Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 28 February 2018 [1]

Case C-15/17

Bosphorus Queen Shipping Ltd Corp.
v
Rajavartiolaitos

(Request for a preliminary ruling from the korkein oikeus (Supreme Court, Finland))

(United Nations Convention of the Law of the Sea — Article 220(6) — Enforcement jurisdiction of a coastal State — Jurisdiction of the Court to interpret provisions of international law — Directive 2005/35/EC — Ship-source pollution — Article 7(2) — Marpol 73/78 — Oil spill in the exclusive economic zone from a foreign vessel in transit — Circumstances in which a coastal State may instigate proceedings against a foreign vessel — Freedom of navigation — Protection of the marine environment — Proximity — Major damage or threat of major damage to the coastline, related interests or any resources in the territorial sea or exclusive economic zone — Clear objective evidence)

1. This request for a preliminary ruling turns, in particular, on the proper construction of Article 220(6) of the United Nations Convention on the Law of the Sea ('UNCLOS') [2] and Article 7(2) of Directive 2005/35/EC [3] on ship-source pollution, a provision which reiterates the content of Article 220(6) of UNCLOS. Specifically, the referring court seeks guidance on the circumstances in which a coastal State may instigate proceedings against a foreign vessel that is the source of an oil spill in the exclusive economic zone ('EEZ') of the coastal State in question.

2. The case raises an important issue of principle that goes to the very heart of the interpretation of generally recognised principles of the law of the sea. More precisely, in answering the questions put to it, the Court will have an opportunity to clarify, for the first time, [4] the circumstances in which a coastal State may, as a matter of EU law, assert jurisdiction in its EEZ against a foreign vessel in order to protect the marine environment without unduly interfering with freedom of navigation.

1 Original language: English.

2 Concluded 10 December 1982 in Montego Bay, Jamaica, and entered into force 16 November 1994. The convention was approved on behalf of the now European Union by Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

3 Directive of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences (OJ 2005 L 255, p. 11), as amended by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 280, p. 52).

4 The novelty of the questions put to the Court is, moreover, highlighted by the circumstance that, at least to my knowledge, the International Court of Justice has never interpreted Article 220 of UNCLOS in its case-law.

I. Legal framework

A. International law

1. The Intervention Convention

3. The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was concluded in Brussels on 29 November 1969 ('the Intervention Convention'). Panama and Finland are parties to that convention, whereas the European Union and some of its Member States are not.

4. In accordance with Article I(1) of the Intervention Convention, parties to that convention 'may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences'.

5. Article II(4) of the convention defines 'related interests' as the 'interests of a coastal State directly affected or threatened by the maritime casualty, such as: (a) maritime coastal, port or estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned; (b) tourist attractions of the area concerned; (c) the health of the coastal population and the well-being of the area concerned, including conservation of living marine resources and of wildlife'.

2. Marpol 73/78

6. The International Convention for the Prevention of Pollution from Ships was concluded in London on 2 November 1973 and complemented by the Protocol of 17 February 1978 ('Marpol 73/78'). That convention puts in place rules designed to minimise pollution in the marine environment. Unlike all the Member States, the European Union is not a party to Marpol 73/78.

7. In accordance with Article 4(2) of Marpol 73/78, any infringement of the requirements of the convention shall be prohibited and sanctions shall be established therefor. That provision also specifies that whenever such an infringement occurs, a party to the convention shall either instigate proceedings in accordance with its law or provide to the flag State such information and evidence as may be in its possession that an infringement has occurred.

8. Annex I to the convention contains rules on the prevention of oil pollution. Regulation 1 in Chapter I of Annex I ('Regulations for the Prevention of Pollution by Oil') defines the Baltic Sea as a special area, for the purposes of that annex. In such areas, for technical reasons relating to their oceanographical and ecological condition and to their sea traffic, special mandatory methods for the prevention of sea pollution are to be adopted. Under Marpol 73/78, special areas are provided with a higher level of protection than other areas of the sea.

9. Regulation 15 (A) of Part C of Chapter 3 of Annex I to Marpol 73/78 concerns the control of the discharge of oil. It states, in essence, that any discharge of effluent with an oil concentration exceeding 15 parts per million (ppm) is prohibited as concerns vessels of 400 tons gross tonnage and above. Regulation 15 (B) of Part C of Chapter 3 of Annex I reiterates, in essence, that same rule in relation to special areas.

3. UNCLOS

10. Like all the Member States, the European Union is a signatory to UNCLOS.

11. Article 1 of UNCLOS explains that, for the purposes of the convention:

'(1) "Area" means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;

…

(4) "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;

…'

12. Article 56 of the convention sets out the rule that governs the jurisdiction of coastal States in the EEZ. It reads:

'1. In the [EEZ], the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting; conserving and managing the natural resources, whether living or non-living, of the waters super-jacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

…

(iii) the protection and preservation of the marine environment;

…'

13. The rights and obligations of other States in the EEZ of a coastal State are laid down in Article 58 of the convention. Pursuant to that provision, other States must ensure that they comply with the convention in exercising their rights in the EEZ, have due regard to the rights and duties of the coastal State and comply with the rules and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law.

14. Part XII of UNCLOS concerns the protection and preservation of the marine environment.

15. Pursuant to Article 192 of UNCLOS, States have the obligation to protect and preserve the marine environment.

16. In accordance with Article 217 of UNCLOS, flag States are to provide for the effective enforcement of rules and standards pertaining to the prevention, reduction and control of ship-source pollution of the marine environment irrespective of where an infringement occurs.

17. Article 220, which deals with enforcement jurisdiction of coastal States, belongs to that part of the convention.

18. Article 220(3) to (6) sets out the grounds of jurisdiction under which a coastal State can take enforcement measures against a vessel that has committed an infringement of international rules and standards regarding ship-source pollution in its EEZ. Those paragraphs read:

'3. Where there are clear grounds for believing that a vessel navigating in the [EEZ] or the territorial sea of a State has, in the [EEZ], committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

5. Where there are clear grounds for believing that a vessel navigating in the [EEZ] or the territorial sea of a State has, in the [EEZ], committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the [EEZ] or the territorial sea of a State has, in the [EEZ], committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or [EEZ], that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.'

B. EU law

19. Directive 2005/35 deals with ship-source pollution and the adequate response to be taken by the Member States to fight such pollution.

20. In particular, it can be seen from recitals 2 and 3 that the directive is designed to improve the implementation of Marpol 73/78 by harmonising its implementation at EU level. The need for harmonisation was seen to be particularly pressing because, on the one hand, the rules contained in Marpol 73/78 are being ignored on a daily basis by a very large number of ships sailing in EU waters, without corrective action being taken. On the other hand, before the directive was adopted, the practices of Member States varied considerably as regards the imposition of penalties for discharges of polluting substances from ships.

21. Article 1 of the directive describes its purpose. It reads:

'1. The purpose of this [directive] is to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

2. This [directive] does not prevent Member States from taking more stringent measures against ship-source pollution in conformity with international law.'

