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**Critical Review of the Concept of “Significant Pollution”
and Its Impact on Flag State Pre-Emption Rights in Legal Proceedings Against Foreign Vessels**
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Abstract

The Law of the Sea grants primary enforcement over polluting ships to the flag state, protecting them from foreign jurisdiction, as stated in Article 228 of UNCLOS as a pre-emption action. However, the jurisdiction beyond territorial waters has proven ineffective in preventing ship-source pollution or protecting coastal states. Pre-emption actions risk undermining the enforcement rights of coastal and port states under Articles 218 and 220 of UNCLOS. Pre-emption can only be overridden in certain situations, such as when ship pollution causes “significant damage” to a coastal state. A broader view of “significant damage” strengthens Coastal States’ legal basis to tighten marine pollution regulations and enforce actions against foreign vessels in their EEZ. The method used in this research is normative juridical. The article concludes that “significant damage” links to “significant pollution,” shown by “clear evidence” of its impact on the “coastline or related interests” of the coastal state. Furthermore, all evidence and scientific data must show actual or potential harm, considering the cumulative impact on the coastal state’s resources and interests. Therefore, a comprehensive and well-defined threshold for “significant damage” is essential to strengthen the legal framework for coastal states to ensuring effective enforcement measures against marine pollution.

Keywords: Article 228 UNCLOS, Law Enforcement, Marine Pollution, Pre-emption Right, Significant Pollution.

A. INTRODUCTION

The United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) serves as a comprehensive regulatory structure for maintaining order in the world's oceans and seas and establishes guidelines for the use of marine resources and all maritime activities. Part XII of UNCLOS defines the framework for

the protection of the marine environment. It outlines the fundamental legal framework for port states, coastal states, and flag states, outlining respective jurisdictions. This includes both prescriptive jurisdiction and enforcement jurisdiction over pollution

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originating from ships.⁴ Essentially, UNCLOS and previous international arrangements on the law of the sea,⁵ establish that primary authority for enforcement against ships causing pollution rests with the flag state but grants the coastal state the authority to arrest and subsequently prosecute offending ships for violations occurring within its territorial waters.⁶ This principle serves as a mechanism to prevent the potential misuse of jurisdiction by port and coastal states. It safeguards vessels from foreign legal actions, ensuring the freedom of navigation and prioritizing enforcement by flag state over ship-originated pollution.⁷

However, the current general principles are increasingly viewed as ineffective and inadequate in practice. The longstanding tenet of exclusive jurisdiction over ships beyond its territorial waters by flag state has ineffectively prevented pollution from ships or shielded coastal states from environmental risks associated with the increasing maritime transport of oil and other dangerous substances.⁸ The non-compliance of vessels with international regulations cannot be resolved solely through the enforcement actions of flag states under the UNCLOS regime. Additionally, the provisions for Port State Control in MARPOL alone are not sufficient as an alternative solution.⁹

In certain situations, UNCLOS addresses this challenge by granting the right of port states and coastal states to detain then proceeded to prosecute foreign vessels that

pollute their waters. Article 218 of UNCLOS defines extension of enforcement jurisdiction by port state pertains to vessels that breach standards and international rules within port state's waters or within another state's territory at the request of the latter.¹⁰ On the other hand, Article 220 grants coastal states the right to initiate judicial proceedings and appertain the detention of foreign vessels if clear objective evidence is found of a violation of applicable standards and international regulations for the preventing, reducing, and controlling of pollution from the vessel, or the law of coastal state itself. Simultaneously, pursuant to article 220 of UNCLOS, coastal states grant the authority to commence legal proceedings, which may include detaining foreign vessels, provided there is clear and objective evidence indicating that the vessel has violated international regulations and standards designed to prevent, reduce, and control pollution from ships, or the law of the coastal state.¹¹

However, the extension of rights for environmental protection provided by Articles 218 and 220 is threatened by a regulation in UNCLOS that allows flag states to prevent judicial proceedings initiated against their vessels. Article 228 of UNCLOS stipulates that enforcement by a coastal state or port state against foreign vessels for pollution violations outside territorial waters must be halted if the flag state prosecutes and imposes penalties within six months from the initial initiation of the

⁴ Zhang Xianglan and Ye Quan, "Coastal State Prescriptive Jurisdiction over Pollution from Ships within Its Exclusive Economic Zone," *Contemporary Law Review*, No. 3, 2013, p. 144.

⁵ These conventions are the International Convention for the Prevention of Pollution From Ships, 1973 and Protocol of 1978 relating thereto (MARPOL 73/78), The Protocol of 1998, the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention 69), International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND Convention 71), Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal, 1991, Convention on the Continental Shelf 1958, Convention on the High Seas, 1958.

⁶ Alan E. Boyle, "Marine Pollution under the Law of the Sea Convention", *The American Journal of International Law*, Vol. 79, No. 2, 1985, p. 363.

