission to flee of the Ukrainian territory. However, in 2019, the captain of “Nord” was released to Kerch and after the “complete exhaustion of the incident” Russian authorities signed the minutes of the 2019 Azov fishery commission meeting, which had already been signed by the Ukrainian party and was transferred to the Russian Federation through the Ukrainian Foreign Ministry. In this Protocol Ukraine de-facto agreed with the illegal practice of transferring the Russian quotas, established by Protocol, for fishery to the Crimean-registered fishery enterprises (part 3 of the point 8.6 of this Protocol) and agreed with “right” of the Russia to establish unilaterally the fishery regime in the Kerch Strait (point 7.2.10 of the Protocol)

Thus, Ukraine is facing the extension for indefinite period of the 1993 and 2003 Azov agreements and corresponding steps to legalization of fisheries in the occupied Crimea, de-facto recognition of Russian specific “rights” on the Azov and Kerch Strait waters, adjacent to peninsula. Apparently, the situation extremely undermines Ukrainian legal positions and evidences in international courts on interstate conflict between Ukraine and Russia towards Crimea, the Azov and Black Sea.

### **Conclusions**

The Russian aggression and attempt of the annexation of Crimea revealed the overwhelming interior problems of Maritime Administration in Ukraine. These problems comprise the significant obstacle for prompt and effective reactions to the challenges erected by Crimean crises and its consequences. Moreover, certain steps of Ukrainian authorities (for example in discussed above Azov fishery case) undermine Ukrainian positions on the issue and limit the range of ways and means of regaining effective control over Ukrainian sea zones. It should be acknowledged that restoring the status of Ukraine at the Black and Azov Seas demands coordinated efforts to reform national maritime industry. That is very important in conditions of Russia’s total superiority in naval forces and facilities in the region. Thus legal and administrative measures become

maxima of Ukrainian naval strategy. To achieve a proper level of non-military capabilities in responding to Crimean challenges Ukraine have to take a series of steps including: joining Paris MoU, creation an effective and transparent system of state port control, setting up attractive legal regime for vessels under Ukrainian flag. Finally, the corruptive and concealed approach to Azov fishery issues should be ceased in favor of complex and transparent measures to grant national security.

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## АНОТАЦІЯ

**Бабін Б. Спроба анексії Криму та адміністрування морської галузі: правові аспекти асиметричного реагування. – Стаття.**

У даній статті автором проаналізовано окремі системні проблеми адміністрування української морської індустрії, які безпосередньо впливають на шляхи і засоби асиметричного реагування на виклики, пов'язані зі спробою анексії Криму Російською Федерацією. Приділяється увага невизначеності відносин підпорядкування між відповідними органами державної влади України, прозорості та ефективності державного портового контролю та загрози втрати прапорів. Досліджуються питання вибору між Паризьким меморандумом та Чорноморським меморандумом про контроль державою порту. Автор відзначає, що українське морське законодавство та законодавство у сфері внутрішнього водного транспорту залишаються застарілими та неефективними, що призводить до постійного зменшення кількості суден під українським прапором. Це також супроводжується прогалиною у правовому забезпеченні режиму

територіального моря та континентального шельфу, у зв'язку з чим останніми роками практично не було вжито заходів для захисту національних інтересів у цих морських просторах. Звертається увага на недостатність зусиль з наближення законодавства відповідно до Угоди про асоціацію між Україною та ЄС. Автором також порушуються питання рибальства в Азовському морі. Наголошено на негативних наслідках дії Угоди з питань рибальства в Азовському морі, підписаної між Україною та Російською Федерацією у 1993 році, та необґрунтованих діях української влади в її рамках. Автор підсумовує, що більшість адміністративних проблем українського морського сектору ще далекі від вирішення, що негативно впливає на наслідки кримської кризи.

**Ключові слова:** Крим, анексія, російська агресія, Азовське море, Чорне море, державний портовий контроль, морська адміністрація.

### АННОТАЦІЯ

**Бабин Б. Попытка аннексии Крыма и администрирование морской отрасли: правовые аспекты асимметричного реагирования. – Стаття.**

В данной статье автором проанализированы некоторые системные проблемы администрирования украинской морской индустрии, непосредственно влияющие на пути и средства асимметричного реагирования на вызовы, связанные с попыткой аннексии Крыма Российской Федерацией. Уделяется внимание неопределенности отношений соподчинения между соответствующими органами государственной власти Украины, прозрачности и эффективности государственного портового контроля и угрозе утраты флагов. Исследуются вопросы выбора между Парижским меморандумом и Черноморским меморандумом о контроле государством порта. Автор отмечает, что украинское морское законодательство и законодательство в сфере внутреннего водного транспорта остаются устаревшими и неэффективными, что приводит к постоянному уменьшению количества судов под украинским флагом. Это также сопровождается пробелом в правовом обеспечении режима территориального моря и континентального шельфа, в связи с чем в последние годы практически не было принято мер для защиты национальных интересов в этих морских пространствах. Обращается внимание на недостаточность усилий по сближению законодательства в соответствии с Соглашением об ассоциации между Украиной и ЕС. Автором также затрагиваются вопросы рыболовства в Азовском море. Отмечены негативные последствия действия Соглашения по вопросам рыболовства в Азовском море, подписанного между Украиной и Российской Федерацией в 1993 году, и необоснованные действия украинской власти в его рамках. Автор приходит к выводу, что большинство административных проблем украинского морского сектора еще далеки от разрешения, что негативно влияет на последствия крымской кризиса.

**Ключевые слова:** Крым, аннексия, российская агрессия, Азовское море, Черное море, государственный портовый контроль, морская администрация.