22. In accordance with Article 3(1) of the directive:

'This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

…

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2 [of UNCLOS] to the extent that a Member State exercises jurisdiction over such straits;

(d) the [EEZ] or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas.'

23. Article 7 of Directive 2005/35 deals with enforcement measures by coastal States with respect to ships in transit. It states:

'1. If the suspected discharge of polluting substances takes place in the areas referred to in Article 3(1)(b), (c), (d) or (e) and the ship which is suspected of the discharge does not call at a port of the Member State holding the information relating to the suspected discharge, the following shall apply:

(a) If the next port of call of the ship is in another Member State, the Member States concerned shall cooperate closely in the inspection referred to in Article 6(1) and in deciding on the appropriate measures in respect of any such discharge;

(b) If the next port of call of the ship is a port of a State outside the Community, the Member State shall take the necessary measures to ensure that the next port of call of the ship is informed about the suspected discharge and shall request the State of the next port of call to take the appropriate measures in respect of any such discharge.

2. Where there is clear, objective evidence that a ship navigating in the areas referred to in Article 3(1)(b) or (d) has, in the area referred to in Article 3(1)(d), committed an infringement resulting in a discharge causing major damage or a threat of major damage to the coastline or related interests of the Member State concerned, or to any resources of the areas referred to in Article 3(1)(b) or (d), that State shall, subject to Part XII, Section 7 of [UNCLOS] and provided that the evidence so warrants, submit the matter to its competent authorities with a view to instituting proceedings, including detention of the ship, in accordance with its national law.

3. In any event, the authorities of the flag State shall be informed.'

C. Finnish law

24. Chapter 3, Paragraph 1, of the Merenkulun ympäristönsuojelulaki (1672/2009) (Law on environmental protection in maritime transport) states:

'Infringements of the ban on the spillage of oil or oily mixtures into Finland's waters or in its [EEZ], laid down in Chapter 2, Paragraph 1, shall be punishable by a fine (*oil spill fine*), in so far as the oil or oily mixture spilled cannot be regarded as minor in the light of its quantity or impact. Infringements of the spill ban committed by a foreign vessel in transit through Finland's [EEZ], shall, however, be amenable to a fine only if the spill causes major damage or a threat of major damage to Finland's coastline or related interests, or to any resources of Finland's territorial sea or [EEZ].'

II. Facts, procedure and the questions referred

25. The *Bosphorus Queen* is a dry cargo vessel registered in Panama. According to the Rajavartiolaitos (the Border Protection Authority, Finland; 'the authority'), that vessel spilled oil into the sea while in transit through Finland's EEZ on 11 July 2011.

26. The spill occurred on the outer edge of Finland's EEZ, around 25 to 30 kilometres off the Finnish coastline. The oil spread over some 37 kilometres in a strip roughly 10 metres wide. The surface area of the spill was estimated to be approximately 0.222 km^2 and its volume to be between 0.898 and 9.050 m^3.

27. No countermeasures were adopted in response to the oil spill. The oil was not observed to have reached the coastline and was not found to have caused any specific damage.

28. When the *Bosphorus Queen* returned from St. Petersburg, Russia, through Finland's EEZ, the authority, by decision of 23 July 2011, required the shipowner, Bosphorus Queen Shipping Ltd Corp. ('Bosphorus'), to provide a financial security of EUR 17 112 regarding the potential obligation to pay an oil spill fine. After the security was deposited on 25 July 2011, the ship resumed its journey.

29. On 26 July 2011, the Suomen ympäristökeskus (the Finnish Environment Agency, 'the agency') issued an expert opinion to the authority on the risks associated with the oil spill. The environmental impact of the oil spill was assessed on the basis of the estimated minimum quantity of oil spilled. According to that opinion:

– At least some of the oil could reach the Finnish coastal areas. In that case, their use for recreational purposes would be adversely affected.

– Some of the oil also affected the open seas in the vicinity of the spillage site.

– The oil spill was prejudicial to the favourable development of the state of the environment in the Baltic Sea.

– The oil spill had adversely affected the birds that rest and feed on the open seas.

– The oil had harmed vegetable and animal plankton. The oil compounds were being passed down the food chain.

– The three-spined sticklebacks that inhabit the surface water of the open sea had probably been directly harmed by the oil spillage, with the result that an acute adverse effect on fish stocks could not be excluded.

– The level of sedimentation in the area was high, and it was likely that a percentage of the oil compounds would reach the sea floor and harm the biocenoses living there.

– Many valuable natural habitats belonging to the Natura 2000 network were located in the vicinity of the spillage site.

– The timing of the oil spill was particularly disadvantageous to the sea bird populations, inasmuch as these had large numbers of young that were unable to fly in the waters that stretch from the outer skerries of the Hanko Peninsula to the Archipelago Sea, and the young eider ducks circulated at considerable distance from the coast.

– At the time of the oil spill, there had been tens of thousands of eider ducks off the Hanko Peninsula. The spill had posed a major threat to the sea bird population on the Finnish coast.

30. On 16 September 2011, the authority imposed an oil spill fine of EUR 17 112 on Bosphorus. On the basis of the expert opinion, the authority took the view that the spill had caused major damage or a threat of major damage to Finland's coastline or related interests, or to resources of its territorial sea or EEZ.

31. Bosphorus subsequently brought an action before the Helsingin käräjäoikeus (Court of First Instance, Helsinki, Finland) sitting as a maritime court. It sought annulment of the decisions relating to the provision of a security and the imposition of an oil spill fine.

32. In its judgment of 30 January 2012, the maritime court considered that it had been shown that *Bosphorus Queen* had released into the sea a minimum quantity of approximately 900 litres of oil. In the light of the environmental impact assessment, the maritime court considered that, for the purposes of Chapter 3, Paragraph 1, of the Law on environmental protection in maritime transport, the oil spill caused a threat of major damage. On those grounds, the maritime court dismissed the action.

33. By decision of 18 November 2014, the Helsingin hovioikeus (Court of Appeal, Helsinki, Finland) dismissed the appeal brought against the judgment of the maritime court.

34. Bosphorus then brought an appeal before the referring court asking that court to set aside the decision of the Helsingin hovioikeus (Court of Appeal, Helsinki) and the judgment of the maritime court, to annul the decisions on the provision of a security and on the oil spill fine and to revoke the oil spill fine.

35. Entertaining doubts as to the correct construction of the relevant provisions of UNCLOS and Directive 2005/35, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the expression "coastline or related interests" in Article 220(6) of [UNCLOS] and the expression "coastline or related interests" in Article 7(2) of Directive [2005/35] to be interpreted by reference to the definition of the expression "coastline or related interests" contained in Article II(4) of the [Intervention Convention]?

(2) In accordance with the definition contained in Article II(4)(c) of the [Intervention Convention] referred to in Question 1, "related interests" means, inter alia, the well-being of the area concerned, including conservation of living marine resources and of wildlife. Does that provision also apply to the conservation of living resources and wildlife in the [EEZ], or is that provision of the Convention concerned only with conservation of the interests of the coastal area?