⁷ Erik J. Molenaar, "Port and Coastal States," dalam Donald Rothwell, *The Oxford Handbook of the Law of the Sea*, Oxford: Oxford University Press, 2015, p. 290.

⁸ R. Michael M'Gonigle, and Mark W. Zacher, *Pollution, Politics, and International Law*, Berkeley: University of California Press, 1979, p. 83.

⁹ Patricia Birnie (et al.), *International Law and The Environment 3rd edition*, Oxford: Oxford University Press, 2009, p. 420.

¹⁰ Article 218 UNCLOS.

¹¹ Article 220 UNCLOS.

proceedings. It should be emphasized that the enforcement proceedings referred to in Article 228 pertain to criminal proceedings, whereas civil proceedings are separately addressed in Article 229 of UNCLOS.¹²

To some extent, the recognition of flag state pre-emption has undermined the enforcement authority of coastal states and port states introduced by UNCLOS.¹³ Pre-emption of legal proceedings against their vessels can be denied only in three situations.¹⁴ Firstly, violations occurring within a coastal state's territorial waters do not necessitate referral to a flag state for prosecution. Secondly, pre-emption by the flag state will be rejected if the flag state has consistently fallen down to fulfill its responsibility to enforce applicable standards and international rules regarding infractions made by its vessels. Third, preemptive legal proceedings cannot be exercised by the flag state if those proceedings pertain to cases causing significant damage to the coastal state.

In the first situation, coastal states possess sovereignty over their territorial waters according to Article 2 of UNCLOS. This provision grants coastal states specific rights and jurisdiction over their territorial waters, extending up to 12 nautical miles from baselines. Within this zone, coastal states have the authority to enforce laws, regulate activities, and manage resources in accordance with international law. UNCLOS establishes these rights to ensure coastal states can protect their territory, manage fisheries, and safeguard their economic interests. Additionally, it allows them to implement measures necessary to prevent, reduce, and control pollution from ships navigating through or polluting their territorial waters, ensuring the preservation

of marine resources for sustainable utilization. This sovereignty confers the right to apprehend and prosecute foreign ships in the territorial waters, as regulated in Article 220 of UNCLOS, as long as it can provide a clear basis and evidence that an infraction has occurred by the ship.¹⁵

In the second situation, pre-emption is restricted in situations where the flag state has consistently failed to adequately enforce relevant international rules and standards concerning violations committed by its flagged vessels. In cases where flag states repeatedly fail to comply, coastal states and port states have the option to commence legal proceedings. Therefore, to reject the use of pre-emption, the coastal state or port state can present evidence showing that the State in question engages in practices of Flags of Convenience (FOC) or refer to the IMO Member State Mandatory Audit Scheme (IMSAS) documentation.¹⁶

In the third situation, the author attempts to analyze the concept of major damage which can be used as grounds to override pre-emption. What are the accepted academic and practical criteria for major damage? Does such major damage have to occur immediately after the pollution incident? Is there no consideration that enforcement should be carried out for minor violations that are repeated and lead to major damage in the future?

However, before discussing the concept of "major damage", the author finds it necessary to address the jurisdiction of law enforcement against ship-source pollution granted by UNCLOS to coastal states, port states, and flag states, and also to provide a critical view on the implementation of each of these jurisdictions.

¹² Article 228 and Article 229 UNCLOS.

¹³ J. Peter A. Bernhardt, "A schematic analysis of vessel-source pollution: prescriptive and enforcement regimes in the law of the sea conference." *Virginia Journal of International Law*, Volume 20, 1979, p. 298.

¹⁴ Article 228 UNCLOS.

¹⁵ Article 220(2) UNCLOS.

¹⁶ Arron N. Honniball, "Vessel-Source Marine Pollution and the Non- Non-Suspension of Coastal State or Port State

Proceedings: Pinpointing Flag States of Repeat Disregard in Article 228 of UNCLOS?", <<https://www.ejiltalk.org/vessel-source-marine-pollution-and-the-non-suspension-of-coastal-state-or-port-state-proceedings-pinpointing-flag-states-of-repeat-disregard-in-article-228-of-unclos/>>, accessed 14 January 2024.

B. ENFORCEMENT JURISDICTION

1. Enforcement by Flag State

Historically, law enforcement has consistently been the most challenging aspect of international efforts aimed at regulating marine pollution. It has become common knowledge that pollution that happens on land, in the atmosphere, and on the seabed is clearly within the coastal state's jurisdiction. However, the mandate for enforcement of regulations that states may have implemented to tackle these issues is not conferred by international law. The authority to enforce laws against ships causing pollution primarily rests with flag states, except when pollution occurs in territorial waters, where coastal states are entitled to apprehend and prosecute violations while respecting innocent passage rights.¹⁷ Traditionally, the principle of flag state jurisdiction places primary responsibility for marine environment protection in the hands of flag states and represents a crucial method for upholding the legal framework governing activities at sea.¹⁸ Any state may grant ships the right to sail under its jurisdiction. Each State has the authority to grant permission for ships to operate under its jurisdiction.¹⁹ Flag states then hold the main authority over their ships on the high seas regarding legislation and enforcement, with a few specific exceptions.²⁰

