

# NOTES

## DEFINING “UNDULY”: RESOLVING INHERENT TEXTUAL AMBIGUITY IN THE IMO’S BALLAST WATER MANAGEMENT CONVENTION

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## INTRODUCTION

In the late 1980s, a striped menace made its first appearance in North America.<sup>1</sup> A native of the Black, Caspian, and Azov Seas, the zebra mussel appeared in Lake St. Clair in Canada.<sup>2</sup> The pestilent mussel found its way into major rivers and other waterways, and quickly proliferated into the United States.<sup>3</sup> Within two years, the zebra mussel had invaded every Great Lake.<sup>4</sup> The mussel caused, and still causes, rampant economic and environmental harm.<sup>5</sup> Indeed, once introduced, the invasive zebra mussel not only disrupts industry by colonizing in facilities' water pipes but also devastates populations of native organisms, thereby disturbing the ecological equilibrium of the invaded area.<sup>6</sup> But how did a mussel native to Eastern Europe and Western Asia get to North America in the first instance? "A release of larval mussels during the ballast exchange of a single commercial cargo ship traveling from the north shore of the Black Sea to the Great Lakes has been deduced as the likely vector of introduction to North America."<sup>7</sup>

Presently, the possibility of a zebra mussel-like catastrophe occurring in the Arctic is growing.<sup>8</sup> Human activity levels in the Arctic are increasing and will continue to do so should current climate change trends continue.<sup>9</sup> From industry and trade, to national security and even recreation, the world will access the Arctic for its

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1. See Amy Benson et al., *Dreissena polymorpha*, U.S. GEOLOGICAL SURVEY, <https://nas.er.usgs.gov/queries/FactSheet.aspx?speciesID=5> [<https://perma.cc/V6RG-W2ZT>] (last modified Mar. 21, 2018).

2. *Id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *Id.* (citing Robert F. McMahon, *The Physiological Ecology of the Zebra Mussel, Dreissena Polymorpha, in North America and Europe*, 36 AM. ZOOLOGIST 339 (1996)).

8. See Taylor Simpson-Wood, *Changes in Latitudes Call for Changes in Attitudes: Towards Recognition of a Global Imperative for Stewardship, Not Exploitation, in the Arctic*, 37 SEATTLE U. L. REV. 1239, 1253 (2014).

9. See Peter G. Pamel & Robert C. Wilkins, *Challenges of Northern Resource Development and Arctic Shipping*, 29 J. ENERGY & NAT. RESOURCES L. 333, 333-36 (2011); Simpson-Wood, *supra* note 8, at 1242.

resources as it becomes more accessible.<sup>10</sup> With increased activity comes the side effects of human endeavor,<sup>11</sup> including the environmental side effects of commercial vessel shipping.<sup>12</sup> As waterways such as the Northwest Passage become increasingly passable now and in the future, commercial vessel traffic in the Arctic will increase.<sup>13</sup> Because of this increase, the introduction of nonindigenous aquatic invasive (or “nuisance”) species<sup>14</sup> into Arctic ecosystems via vessel ballast water discharge—a problem known to the rest of the navigable world for over a century<sup>15</sup>—is becoming a proposition of “when” rather than “if.”<sup>16</sup> Indeed, “a disastrous outcome has already been predicted for the Arctic.”<sup>17</sup>

Aquatic invasive species transfer is a serious threat to the world’s aquatic ecosystems.<sup>18</sup> International (and domestic) instruments such as the International Convention for the Control and Management of Ships’ Ballast Water and Sediments (BWMC) seek to regulate vessels and their ballast water to reduce and eventually eradicate such transfers.<sup>19</sup> Now that the BWMC has entered into

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10. Pamel & Wilkins, *supra* note 9, at 334-35; Lesley Stahl, *The Arctic Frontier*, CBS NEWS (Sept. 10, 2017), <https://www.cbsnews.com/news/60-minutes-arctic-frontier-lesley-stahl-2/> [<https://perma.cc/U8NS-GJEE>]; *see also* U.S. DEP’T OF DEF., REPORT TO CONGRESS ON STRATEGY TO PROTECT UNITED STATES NATIONAL SECURITY INTERESTS IN THE ARCTIC REGION 2-3, 15 (2016) (demonstrating the level of U.S. involvement in the Arctic by outlining evolving national security and other policies).