(3) If Question 1 is answered in the negative, what meaning is to be ascribed to the expression "coastline or related interests" in Article 220(6) of [UNCLOS] and the expression "coastline or related interests" in Article 7(2) of Directive [2005/35]?

(4) What meaning is to be ascribed to the expression "resources of its territorial sea or [EEZ]" as it is used in Article 220(6) of [UNCLOS] and Article 7(2) of Directive [2005/35]? Are living resources to be taken to mean only exploitable species or does that term also include species associated with or dependent upon exploitable species within the meaning of Article 61(4) of [UNCLOS], such as, for example, species of flora and fauna which are used by exploitable species for nutriment?

(5) What definition is to be adopted of the expression "causing … [a] threat" in Article 220(6) of [UNCLOS] and Article 7(2) of Directive [2005/35]? Is the threat of damage being caused to be determined by reference to the concept of abstract or specific risk or in some other way?

(6) In the assessment of the conditions governing the exercise of power by the coastal State, laid down in Article 220(6) of [UNCLOS] and Article 7(2) of Directive [2005/35], must it be assumed that major damage or the threat of major damage is a more serious consequence than significant pollution of the marine environment or the threat of such pollution within the meaning of Article 220(5)? What definition is to be adopted of "significant pollution of the marine environment" and how is account to be taken of such pollution in the assessment of major damage or the threat of major damage?

(7) What factors are to be taken into account in the assessment of whether damage or the threat of damage is major? Is account to be taken, for example, of the duration and geographical extent of the adverse effects that manifest themselves as damage? If so, how are the duration and the extent of the damage to be assessed?

(8) Directive [2005/35] is a directive laying down minimum standards and does not prevent Member States from taking more stringent measures against ship-source pollution in conformity with international law (Article [1(2)]). Does the possibility of applying more stringent rules apply to Article 7(2) of that directive, which governs the power of the coastal State to take action against a vessel in transit?

(9) May any account be taken of the specific geographical and ecological characteristics and sensitivity of the Baltic Sea Area in the assessment of the conditions governing the exercise of power by the coastal State which are laid down in Article 220(6) of [UNCLOS] and Article 7(2) of the Directive?

(10) Does "clear objective evidence" within the meaning of Article 220(6) of [UNCLOS] and Article 7(2) of Directive [2005/35] include not only evidence that a vessel has committed the infringements to which the aforementioned provisions refer but also evidence of the consequences of the spill? What form of evidence is to be required to show that there is a threat of major damage to the coastline or related interests or to any resources of its territorial sea or of the [EEZ], such as the bird and fish stocks and the marine environment in the area? Does the requirement of clear objective evidence mean, for example, that the assessment of the adverse effects of the oil spillage on the marine environment must always be based on specific surveys and studies relating to the impact of the oil spill that has occurred?'

36. Written observations have been submitted by the Belgian, Greek, French, Netherlands and Finnish Governments as well as the European Commission. Almost as though to commemorate the 100th anniversary of Finland becoming a maritime nation in its own right, Bosphorus, the French, Netherlands and Finnish Governments and the Commission presented oral argument at a hearing held on 6 December 2017.

III. Analysis

37. The referring court has put numerous questions to the Court regarding, in particular, the proper construction, as a matter of EU law, of Article 220(6) of UNCLOS (and by extension, Article 7(2) of Directive 2005/35). Although approaching the issue from various angles, the questions referred essentially concern two interrelated issues pertaining to the circumstances in which a coastal State may assert jurisdiction in its EEZ: namely, the interests covered by coastal State jurisdiction and the evidence required to justify the adoption of enforcement measures against a vessel in transit.

38. After some introductory remarks, the questions raised by the referring court will be addressed in thematic groups: (1) the interests covered by coastal State jurisdiction in the EEZ under Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35 (Questions 1 to 4); (2) the evidence required under Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35 in order for the coastal State to instigate proceedings against a foreign vessel (Questions 5 to 7 and 9 and 10); and (3) the discretion of Member States under Article 7(2) of Directive 2005/35 (Question 8).

A. Introductory remarks

39. For a better understanding of the problematic issues underlying this request for a preliminary ruling, I consider it helpful to begin my analysis with some introductory observations. First, bearing in mind that the request for a preliminary ruling touches upon a number of different international agreements in the field of the law of the sea, I shall first call to mind the principles that govern the Court's jurisdiction, in the context of the preliminary ruling procedure, to interpret provisions of international law. Second, I shall map out the legal architecture as regards the division of jurisdiction between flag States and coastal States in the context of the law of the sea. In that context, I shall explain, in particular, how UNCLOS approaches the need to balance the freedom of navigation and the protection of the marine environment.

1. The Court's jurisdiction to interpret provisions of international law

40. The referring court identifies three sets of rules of international law that are relevant in the present case. Those are UNCLOS, Marpol 73/78 and the Intervention Convention. Each of those conventions enjoys, as a matter of EU law, a different status.

41. First, as all the parties agree, the Court has jurisdiction to interpret the provisions of UNCLOS. It is settled case-law that the Court has jurisdiction to interpret provisions of international law that form part of the EU legal order. [5] Since the European Union has acceded to UNCLOS, that convention forms an integral part of the EU legal order. Hence, the Court has jurisdiction to interpret the provisions of that convention.

42. Second, as concerns Marpol 73/78, all Member States of the European Union are bound by that convention, whereas the European Union is not. Precisely because the Member States are bound by that convention, the Court has accepted that Marpol 73/78 should be taken into consideration in interpreting, on the one hand, UNCLOS and, on the other hand, the provisions of secondary law which fall within the ambit of Marpol 73/78. That is most notably the case of Directive 2005/35. [6]

5 See judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraphs 4 to 6; of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312, paragraphs 42 and 43; of 4 May 2010, *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 60 and the case-law cited; and of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 30 and the case-law cited.

6 Judgment of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312, paragraph 52.

43. Third, neither the European Union nor all of its Member States are bound by the Intervention Convention. The parties having submitted written observations presented contrasting views regarding the scope of the Court's jurisdiction to interpret the provisions of that convention. Whereas the Belgian and French Governments seem to contend that the Court may interpret the provisions of that convention, the Commission, as well as the Netherlands and Finnish Governments, considers that such an interpretation would fall outside the Court's jurisdiction. Questioned on that point at the hearing, the Commission nuanced its position: it agreed that the Intervention Convention can indeed be a source of inspiration for the Court in interpreting Article 220 of UNCLOS.

44. It seems to me that all of the parties having addressed the issue are correct.

45. On the one hand, as a matter of principle, the Court has no jurisdiction to interpret authoritatively, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries. That viewpoint is confirmed by the Court's case-law in that field.[7] Indeed, without prejudice to the particular case of conventions such as Marpol 73/78 referred to above, and the situation where the European Union has taken over powers previously exercised by Member States in the area governed by the international agreement in question,[8] the Court's interpretative jurisdiction extends only to rules that form part of the EU legal order.