However, relying solely on flag state authority is insufficient for deterring pollution from ships. When exercising its jurisdiction, flag state faces the most fundamental issues in maritime law, namely the "ability and willingness" of flag state to effectively oversee its vessels.²¹ Over the years, many flag states have failed to take the required actions or shown reluctance to fulfill their responsibilities.²² One of the reasons is the practice of Flags of Convenience (FOC), which currently reaches 49%, carried out by countries with large maritime fleets. On one hand, FOC occurs with the aim of reducing operational costs, as the design, dismantling, and equipping of these ships are not made according to applicable standards.²³ Hence, these vessels are prone to causing marine pollution and safety risks. Conversely, the large fleet of national vessels navigating the seas makes it challenging for flag states to enforce effective control over them.²⁴ Moreover, critics contend that flag states may have less motivation to establish environmental standards or enforce laws effectively because pollution in international waters or in coastal zones of other nations usually does not directly affect them.²⁵

2. Enforcement by Port State

Under UNCLOS, port states are given a significant role in dealing with the pollution from ships.²⁶ Port state

¹⁷ Alan E. Boyle, *Op.Cit.*, at. 363.

¹⁸ McDougal and Myres Smith, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven: Yale University Press, 1962, p. 794.

¹⁹ Robert Rienow, *The Test of the Nationality of a Merchant Vessel*, New York Chichester, West Sussex: Columbia University Press, 1937, p. 219.

²⁰ Articles 94–111 UNCLOS.

²¹ UN Doc A/59/63 5 March 2004, United Nations General Assembly, Oceans and the law of the sea, Consultative Group on Flag State Implementation Report of the Secretary-General, <<https://digitallibrary.un.org/record/522686?v=pdf>>, accessed 26 May 2024.

²² Ho Sam Bang, "Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea", *Journal of Maritime Law & Commerce*, Vol. 40, No. 2, 2009, p. 291.

²³ Virginie Terrie, "Are "Black Tides" Inevitable?" *Coventry Law Journal*, Vol. 6, No. 2, 2001, at. 35-38.

²⁴ Yaodong Yu, Yue Zhao & Yen Chiang Chang, "Challenges to the Primary Jurisdiction of Flag States Over Ships," *Ocean Development & International Law*, vol. 49, Issue 1, 2018, at. 92.

²⁵ Daniel Bodansky, "Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond," *Ecology Law Quarterly*, Vol. 18, 1991, p. 737.

²⁶ Jiang Jiadong and JIANG Wei, "Port State Responsibility for Combating Vessel-Source Pollution: Enforcement and Safeguard Mechanisms," *China Oceans Law Review*, Vol. 2016 No. 1, 2016, p. 203.

jurisdiction is a middle ground between enforcement by coastal states and flag states. Port State jurisdiction enables the detention of rogue vessels within its port to deter pollution from unseaworthy vessels. This authority ensures that violations are promptly investigated, addressed, and prosecuted.²⁷

Article 218 of UNCLOS sets up a legal framework for enforcement by port states to prevent pollution from vessels. When a vessel enters an offshore terminal or port voluntarily, the port state may conduct an investigation if strong evidence is found and initiate legal proceedings related to the unauthorized discharge from the ship beyond its internal waters, territorial sea, or EEZ.²⁸ This process is initiated if requested by that State, flag State, or the State affected or threatened by the violation.²⁹ Specifically, the legal processes that can be taken by a port State under UNCLOS are actions against ships, including the detention of ships, prosecution for violations, and enforcement of court orders or decisions.³⁰ However, the port state's legal actions could be halted if requested by the coastal state if the offense took place within the coastal State's internal waters, territorial sea, or EEZ,³¹ All records of evidence, including bonds or other financial guarantees related to the case, must be submitted to the coastal state.³² Furthermore, the process of imposing penalties for violations committed by foreign vessels must be suspended by the port State after a similar process has been conducted by

the flag State. Flag State has six months from the start of the initial proceedings to complete its process. Once this process is completed, any suspended proceedings in the port State should be ended.³³

UNCLOS grants port states greater authority to ensure that international laws are applied to foreign ships visiting their ports due to pollution violations occurring in the other states' territorial waters or on the high seas.³⁴ Several provisions in UNCLOS offer a legal foundation for port states to contribute positively to marine environmental protection, recognized as complementary to flag State jurisdiction. Law enforcement in port States is also considered preferable to enforcement in coastal States because these actions are less disruptive to navigation freedom and can generally be conducted more safely.³⁵ It can be concluded that with respect to law enforcement jurisdiction, UNCLOS provides port States with the authority to voluntarily enforce jurisdiction over foreign ships in its ports for violations that take place beyond its territorial waters while respecting freedom of navigation.³⁶

However, so far, no case has been brought to court using Article 218 UNCLOS by a port state to prosecute foreign vessels for illegal discharge outside their maritime zones. Neither the UN website nor the UN Secretary-General's annual reports on Oceans and the Law of the Sea nor the Law of the Sea Bulletin provide details about the practical of Article 218 of UNCLOS.³⁷

²⁷ I. A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels," *International and Comparative Law Quarterly*, Vol. 35, No. 2, 1986, p. 341.