46. That principle was reaffirmed in the Court's judgment in *Manzi*,[9] in respect of a later protocol to Marpol 73/78 to which some Member States had not adhered. In that case, the Court held that provisions of secondary law could not be interpreted in the light of an obligation imposed by an international agreement which does not bind all the Member States. Otherwise, the scope of that obligation would be extended to those Member States that are not contracting parties to such an agreement.[10]

47. While that might have been, in practice, the outcome in the circumstances underlying *Manzi*, the Court's statement cannot in my view be taken to mean that the Court may not take into consideration, in interpreting provisions of EU law, rules of international law that do not bind the European Union, or all of its Member States.

48. As is commonly accepted, judicial interpretation does not take place in a vacuum. While it is clear that the Court lacks jurisdiction to interpret authoritatively rules that do not form part of the EU legal order, I find it difficult to accept that lessons could not — where relevant — be drawn from such rules for the purposes of interpreting provisions of EU law. That is so, in particular, where the legislative history of an international agreement that binds the European Union, or its Member States, suggests a close nexus to an agreement that does not.

49. Put differently, it does not follow from the clear lack of jurisdiction to interpret the Intervention Convention that inspiration could not be drawn from that convention in interpreting similar notions that can be found in UNCLOS. In other words, it is not impossible that the Court may interpret UNCLOS in a manner that coincides with the terminology employed in the Intervention Convention. As I shall illustrate in the context of the assessment of the first, second, third and fourth questions referred, the relevant provisions of the Intervention Convention may provide helpful assistance in construing, as a matter of EU law, Article 220(6) of UNCLOS.[11]

7 Judgments of 4 May 2010, *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 61 and the case-law cited, and of 17 July 2014, *Qurbani*, C-481/13, EU:C:2014:2101, paragraph 22.

8 See, in particular, judgments of 12 December 1972, *International Fruit Company and Others*, 21/72 to 24/72, EU:C:1972:115, paragraph 18; of 14 July 1994, *Peralta*, C-379/92, EU:C:1994:296, paragraph 16; of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312, paragraph 48; and Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017, EU:C:2017:376, paragraph 248.

9 Judgment of 23 January 2014, *Manzi and Compagnia Naviera Orchestra*, C-537/11, EU:C:2014:19.

10 Judgment of 23 January 2014, *Manzi and Compagnia Naviera Orchestra*, C-537/11, EU:C:2014:19, paragraphs 47 and 48.

11 See point 69 et seq. below.

50. Before dealing with that issue, however, the basic tenets of the legal framework that governs the division between flag State and coastal State jurisdiction in the particular context of UNCLOS will be examined.

2. The principles governing the enforcement jurisdiction of coastal States: the freedom of navigation and the protection of the marine environment

51. As the Court has held, UNCLOS seeks to strike a fair balance between the interests of coastal States and those of other States, which may conflict.[12] Those interests relate, among others, to the legitimate interest of navigation irrespective of the State's geographical location, the exploitation of natural resources and the need to preserve the marine environment.

52. In that framework, freedom of navigation is of particular importance. Indeed, as an emanation of the age-old principle of the freedom of the seas,[13] freedom of navigation constitutes the bedrock of international law of the sea. To avoid the fragmentation of the sea for protectionist purposes, freedom of navigation ensures that anything beyond the territorial sea remains open for use for the common good.[14]

53. That principle is reflected in UNCLOS: as a corollary to freedom of navigation, coastal States have, as a rule, jurisdiction only over vessels navigating in their territorial sea, which is limited to 12 nautical miles from the baseline.[15] Even then, that jurisdiction is circumscribed by the obligation to ensure free passage for vessels in transit.[16] Beyond that area, the starting-point is that the flag State has jurisdiction over vessels flying its flag. More precisely, it is for the flag State to set the safety, social and environmental standards to be applied and enforce those rules in relation to vessels flying its flag in accordance with international rules and standards.[17] Not only that, however: the flag State *must*, in accordance with Article 217 of UNCLOS, effectively enforce international rules and standards regarding ship-source pollution, no matter where an infringement occurs.

54. However, under the system of jurisdiction put in place by UNCLOS, flag State jurisdiction beyond the territorial sea of a coastal State is subject to important exceptions. One of those exceptions concerns coastal State jurisdiction in the EEZ.

55. The EEZ is defined in Article 57 of UNCLOS as an area beyond and adjacent to the territorial sea, extending a maximum of 200 nautical miles from the baseline. The EEZ is subject to the specific legal regime set out in part V of UNCLOS (Articles 55 to 75 thereof). By dint of Article 56 of the convention, the coastal State has, among other things, (limited) enforcement jurisdiction in that zone for the purposes of protecting adequately the marine environment. On the other hand, in accordance with Article 58 of UNCLOS, other States must ensure that they comply with the convention in exercising their rights in the EEZ, have due regard to the rights and duties of the coastal State and comply with the rules and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law.

12 Judgment of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312, paragraph 58.

13 The principle of the freedom of the seas and the right of all nations to use the sea for trade can be traced back to the Dutch scholar Hugo Grotius' treatise *Mare Liberum*, which was first published in 1609.

14 Guilfoyle, D., 'Part VII. High Seas', in Proels, A., (ed.), *The United Nations Convention on the Law of the Sea, A commentary*, Verlag C., Beck H., Munich, 2017, p. 679.

15 The 'baseline' coincides, as a general rule, with the coastal line at low tide.

16 This can be seen from a combined reading of Articles 2, 3 and 17 of UNCLOS.

17 See, in particular, Article 94 of UNCLOS.

56. Those principles arguably reflect the broad international consensus that exists regarding the need to protect the marine environment from (ship-source) pollution. In particular, the enforcement jurisdiction afforded to coastal States in accordance with Article 220(3) to (6) of UNCLOS in the EEZ in order to take measures against vessels in transit can be understood as a concrete expression of that concern.

57. More precisely, several treaties were concluded in the second part of the 20th century in response to the growing concern over marine pollution.[18] For example, the Intervention Convention was concluded in 1969 in the wake of the devastating *Torrey Canyon* disaster. It granted all parties to the convention the power to intervene on the high seas in cases where oil pollution threatened the sea or coastline as a result of a maritime casualty. That principle of right of intervention was reaffirmed in Article 221 of UNCLOS.[19]

58. Indeed, it seems generally accepted that flag State jurisdiction is on its own insufficient to combat ship-source pollution.[20] Seen in that light, the powers afforded to coastal States in Article 220 of UNCLOS — which arguably adds to the powers afforded by the Intervention Convention and Article 221 of UNCLOS to coastal States in that it allows the coastal State to instigate proceedings even in cases where no maritime casualty has occurred — can in my view be seen as reflecting the wish of the international community to devise tools for combating more efficiently ship-source pollution and to protect the marine environment as a common good. In that regard, I note that the Intervention Convention has not only influenced the drafting of Article 221 of UNCLOS, but also that of Article 220 thereof.[21]

59. At this juncture, a point that should be emphasised is that Article 220(3) to (6) of UNCLOS simply confers enforcement jurisdiction on the coastal State in a clearly defined set of circumstances, which is additional to the jurisdiction of the flag State. It affords (limited) jurisdiction to coastal States in order to protect the marine environment in the event of an infringement of applicable international rules and standards regarding ship-source pollution. The substantive rules contained in Marpol 73/78 regarding the prevention of oil pollution constitute a set of such rules. Indeed, it should not be forgotten that UNCLOS constitutes a framework convention that has been complemented by other international agreements, such as Marpol 73/78.[22]

60. Contrariwise, Article 220(3) to (6) of UNCLOS does not impose, for example, stricter pollution standards than those that would be otherwise applicable. Nor do those rules confer jurisdiction on coastal States to intervene against foreign vessels which would go beyond the powers of the flag State. Indeed, as can be seen from Article 228(1) of UNCLOS, the flag State may take over the proceedings within six months of having been informed by the coastal State of measures taken against a vessel flying its flag.[23]

18 Of particular significance here are Marpol 73/78 and the Intervention Convention. In addition, in that period, several regional treaties were concluded. Among such agreements is the Convention on the Protection of the Marine Environment of the Baltic Sea Area, concluded in Helsinki in 1992 ('the Helsinki Convention'), which entered into force on 17 January 2000.

19 See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations, *The Law of the Sea, Enforcement by Coastal States, Legislative History of Article 220 of the United Nations Convention on the Law of the Sea*, United Nations Publication, New York, 2005, p. 4, point 17.

20 See to that effect, recital 2 of Directive 2005/35, which specifically states that international rules governing ship-source pollution laid down in Marpol 73/78 are being ignored on a daily basis by a very large number of ships sailing in Community waters.

21 See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations, *The Law of the Sea, Enforcement by Coastal States, Legislative History of Article 220 of the United Nations Convention on the Law of the Sea*, United Nations Publication, New York, 2005, p. 4, point 17. See also to that effect, Churchill, R.R., and Lowe, A.V., *The law of the sea*, 3rd edition, Juris Publishing, Manchester University Press, Manchester, 1999, p. 354.

22 Churchill, R.R., and Lowe, A.V., op. cit., p. 369.

23 It was clarified at the hearing that, in the present case, the authorities of the flag State (Panama) have been informed, in accordance with the relevant provisions of UNCLOS, of the measures taken by the Finnish authorities against *Bosphorus Queen*. In addition to Article 228 of UNCLOS, it is important to note that also more generally, the rules contained in Section 7 of Part XII of UNCLOS regarding safeguards ensures that the rights of the flag State are adequately taken into account where the coastal State exercises jurisdiction.

61. Just like all other States, flag States must also, by dint of Article 192 of UNCLOS, protect and preserve the marine environment. They must also ensure effective enforcement of international rules and standards regarding ship-source pollution on the basis of Article 217 of UNCLOS. In accordance with the principle of proximity, Article 220(3) to (6) of UNCLOS nevertheless assigns jurisdiction also to the State that has the most obvious interest in doing so, namely, the coastal State. In practice, the coastal State is arguably the State best placed to identify an infringement of the relevant international rules regarding ship-source pollution and to take, as the case may be, enforcement measures against the vessel in question.

62. Seen in that light, the grounds of jurisdiction set out in Article 220(3) to (6) of UNCLOS regarding a coastal State's jurisdiction in its EEZ are designed to ensure that the rules of that convention pertaining to the protection and preservation of the marine environment can be effectively enforced.

63. To summarise, flag State jurisdiction remains the main rule under UNCLOS. Nevertheless, by conferring concurrent jurisdiction on the coastal State in the EEZ in the case of an infringement of the relevant international rules, UNCLOS reflects the recognised need to effectively protect the interests of the coastal State and protect and preserve — in an era of increasing exploitation of the seas — the marine environment as a common good for mankind. [24]

64. Those considerations ought to be borne in mind in assessing the questions put to the Court in the present case.

B. Questions 1 to 4: the interests covered by Article 220(6) of UNCLOS

65. As a preliminary point, I observe that the Court has no jurisdiction to answer the second question referred, as it specifically seeks to obtain an interpretation of the Intervention Convention. As was explained above, the Court may not answer that question owing to lack of jurisdiction. [25]

66. Nevertheless, I understand that that question, read in context, together with the first, third and fourth questions asks, in essence, how the interests covered by Article 220(6) of UNCLOS — and reiterated in Article 7(2) of Directive 2005/35 — ought to be construed. It should not be forgotten that, in addition to the other elements referred to in Article 220(6) of UNCLOS, the coastal State has jurisdiction to institute proceedings only to the extent that the interests it seeks to protect by asserting jurisdiction coincide with those referred to in that provision.

67. To know whether that is so in the case pending before it, the referring court asks the Court to clarify the meaning of the notions of 'coastline or related interests' and 'any resources in the territorial sea or the [EEZ]'. Indeed, it can be understood from the order for reference that the referring court is unsure whether the interests identified in the expert opinion issued by the agency are covered by those notions. [26]

68. As I have explained above, Article 220(6) of UNCLOS is designed to ensure effective protection and preservation of the marine environment. It is in the light of that objective that the interests referred to in that provision should be interpreted.

24 In Article 136 of UNCLOS, the seabed is specifically defined as the 'common heritage of mankind'.

25 See point 45 above.

26 See point 29 above.

1. The notion of 'coastline or related interests'

69. As regards, first, the notion of 'coastline or related interests', the circumstance that the Court has no jurisdiction to interpret the provisions of the Intervention Convention cannot mean that the provisions of that convention should be ignored entirely — or that the same interpretation could not be reached as in that convention — as concerns the interpretation of Article 220(6) of UNCLOS. At the same time, there is clearly no obligation directly to transpose the definition of 'related interests' in Article II(4) of the Intervention Convention to Article 220(6) of UNCLOS.

70. More precisely, it is clear from the legislative history of Article 220(6) of UNCLOS that the contracting parties drew inspiration from the Intervention Convention when establishing that coastal States should also have jurisdiction to take measures against foreign vessels having committed an infringement in the EEZ.[27] True, there is no indication that the definitions adopted in the Intervention Convention too were meant to be transposed to UNCLOS which does not contain any definition of 'coastline or related interests' or, for that matter, of 'any resources of its territorial sea or the EEZ'.

71. Yet, as illustrated above, the Intervention Convention undoubtedly constitutes a part of the broader legislative context in which Article 220(6) of UNCLOS operates. Bearing in mind that the rules contained in UNCLOS appear to be intended to supplement and broaden those contained in the Intervention Convention regarding coastal State jurisdiction to intervene in case of a maritime casualty, the meaning ascribed to 'related interests' in the Intervention Convention constitutes a helpful benchmark for defining the interests covered by Article 220(6) of UNCLOS.