²⁸ Article 218 (1) UNCLOS.

²⁹ Article 218 (3) UNCLOS.

³⁰ Sophia Kopela, "Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons," *Ocean Development & International Law*, Vol. 47 No. 2, 2016, p. 98.

³¹ Article 218 (2) UNCLOS.

³² Article 218 (4) UNCLOS.

³³ Article 228 UNCLOS.

³⁴ Baven Marten, "The enforcement of shipping standards under UNCLOS," *WMU Journal of Maritime Affairs*, volume 10, 2011, p. 56.

³⁵ Daniel Bodansky, *Op.Cit*, p. 741.

³⁶ Lan Ngoc Nguyen, "Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits," *Ocean Development & International Law*, volume 52, issue 4, 2021, p. 434.

³⁷ Ho Sam Bang, *Op.Cit*, at. 312.

Besides, the primary characterization of port relationships is competition, stringent environmental requirements and safety standards imposed on visiting ships may lead to higher transportation costs and potentially reduce the competitiveness of ports.³⁸ The reluctance of port states to engage in pollution incidents beyond their territorial waters stems from the discretionary nature of port state enforcement, which is not obligatory. This approach contrasts with the jurisdictional authority granted under international maritime laws, where port states can choose whether or not to take action based on their own discretion. This discretionary enforcement approach often results in varying levels of engagement and response among different port states, depending on their individual policies, capacities, and priorities regarding maritime environmental protection. As a result, incidents of pollution occurring outside their immediate jurisdiction may not consistently receive the same level of attention or enforcement from port states, contributing to challenges in effectively addressing pollution by ship issues.

3. Enforcement by Coastal State

UNCLOS signifies a significant advancement in granting coastal states jurisdiction over ship pollution, marking a pivotal development in this domain.³⁹ However, bear in mind that despite advancements, coastal state jurisdiction still exhibits weaknesses and limitations. On the one hand, UNCLOS creates an EEZ regime that prolongs up to 200 nautical miles; on the other hand, it presents a challenge for coastal states to effectively detect violations of waste disposal

regulations in these expansive waters unless a vessel leads to substantial pollution to the marine environment.

It is worth emphasizing that coastal states experience a higher impact from marine pollution compared to flag states, making them more motivated to prevent ship-originating pollution. Hence, it is reasonable for coastal states to support more rigorous environmental standards and seek increased jurisdiction over foreign vessels operating in their coastal waters. The enforcement process for infringement of coastal state laws and regulations, aligned with international standards or international conventions for preventing, reducing, and controlling pollution from vessels, can occur in two scenarios. Firstly, when a violating ship voluntarily enters an offshore terminal or port, the coastal state grants the authority to initiate legal proceedings against the vessels under Article 220(1). In this situation, a coastal state assumes the role of a port state but exercises jurisdiction based on its coastal state status rather than solely as a port state.⁴⁰ Secondly, if the vessel in question is navigating within the territorial waters, the coastal state may commence legal proceedings if there is clear and strong evidence indicating that the vessel has performed such violations, provided that such evidence justifies the conduct of a trial under Article 220(2). Conversely, if the proceedings cannot be substantiated with evidence, only physical inspection can be conducted for violations of legislative regulations, even if the vessel in question is sailing in the territorial waters.⁴¹

Further, article 211(5) grants legislative authority to coastal states to

³⁸ Ted L. McDorman, "Regional Port State Control Agreements: Some Issues of International Law," *Ocean and Coastal Law Journal*, Vol. 5, No. 2, 2000, p. 208.

³⁹ Zacharias L. Kapsis, "The Prescriptive and Enforcement Jurisdiction of a Coastal State in Relation to Ship Source Pollution Occurs in Its Various Maritime Zones, Under the

United Nations Convention on The Law of The Sea and The Customary International Law," *International Journal of Advanced Research*, Vol. 8, Issue 11, 2020, p. 619.

⁴⁰ Erik J. Molenaar, *Op.Cit*, p. 294.

⁴¹ *Ibid*, p. 294.

establish regulations, and Article 220 enables coastal states to impose these regulations and laws. The response of coastal states in different circumstances varies based on the level of pollution caused by the vessel. As a standard rule, the coastal state, according to article 220(3), typically requests specific information such as the identity and port of registration of the vessel. In other words, has the authority to perform a physical examination of the ship if violations of its legislative regulations lead to significant discharges that cause or pose a significant threat of pollution.⁴² A physical examination can also occur if the ship refuses to provide information or if the information provided clearly contradicts the factual circumstances, justifying such an inspection under Article 220(5).