72. In that regard, I observe that the definition of 'related interests' adopted in the Intervention Convention is a broad one. Pursuant to Article II(4) of the Intervention Convention, 'related interests' includes the interests of a coastal State directly affected or threatened by the maritime casualty, such as maritime coastal, port or estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned, tourist attractions in the area concerned and the health of the coastal population and the well-being of the area concerned, including conservation of living marine resources and of wildlife.

73. I fail to identify any reasons that would lend support to the viewpoint that a different reading should be adopted in the context of UNCLOS. Indeed, it should not be forgotten that Article 220(6) of UNCLOS seeks to ensure appropriate protection of the marine *environment*. To do so, that provision affords jurisdiction to coastal States to intervene in the EEZ. Clearly, the possibility of intervening would be greatly hampered if the interests referred to therein were afforded a narrow interpretation.

74. There is simply no indication that only some aspects of the environment are concerned or that only interests of the coastal State in the territorial sea should be covered. For those reasons, I take the view that 'coastline or related interests' must be interpreted as including all interests of the coastal State in the territorial sea and the EEZ pertaining to the exploitation of the sea and a healthy environment.

2. The notion of 'any resources of its territorial sea or [EEZ]'

75. As regards, second, the notion of 'any resources of its territorial sea or the [EEZ]', I observe that, if anything, the fact that Article 220(6) of UNCLOS also makes specific mention of 'any resources of its territorial sea or the [EEZ]' appears to reflect a wish to include, in the scope of Article 220(6) of UNCLOS, all aspects of the marine environment that may be affected by ship-source pollution.

27 See point 58 above.

76. As concerns the specific question raised by the referring court, the following reasons lead me to consider that the interests covered by the notion of 'any resources in the territorial sea or the [EEZ]' must include species of flora and fauna which are used by exploitable species for nutriment.

77. Firstly, the use of the word 'any' to describe the resources in question suggests that a broad interpretation, in accordance with the ordinary meaning of that word, ought to be adopted; that is to say, it must be understood as referring to all living and non-living resources irrespective of whether those resources can be directly exploited or not.

78. Secondly, an interpretation of 'any resources' according to which species of flora and fauna which are used by exploitable species for nutriment ought to be covered by the notion of 'any resources of its territorial sea or the [EEZ]' is in keeping with the ecosystem-based approach in marine environmental policy and the common fisheries policy endorsed by the European Union.[28] That approach recognises the interactions within an ecosystem, including those between species, rather than considering species in isolation from the broader ecosystem.[29] Those connections are also recognised clearly in UNCLOS, and notably in Article 61(4) thereof,[30] to which the referring court also refers.

79. Thirdly, and most fundamentally, it should not be forgotten that Article 220 of UNCLOS is designed to ensure *effective* protection and preservation of the marine *environment* as a whole. Quite simply, it would be contrary to that objective to limit the scope of that provision to resources that are not directly exploited by the coastal State.

80. Accordingly, I suggest that the answer to the first, second, third and fourth questions referred should be that Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35 must be interpreted to the effect that, on the one hand, the notion of 'coastline or related interests' includes all interests of the coastal State in the territorial sea and the EEZ pertaining to the exploitation of the sea and a healthy environment and that, on the other hand, the notion of 'any resources of its territorial sea or the [EEZ]' includes both living resources — such as species of flora and fauna which are used by exploitable species for nutriment — and non-living resources.

C. Questions 5 to 7 and 9 and 10: the evidence required under Article 220(6) of UNCLOS in order for the adoption of enforcement measures by a coastal State to be justified

81. By its fifth, sixth, seventh, ninth and tenth questions, the referring court essentially seeks guidance on the evidence required in order for the coastal State to instigate proceedings against a foreign vessel navigating in its EEZ in accordance with Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35.

82. To provide guidance on that issue, I shall proceed in two steps. First, the interrelationship between Article 220(3), (5) and (6) of UNCLOS will be examined. Second, the element of 'threat of major damage' referred to in Article 220(6) of UNCLOS will be dealt with.

28 See recital 44 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ 2008 L 164, p. 19) and recitals 13 and 22 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22).

29 See also my Opinion in *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V.*, C-683/16, EU:C:2018:38, points 18 to 31.

30 Pursuant to Article 61(4) of UNCLOS, in taking conservation and management measures regarding living resources, the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

1. The interrelationship between Article 220(3), (5) and (6) of UNCLOS: three separate grounds of jurisdiction

83. For a better understanding of the internal logic of Article 220 of UNCLOS, and how Article 220(6) of UNCLOS operates, it is useful to begin by examining the interrelationship between Article 220(3), (5) and (6) of UNCLOS, of which the two latter received detailed attention at the hearing.

84. As a preliminary point, it is generally accepted that Article 220 of UNCLOS is based on a graded approach.

85. Of particular relevance in the context of the present case are the grounds of jurisdiction set out in Article 220(3), (5) and (6) of UNCLOS that grant the coastal State jurisdiction over foreign vessels navigating in its EEZ. In fact, as shall be seen in the following, each of those provisions contains a *separate* ground of jurisdiction in favour of the coastal State. Those grounds fall to be applied in different circumstances and they differ significantly as regards the measures the coastal State may take on the basis of each one of them. Accordingly, the relevant elements of each ground of jurisdiction should be assessed independently in the light of the circumstances of the case at hand.

86. The graded approach is apparent from the level of intervention that each of those provisions allows for. First, Article 220(3) of UNCLOS gives the coastal State the right to request information from a foreign vessel in order to establish an infringement of international rules and standards regarding ship-source pollution. Second, Article 220(5) of UNCLOS gives the coastal State the right to proceed to an inspection of a foreign vessel. Third, Article 220(6) of UNCLOS gives the coastal State the right to instigate proceedings against a foreign vessel.

87. The grounds of jurisdiction provided for in Article 220(3) and (5) are clearly connected. On the one hand, both provisions concern circumstances where the coastal State suspects (that is to say, the State has *clear grounds for believing*) that a foreign vessel has infringed international rules and standards regarding ship-source pollution. The measures referred to in those provisions aim at establishing that the vessel is the source of the infringement in question. On the other hand, in accordance with Article 220(5) of UNCLOS, the coastal State may proceed to an inspection of a foreign vessel — that has refused to cooperate with coastal State authorities regarding requests for information under Article 220(3) — only where the infringement under investigation has resulted in a *substantial* discharge causing or threatening *significant pollution of the marine environment*.

88. In other words, refusal to cooperate does not automatically mean that the coastal State may proceed to an inspection under Article 220(5) of UNCLOS. On the contrary, an inspection is possible only on strict conditions where the volume of the discharge and the pollution resulting from that discharge are sufficiently significant.

89. In contrast to Article 220(3) and (5), Article 220(6) of UNCLOS deals with a situation where the coastal State *has clear objective evidence* of the infringement.[31] Moreover, in order for the coastal State to have the right to instigate proceedings, the infringement must have resulted in a discharge causing major damage or threat of major damage to the interests protected by that provision.

90. It is important to emphasise that in contrast to Article 220(3) and (5) of UNCLOS, there is no indication that the application of Article 220(6) of UNCLOS would be contingent on the prior application of Article 220(5) of UNCLOS. Those provisions simply govern distinct circumstances.

31 In that regard, the English and French official versions of Article 220(6) of UNCLOS are different. Whereas the English text refers to 'clear objective evidence', the French text refers simply to 'clear evidence' (*preuve manifeste*).

91. Certainly, it is perfectly conceivable that an inspection within the meaning of Article 220(5) of UNCLOS may provide the clear objective evidence of the infringement required for the application of Article 220(6) of UNCLOS. That is not, however, necessarily the case. Indeed, the coastal State may have at its disposal, for example, (aerial) photographic evidence that shows that the foreign vessel in question has committed an infringement of the applicable international rules and standards regarding ship-source pollution. The present case is illustrative in that regard: it was explained at the hearing that the authority had at its disposal aerial footage confirming that the *Bosphorus Queen* was the source of the spill in question.

92. Nevertheless, as stated above, clear objective evidence of an infringement by a specific foreign vessel is not in itself sufficient to justify the instigation of proceedings against that vessel in accordance with Article 220(6) of UNCLOS. That infringement must have resulted in a discharge causing major damage or threat of major damage.

93. As I understand it, the referring court is unsure whether, in the circumstances of the present case, a 'threat of major damage' exists within the meaning of Article 220(6) of UNCLOS. It is, in particular, unsure what kind of evidence of that threat the coastal State must possess in order to assert jurisdiction under Article 220(6) of UNCLOS (and Article 7(2) of Directive 2005/35).

94. Without further ado, I shall move on to consider how that element ought to be construed in the specific circumstances of the present case.

2. The threat of major damage referred to in Article 220(6) of UNCLOS: a concrete assessment on the basis of Marpol 73/78

95. At the outset, it is useful to call to mind that Article 220(6) of UNCLOS lays down the ground of jurisdiction that allows a coastal State to *instigate* proceeding against a foreign vessel navigating in its EEZ. In accordance with the graded approach of Article 220, paragraph 6 of that provision affords the coastal State the most far-reaching powers in relation to foreign vessels.

96. Yet, it is important to emphasise that the evidence required to *impose sanctions* on the foreign vessel in the proceedings referred to in Article 220(6) of UNCLOS — such as the oil spill fine imposed in the present case — *is not* governed by that provision. The evidence required for the imposition of sanctions in those proceedings, and the amount thereof, remains, by contrast, a matter of national law of the coastal State concerned. [32]

97. Against that background, the question that arises is how the referring court ought to assess whether a threat of major damage exists for the purposes of *instigating* proceedings in accordance with Article 220(6) of UNCLOS.

98. First of all, in defining the 'threat of major damage' referred to in Article 220(6) of UNCLOS, the temptation of comparing that notion with the notion of 'the threat of significant pollution' in Article 220(5) of UNCLOS should be resisted. As already pointed out, the circumstances in which a coastal State may assert jurisdiction on the basis of the grounds of jurisdiction set out in those provisions are different and the elements contained therein should be assessed independently. In particular, it should not be forgotten that 'pollution' and 'damage' are two distinct concepts. Depending on the circumstances, significant pollution may — or may not — cause (a threat of) major damage to specific interests. In other words, the link between the two is not automatic.

32 Article 4(2) of Marpol 73/78 obliges parties to the convention to impose sanctions in accordance with their laws. In the EU context, Article 8 of Directive 2005/35 specifies that Member States are to impose sanctions that are effective, proportionate and dissuasive for discharges of polluting substances.

99. Secondly, Article 220(6) of UNCLOS requires clear objective evidence of infringement of international rules and standards regarding ship-source pollution. As was explained briefly above, Marpol 73/78 sets out the substantive international rules that govern oil pollution. Both Article 220(3) of UNCLOS and Directive 2005/35 specifically refer to that convention.

100. In accordance with Regulation 15 of Part C of Chapter 3 of Annex I to Marpol 73/78, as concerns vessels of 400 tons gross tonnage and above, any discharge of effluent with an oil concentration exceeding 15 ppm is prohibited. In other words, any discharge beyond that concentration constitutes an infringement of Marpol 73/78 for which a sanction should be imposed in accordance with Article 4(2) of that convention.

101. Where, as here, the oil spill is visible to the naked eye, that limit has been significantly exceeded.[33] Yet, whether that is sufficient to cause a threat of *major* damage, as required by Article 220(6) of UNCLOS depends, as I see it, on the specific circumstances in which the spill has occurred.

102. In other words, the gravity of the threat of damage should not be determined in the abstract. Otherwise, as is in essence argued by the French Government, the coastal State could instigate proceedings against a foreign vessel navigating in its EEZ automatically, in every instance, where that State has evidence that a vessel has discharged oil in the EEZ of that State in breach of the relevant rules of Marpol 73/78. Indeed, that Government argues that the threat of major damage can be presumed, provided that there is evidence that the vessel in question is the source of a spill that exceeds (significantly) the limit set out in Regulation 15 of Part C of Chapter 3 of Annex I to Marpol 73/78.

103. Such an approach would undoubtedly be in line with the objective of Article 220 of UNCLOS to ensure effective protection and preservation of the marine environment. Nevertheless, as was explained above, the main rule of UNCLOS remains that of flag State jurisdiction. Indeed, it should not be forgotten that, above all, flag States are to ensure that the applicable international rules and standards are respected by vessels flying their flag and take appropriate enforcement measures in case its ships infringe such rules. It is only in exceptional, clearly defined circumstances that the coastal State has, in accordance with the principle of proximity, the power to take measures against a foreign vessel in the EEZ. Therefore, to prevent the exception of coastal State jurisdiction becoming, instead, the main rule, the threat of major damage should not simply be presumed.

104. For that reason, it is my understanding that the element of the 'threat of major damage' should be based on a concrete circumstantial assessment on the basis of which it can reasonably be presumed that the discharge causes a threat of major damage to coastal State interests referred to in Article 220(6) of UNCLOS. The factors that are relevant for assessing whether there is a threat of major damage may, for example, include the vulnerability of the area affected by the spill, the volume, the geographical location and the extent thereof, as well as the duration of the spill and the prevalent meteorological conditions in the area around the time of the spill.

33 Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences, COM(2003)0092 final, Explanatory Memorandum, point 4.2. See also Resolution MEPC.61(34) adopted on 9 July 1993, Visibility Limits of Oil Discharges of Annex I of Marpol 73/78. According to that resolution, a discharge of an oily mixture with a concentration of 15 ppm can under no circumstances be observed, either visually, or with remote sensing equipment. The lowest concentration of oil present in the discharge of an oily mixture where the first traces were visually observed from the aircraft was 50 ppm, irrespective of related factors, such as settings of the installation, speed of the discharging vessel, wind and wave height.