Furthermore, If the violation has resulted in the release of substances causing major or significant harm or poses a threat of major harm to the "coastline" or "interests of the coastal state" or any resources within its internal waters, territorial waters, or EEZ, a coastal state can take legal action, including detaining the ship, based on Article 220(6). In other words, even in instances of significant pollution threats, the coastal state is only allowed to obtain relevant information, which is then handed over the law enforcement actions to the flag state, unless the pollution causes significant harm or poses a threat of substantial detriment that has an impact on specific interests. Coastal states are also not permitted to take any enforcement actions against vessels violating applicable regulations unless such violations result in significant harm.⁴³

Coastal state has limited jurisdiction to ensure that any vessel crossing its EEZ adheres to international regulations. Law enforcement can be conducted when a ship voluntarily enters a port, nonetheless, jurisdiction in the EEZ is adjusted based on the level of threat posed.⁴⁴ Detention and prosecution are permitted only if there is "clear and objective evidence" of an infringement of international regulations related to illegal discharge that causes or possibly causes major damage to the coastal state. Only if the violation causes a substantial discharge of waste causing or threatening significant pollution, a ship may undergo inspection for evidence related to the violation, namely illegal discharge of waste. In these situations, a ship may be detained if it is deemed necessary to deter undue damage to the marine environment.⁴⁵ Presuming that conditions are not met, coastal state's authority is restricted to collecting information about ship's identity and subsequent port destination, after which it can request port state to take necessary actions.⁴⁶ Although law enforcement authority in the EEZ provides flexibility for coastal states to determine justified actions in individual cases, this authority is more limited than that held in territorial waters. In less severe instances, enforcement authority remains under the jurisdiction of either flag states or port states.⁴⁷

C. THE CONCEPT OF "MAJOR DAMAGE"

Under international law, the flag State holds the authority to oversee and regulate vessels flying its flag, including the responsibility to enforce compliance and impose sanctions for any breaches of

⁴² David M. Dzidzornu, "Four Principles in Marine Environment Protection: A Comparative Analysis," *Ocean Development & International Law*, Volume 29, Issue 2, 1998, p. 99.

⁴³ Zacharias Kapsis, *Op.Cit.*, p. 622-623.

⁴⁴ Patricia Birnie (et.al), *Op.Cit.*, p. 422.

⁴⁵ Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague: Kluwer Law International, 1998, p. 389.

⁴⁶ Jiang Jiadong and Jiang Wei, *Op.Cit.*, p. 210.

⁴⁷ Patricia Birnie (et.al), *Op.Cit.*, p. 425.

applicable regulations.⁴⁸ However, UNCLOS affirms that the condition of "major damage" can serve as a legal basis for coastal States to take enforcement actions against foreign vessels responsible for pollution within their EEZ.⁴⁹ One of the most severe maritime pollution cases demonstrating the legal significance of this threshold is the Prestige oil spill of 2002. The Prestige, a Bahamas-flagged oil tanker, suffered structural damage off the coast of Galicia, Spain. As a result, it broke apart and sank, releasing approximately 63,000 tons of oil into the sea. This disaster led to extensive environmental destruction, severely impacting marine ecosystems and causing significant economic losses, particularly in the fisheries and tourism sectors.⁵⁰ The Prestige case is considered to have highlighted important benchmarks for defining "major damage". It was observed that the volume of the spill, which involved a massive oil discharge of tens of thousands of tons, clearly surpassed acceptable pollution levels set by international environmental laws. Additionally, the environmental impact was noted to be severe, with the spill causing significant damage to marine and coastal ecosystems, leading to the mass mortality of marine species and the destruction of crucial habitats. The socio-economic consequences were also significant, as the contamination resulted in substantial financial losses for local communities, particularly within the fishing and tourism industries, which suffered major disruptions. It has been established that "major damage" involves both quantitative and qualitative assessments, which consider the scale of pollution, ecological destruction, and economic impact. These factors collectively

provide a stronger legal basis for coastal States to assert their enforcement jurisdiction over polluting vessels within their EEZ.⁵¹

1. Pre-emption Actions by Flag State

Article 228 gives flag states the authority to take preemptive actions to prevent legal proceedings against their ships by port state or coastal state. The imposition of sanctions for infringement of laws, regulations, or international standards related to preventing, reducing, and controlling pollution from foreign ships outside territorial waters is suspended if the flag state initiates appropriate sanction proceedings within six months of the initial process. Flag states cannot claim suspension if the process relates to cases causing major damage to or serious harm to the territory of the coastal state or if the flag state frequently neglects its obligation to enforce rules and international standards against violations committed by its ships.⁵² Then, coastal and port states have only three years to formalize proceedings against foreign ships. Article 228(2) also prohibits other states from initiating legal proceedings if proceedings have already been initiated by another state. This limitation prevents port and coastal states from prolonging investigations longer than necessary and prevents parallel legal processes.⁵³ Article 228(3) asserts that the flag State has the principle of pre-emption in applying and enforcing its laws and regulations on ships flying its flag, neglecting whether legal proceedings have already been initiated

⁴⁸ Theodore Okonkwo, "International Maritime Legal Regime and The Escalation of Flags of Convenience Practices", *International Journal of Law*, Volume 4 Issue 1, 2018, p. 1.