105. In the present case, the oil spill occurred in the Baltic Sea and, more particularly, in the Gulf of Finland. The Baltic Sea is internationally recognised to be a special area characterised by geographical particularities and a particularly vulnerable ecosystem in need of special protection.[34] Undoubtedly, that circumstance should be taken into account in interpreting Article 220(6) of UNCLOS: it is of relevance in determining whether the spill causes a threat of major damage in the circumstances of the case at hand.

106. As pointed out by the Commission at the hearing, an abstract threat of (major) damage (that is to say, the existence of a visible spill) turns, somewhat paradoxically, into a concrete threat of major damage in the specific circumstances of a spill in a particularly vulnerable area. That is so given that, in such circumstances, the mere existence of a spill of the kind at issue in the main proceedings may reasonably be presumed to cause a threat of major damage.

107. Put another way: the specific geographical and ecological characteristics and sensitivity of the Baltic Sea Area do not affect the *scope* of coastal State jurisdiction under Article 220(6) of UNCLOS so as to extend that ground of jurisdiction to situations where an infringement of the applicable rules of Marpol 73/78 does not cause a threat of major damage. Those characteristics have a bearing on establishing that a threat of major damage exists.

108. On that basis, I consider that the fifth, sixth, seventh, ninth and tenth questions referred should be answered to the effect that a coastal State may exercise enforcement jurisdiction laid down in Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35 in circumstances where, on the one hand, that State has clear objective evidence that a foreign vessel is the source of a discharge that infringes applicable international rules and standards regarding ship-source pollution and, on the other hand, that discharge can, in the specific circumstances of the case, reasonably be presumed to cause a threat of major damage to the marine environment. In determining whether a threat of major damage exists, particular importance ought to be placed on the vulnerability of the area affected by the spill, the volume, the geographical location and the extent thereof, as well as the duration of the spill and the prevalent meteorological conditions in the area concerned.

D. Question 8: the discretion of Member States under Article 7(2) of Directive 2005/35

109. Lastly, I shall briefly deal with the eighth question referred. By that question, the referring court is essentially asking how Article 1(2) of Directive 2005/35 ought to influence the interpretation of Article 7(2) of the directive, which governs the power of the coastal State to instigate proceedings against a vessel in transit. That is because Article 1(2) provides that that directive does not prevent Member States from taking more stringent measures against ship-source pollution, provided that those measures are in conformity with international law.

110. On the one hand, there is no indication in Directive 2005/35 that the possibility of applying more stringent rules to combat pollution does not concern all provisions of that directive. Therefore, in principle, the possibility of applying more stringent rules concerns Article 7(2) of the directive too.

34 That is illustrated not only by the regional Helsinki Convention that puts in place specific rules designed to combat pollution in the Baltic Sea. The Baltic Sea is also recognised in Regulation 1 of Chapter 1 of Annex I to Marpol 73/78 as a special area in need of special mandatory methods for the prevention of sea pollution by oil. Moreover, the International Maritime Organisation ('IMO') designated in 2005 the Baltic Sea as a 'Particularly Sensitive Sea Area', meaning that it 'needs special protection through action by IMO because of its significance for recognized ecological, socio-economic or scientific attributes where such attributes may be vulnerable to damage by international shipping activities'. See IMO Resolution A. 982 (24), Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted on 1 December 2005.

111. On the other hand, however, to the extent that such rules are to be in conformity with international law, Member States may not take action against a foreign vessel under Article 7(2) of Directive 2005/35 unless such action is allowed under Article 220(6) of UNCLOS. That provision defines, as a matter of international law, the ground of jurisdiction that allows a coastal State to instigate proceedings against a foreign vessel. In practice, that means that Article 220(6) of UNCLOS, read in the light of the relevant provisions contained in Marpol 73/78, defines the limits to the power of a Member State to take action against a vessel in transit in accordance with Article 7(2) of Directive 2005/35.[35] Quite simply, the discretion left to the Member States by dint of Directive 2005/35 to adopt more far-reaching measures to combat ship-source pollution, is circumscribed by the applicable international rules, which, as a matter of EU law, must not be exceeded.

112. In that regard, it is nevertheless important to emphasise that, so long as they do not exceed those limits, Member States may take into account, in asserting jurisdiction under Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35, the special characteristics, and as the case may be, the vulnerability, of the area in which the spill has occurred. As was explained above, those characteristics are of relevance in determining whether an infringement of the relevant rules of Marpol 73/78 causes (a threat of) major damage to the interests of the coastal State in question within the meaning of Article 220(6) of UNCLOS.[36] In other words, even within the limits set by the applicable international rules, Member States retain considerable discretion in assessing to what extent instigating proceedings against a foreign vessel in transit is appropriate for the purposes of adequately protecting and preserving the marine environment in the circumstances at hand.

113. Therefore, the eighth question referred should be answered to the effect that, notwithstanding Article 1(2) of Directive 2005/35, Member States may not extend their enforcement jurisdiction laid down in Article 7(2) of the directive beyond what is allowed under Article 220(6) of UNCLOS.

IV. Conclusion

114. In the light of the arguments presented, I propose that the Court answer the questions referred by the korkein oikeus (Supreme Court, Finland) as follows:

Article 220(6) of the United Nations Convention on the Law of the Sea concluded on 10 December 1982 in Montego Bay (UNCLOS) and Article 7(2) of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences, as amended by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 must be interpreted to the effect that, on the one hand, the notion of 'coastline or related interests' includes all interests of the coastal State in the territorial sea and the exclusive economic zone pertaining to the exploitation of the sea and a healthy environment and that, on the other hand, the notion of 'any resources of its territorial sea or the exclusive economic zone' includes both living resources — such as species of flora and fauna which are used by exploitable species for nutriment — and non-living resources.

A coastal State may exercise enforcement jurisdiction laid down in Article 220(6) of UNCLOS and Article 7(2) of Directive 2005/35 in circumstances where, on the one hand, that coastal State has clear objective evidence that a foreign vessel is the source of a discharge that infringes applicable

35 In fact, it seems to me that the possibility of applying more stringent rules referred to in Article 1(2) of Directive 2005/35 concerns, first and foremost, the penalties to be imposed in case of a breach of the relevant pollution standards laid down in Marpol 73/78. In that regard, recital 5 of Directive 2005/35 specifically refers to the need to harmonise, in particular, the precise definition of the infringement in question, the cases of exemption and *minimum rules for penalties*, and liability and jurisdiction.

36 It is also useful to note that Article 237(1) of UNCLOS specifically states that the provisions of UNCLOS relating to the protection and preservation of the marine environment are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in UNCLOS.

international rules and standards regarding ship-source pollution and, on the other hand, that discharge can, in the specific circumstances of the case, reasonably be presumed to cause a threat of major damage to the marine environment. In determining whether a threat of major damage exists, particular importance ought to be placed on the vulnerability of the area affected by the spill, the volume, the geographical location and the extent thereof, as well as the duration of the spill and the prevalent meteorological conditions in the area concerned.

Notwithstanding Article 1(2) of Directive 2005/35, Member States may not extend their enforcement jurisdiction laid down in Article 7(2) of the directive beyond what is allowed under Article 220(6) of UNCLOS.