⁴⁹ Lan Ngoc Nguyen, "Coastal States' Rights and Obligations under the Law of the Sea," in *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies*, Cambridge University Press; 2023, p. 29.

⁵⁰ Gonzalo Caballero and David Soto-Oñate, "Environmental crime and judicial rectification of the *Prestige* oil spill: The polluter pays", *Marine Policy*, Vol. 84, 2017, p. 215.

⁵¹ Jose Juste Ruiz and Valentín Bou Franch, "After the Prestige Oil Spill: Measures Taken by Spain, in an Evolving Legal Framework," in *Spanish Yearbook of International Law Online* - January 2004, p. 13-14.

⁵² Article 228(1) UNCLOS.

⁵³ Article 228(2) UNCLOS.

by the port state or coastal State.⁵⁴ Within certain limits, the recognition of the pre-emption principle in Article 228 of UNCLOS can impact the reduction of law enforcement authority by port and coastal States introduced by UNCLOS in Articles 218 and 220.⁵⁵ Therefore, it's important to thoroughly analyze the essential components of Article 228, as outlined below.

The process of imposing penalties. Flag States may exercise their right to suspend legal proceedings under the provisions of this article only after such legal proceedings have been initiated by port state or coastal state according to article 218 and 220 of UNCLOS. The process of imposing penalties referred to in Article 228 pertains to criminal proceedings.⁵⁶ This process must be distinguished from penalties seeking redressal for losses resulting from damage to the marine environment caused by pollution, as referred to in Article 229.

Violations by foreign vessels beyond territorial waters. Flag state may suspend and limit port state's authority to impose sanctions for infringements of standards and international rules by foreign ships in another state's EEZ or high seas, but only upon request from that state.⁵⁷ The process may also be suspended when a coastal state imposes sanctions for violations of its regulations and laws in the EEZ.⁵⁸

The appropriate charges. Flag State may only invoke the pre-emption principle regarding proceedings aimed at imposing penalties by coastal state and port state based on the appropriate charges. These charges must relate to

the same facts underlying infringement by a foreign vessel. Coastal state and port state retain the right to pursue legal proceedings against foreign vessels if the flag state fails to initiate legal proceedings, fails to do so within six months, or initiates legal action based on the same facts.⁵⁹

Repeatedly neglecting its duty to enforce. Pre-emption by flag state is limited if it frequently neglects its duty to enforce applicable standards and international rules against violations by ships flying its flag. In such conditions, coastal states and port states may proceed with legal proceedings,⁶⁰ especially regarding violations by vessels that cause "major damage" to the marine environment of the coastal state.

Major damage was inflicted upon the coastal state. UNCLOS uses the term "major damage" in two provisions without providing a definition or clarification. Most other provisions only mention "damage" and, in one instance, refer to "serious damage."⁶¹ Several discussions have debated the definition of major damage, which is explained below.

According to Nordquist, the term "major damage" in Article 233 of UNCLOS, although not explicitly defined, typically refers to significant maritime disasters like the Amoco Cadiz incident. Koh adds that two key factors are accidents in straits due to violations of navigation rules and the extent of damage according to the type of vessel

⁵⁴ Article 228(3) UNCLOS.

⁵⁵ J. Peter A. Bernhardt, *Op.Cit.*, p. 265.

⁵⁶ UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), Art. 38, p. 179-180, <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_5/a_conf62_wp8_rev1_part3.pdf>, accessed 31 May 2024.

⁵⁷ Yaodong Yu, Yue Zhao & Yen-Chiang Chang, *Op.Cit.*, p. 95.

⁵⁸ Zacharias L. Kapsis, *Op.Cit.*, p. 621.

⁵⁹ Alexander Proelss (eds), *United Nations Convention on the Law of the Sea: A Commentary*, Munich: Oxford and Baden-Baden, 2017, p. 1550.

⁶⁰ *Ibid.*, p. 1552.

⁶¹ Major damage is used in Article 220 (6) and Article 233, among others. At the same time, serious damage is found in Article 94 (7). See also Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague: Kluwer Law International, 1998, p. 464.

and cargo carried.⁶² When Nordquist's and Koh's views are combined, major damage can be understood as any form of pollution resulting from vessel navigation that can affect the socio-economic well-being of coastal populations. This pollution can harm the economies of countries around the straits, both directly and indirectly.

The Court of Justice of the European Union interpreted the term "major damage" in Article 220(6) of UNCLOS in *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos* case, relating it to key phrases in the article such as "clear objective evidence," "coastline or related interests," and "significant pollution." The term "clear objective evidence" includes not just proof of the violation itself but also aftermath effect evidence of such violation.

The term "coastline or related interests" carries a similar meaning as defined in Article I(1) and Article II(4) of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, referring to the welfare of the affected area, encompassing the preservation of wildlife and marine resources. Furthermore, this term additionally signifies that marine resources of a coastal state's territorial waters and EEZ include harvested species as well as species related to and reliant upon them, such as plants and animals that rely on harvested species for food.

Regarding the term "significant pollution," the court opined that, in principle, it is unnecessary to consider this concept when measuring the effect of a violation. To measure the impact, as defined in Article 220(6), all necessary

evidence must be used to define that damage has occurred or that there is any possibility of a threat of damage to the coastal State's resources and related interests.

To assert the effects of violation, as outlined in Article 220(6), all essential evidence must be employed to demonstrate that harm has taken place or there exists a potential for harm to the resources and related interests of the coastal state. The evaluation of the level of damage caused or threatened to resources or related interests must consider several factors. Several factors need to be considered when assessing the extent of damage caused or potentially threatened to resources or related interests. These factors encompass the cumulative impact on resources and related interests, the differential sensitivity of coastal State's various resources and interests to damage, and the potential hazardous outcomes of waste disposal affecting these resources and interests.⁶³ This evaluation should rely on both accessible scientific data and the characteristics of hazardous substances in waste discharge. Additionally, it should consider factors such as the quantity, speed, direction, and duration of the dispersion of waste.⁶⁴

Assessing the cumulative nature of damage involves understanding how multiple impacts, even if individually minor, can collectively affect economic and ecosystem activities. Coastal States often have varying degrees of sensitivity to damage depending on the economic and ecosystem significance of different resources. For example, a spill affecting a sensitive marine habitat might have

⁶² Hazmi Rusli, R. Dremligau, and Wan I. Talaat, "Legal Framework on the Marine Environment Protection of Straits Used for International Navigation: Has It Been Effective in the Straits of Malacca and Singapore?", dalam Eric Yong Joong Lee (ed), *ASEAN International Law*, Singapore: Springer Nature Singapore, 2021, p. 352.

⁶³ Case C-15/17: Judgment of the Court (Third Chamber) of 11 July 2018 (request for a preliminary ruling from the Korkein oikeus — Finland) — *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos*, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CA0015>>, accessed on 31 January 2024.

⁶⁴ *Ibid.*

more severe consequences than one impacting a less critical area.⁶⁵ Furthermore, the hazardous consequences of waste disposal are crucial to evaluate. This assessment includes considerations of the types of hazardous substances involved, their persistence in the environment, the direction and speed of their dispersion, and the timeframe over which they pose a threat. This holistic approach ensures that the evaluation is comprehensive and takes into account both immediate and long-term impacts on resources and related interests of coastal States. From the explanation provided above, it can be inferred that the evaluation under Article 220(6) of UNCLOS demands a thorough examination of all relevant evidence to determine the magnitude of harm or the potential risk to coastal resources and interests. This approach ensures that appropriate measures can be implemented to mitigate and address several harms caused by violations of international maritime regulations.

The European countries participating in OSPAR and the Bonn Agreement also share the views of the Court of Justice of the European Union. On 29-30 November 2023, a Seminar on Maritime Environmental Crimes was held in Brussels; the participating countries issued recommendations defining significant pollution and major damage, specifically identifying proven illegal oil discharge as a pollutant causing major damage by considering the visibility of cumulative impacts from illegal discharges. Additionally, environmental assessments to determine environmental health status can be used to demonstrate major

damage, taking into account indicators such as the volume of discharge, type of oil and weather conditions, distance to valuable habitats and protected areas, and acute, cumulative, and long-term toxic and suffocation effects on the environment and human health.⁶⁶

2. Minor Damage and Enforcement by Port States and Coastal States

Narrowly interpreting the term "major damage" could potentially contradict Article 192, which outlines the obligation of participating states to maintain the marine environment under Part XII. The primary challenge lies in UNCLOS does not offer a definition for terms like minor or major damage.⁶⁷ Since UNCLOS does not clearly define "major damage," there is a possibility of drawing the incorrect conclusion that vessels transiting are not prohibited from polluting the marine environment as long as the resulting damage is relatively insignificant. Therefore, both coastal states, port states, and flag states, would be unable to exercise the enforcement against such vessels. Such a conclusion would undermine the objectives of UNCLOS.

Port states and coastal states can still enforce the law against vessels engaged in illegal discharge, even if the impact is not as extensive as in the Amoco Cadiz incident. Major damage does not necessarily have to demonstrate its impact immediately or within a short period.⁶⁸ Continuous illegal discharges along the coast of a region can lead to serious long-term damage.

Article 220(6) of UNCLOS stipulates that If there is "clear and objective evidence" that a vessel operating in territorial waters or EEZ of a state has

⁶⁵ Alexeeff GV, Faust JB (et.al), "A Screening Method for Assessing Cumulative Impacts", *International Journal of Environmental Research and Public Health*, Vol. 9 Issue 2, 2012, p. 650.

⁶⁶ 2023 Joint NSN-OTSOPA Seminar on Maritime Environmental Crimes, Recommendation,

<<https://www.ospar.org/work-areas/cross-cutting-issues/north-sea-network>>, accessed 25 June 2024.

⁶⁷ Mary George, *An Alternate Regime of Liability and Compensation for Oil Pollution from Tankers in The Straits of Malacca and Singapore*, A Doctorate Thesis, Sydney: Faculty of Law, University of Sydney, 2000, p. 237.

⁶⁸ Case C-15/17, *op.cit.*

committed a violation as defined in Article 220(3), leading to "major damage" or poses a significant threat of harm to the "coastline or related interests" of coastal State, or if such harm extends to resources within territorial waters or EEZ, coastal State has the right to initiate legal proceedings, encompassing detaining the vessel, pursuant article 220(6). Hence, there is a necessity for clear and objective evidence of the pollution's impact, leading to substantial harm to the coastline or related interests of the coastal state.

Clear, objective evidence pertains to the proof needed to substantiate breaches of international regulations and standards aimed at preventing, reducing, and managing pollution from ships. This includes the laws and regulations of the state implementing these international standards, notably the MARPOL Convention 73/78, which specifies such violations. Moreover, these infractions lead to significant discharge of waste that causes or poses a serious threat of marine environmental pollution or violations with serious consequences. Such violations must lead to significant discharge into the marine environment, causing or posing a significant threat of pollution. With clear objective evidence that such violations have occurred and have a serious impact, the coastal State is authorized to detain the vessel in accordance with Article 220(3).

Article I (1) and Article II (4) of the 1969 Convention are used as benchmarks for interpreting the "coastline and related interests" of coastal states. Article I (1) states that in case of a maritime accident or an act related to such an accident, which could reasonably lead to significant adverse effects, contracting parties can take actions on the high seas as needed to deter, minimize, or annihilate

immediate and severe risks to their "coastlines or related interests" from oil waste or the threat thereof. Article II (4) defines "related interests" as "interests of a coastal state" directly impacted or endangered by a maritime accident, *inter alia*: (i) coastal, port, or estuary activities, including fishing, crucial for local livelihoods; (ii) tourism sites in the affected area; (iii) the health and welfare of people living along the coast, as well as the conservation of wildlife and marine life in the region. In summary, Article 220(6) of UNCLOS acknowledges the jurisdiction of coastal states' overall biological and non-biological resources within both territorial waters and EEZ, including harvested species and their associated species, such as animals or plants relying on harvested species for sustenance. Furthermore, "related interest" includes the social, economic, and health conditions of those affected. This includes significant harm or threats to various marine activities essential to coastal populations, such as livelihoods, tourism, and the overall well-being of their communities. It also pertains to the preservation of wildlife and marine biological resources in those areas.

Meanwhile, "significant pollution" is interpreted as "major damage" or the "threat of major damage" to specific resources. This implies that all evidence demonstrating the occurrence of "damage" or the "potential threat for damage" to those resources and interests must be considered, and the tier of the damage inflicted or potential threat must be evaluated. In this regard, considering the available scientific data, coastal states must evaluate the type and magnitude of damage that could result from such discharges to different "resources and related interests" of the

"coastline".⁶⁹ This assessment should also consider the type and volume of hazardous substances in the discharge, as well as the direction, speed, and duration of the discharge's spread. All evidence needed to confirm damage or a potential threat to the "resources and related interests" of "coastline," as well as to evaluate the tier of the damage to those resources or interests, should also take into account the cumulative impact on some or all related resources and interests. This involves taking into account long-term and cumulative impacts on human health.

D. CONCLUSION

Based on the perspective of the Court of Justice of the European Union and the European countries participating in OSPAR and the Bonn Agreement, it can be concluded that the concept of "significant pollution" in Article 220(5) UNCLOS is interpreted as the result of an assessment of the consequences of the violation. To assess the consequences of violations, all evidence and scientific data must be used to determine whether damage has occurred or there is a potential threat to the "resources and related interests" of the "coastline." This evaluation should also consider the cumulative impact on certain or all interconnected resources and interests, as well as the potential adverse outcomes of waste disposal on those resources and interests. Once all clear objective evidence is available, the port state and coastal state can counter the use of preemptive rights by the flag State and can enforce their authority based on law enforcement against vessels responsible for pollution under Article 220 of UNCLOS.

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⁶⁹ Ricardo, "Evaluation of Directive 2005/35/EC on ship-source pollution", Directorate-General for Mobility and

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