11. *See* Angie Lyne Fredrickson, Note, *The Ice-Free Arctic is Coming: Why a Circumpolar Network of Marine Protected Areas is Needed to Protect Arctic Fisheries from Climate Change*, 8 DREXEL L. REV. 185, 197-98 (2015).

12. *See* Simpson-Wood, *supra* note 8, at 1251-52.

13. *See id.* at 1239-45.

14. For definitions, *see infra* Part I.A.

15. *See* MD SAIFUL KARIM, PREVENTION OF POLLUTION OF THE MARINE ENVIRONMENT FROM VESSELS 67-68 (2015). The 1980s ushered in the modern campaign against aquatic invasive species when the United States, Australia, and Canada came to the IMO with findings of foreign organisms in the Great Lakes. *See id.* at 68; ALAN KHEE-JIN TAN, VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION 169 (2006); *see also* Benson et al., *supra* note 1.

16. *See* Simpson-Wood, *supra* note 8, at 1252-53.

17. *Id.* at 1253.

18. *See infra* Part I.A.

19. INT’L MAR. ORG., *Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: International Convention for the Control and Management of Ships’ Ballast Water and Sediments, 2004*, annex at 2, IMO Doc. BWM/CONF/36 (Feb. 16, 2004), [hereinafter BWMC] [http://www.bsh.de/de/Meeresdaten/Umweltschutz/Ballastwasser/Konvention\\_en.pdf](http://www.bsh.de/de/Meeresdaten/Umweltschutz/Ballastwasser/Konvention_en.pdf) [<https://perma.cc/2JYJ-YUMR>]. For background on ballast water regulation and the BWMC, *see infra* Parts I.A-B.

force,<sup>20</sup> it is critical to consider potential implementation issues that have received limited exploration during the ratification period. In an effort to begin a critical discourse, this Note closely examines one such issue: ships' undue delay and detention during compliance inspections.<sup>21</sup>

To meet its invasive species mitigation objectives, the BWMC authorizes, among other things, the inspection of vessels for compliance with other BWMC provisions.<sup>22</sup> These inspections may include checking for required documentation and logbooks, as well as testing ships' ballast water while in port.<sup>23</sup> According to the BWMC, a ship may not be "unduly detained or delayed" during, or as a result of, such inspections.<sup>24</sup> However, due to the lack of any definition of "unduly," there is an inherent tension between the undue delay and detention provisions and the BWMC's overall objectives.<sup>25</sup> This Note argues that to avoid undermining the BWMC's purpose and efficacy, the undue delay and detention provisions *can* and *should* be read such that the standard for what constitutes "undue"<sup>26</sup> takes into consideration the location of the compliance inspection (a "geography-dependent" standard).<sup>27</sup>

Part I of this Note provides background regarding ballast water regulation and introduces relevant BWMC provisions. Part II conducts a close textual analysis of the BWMC, arguing that the undue delay and detention provisions can be read to contemplate a geography-dependent standard. Part III first argues that the undue delay

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20. See *infra* text accompanying note 56.

21. While undue delay and detention appear in other BWMC Articles, see, e.g., BWMC, *supra* note 19, art. 7, this Note is limited to Article 9 and Article 12's applicability to Articles 9 and 10. This narrow focus provides for a close look at the impact of textual ambiguity on vessel compliance inspections, a vital BWMC enforcement mechanism. Further, one could extrapolate the Articles 9 and 12 analyses to the other BWMC undue delay and detention provisions.

22. See *id.* art. 9.

23. *Id.* ¶ 1, (a)-(c).

24. *Id.* art. 12, ¶ 1; see also *id.* arts. 9-10 (discussing the power to detain ships).

25. See Suzanne Bostrom, *Halting the Hitchhikers: Challenges and Opportunities for Controlling Ballast Water Discharges and Aquatic Invasive Species*, 39 ENVTL. L. 867, 891 (2009).

26. For the purposes of this Note, differences in the grammatical form of "undue" as they are found throughout the BWMC are considered nugatory; "undue" and "unduly" are used interchangeably depending on sentence structure, and so on.

27. See *infra* Parts II-III.

and detention provisions should be read to contemplate a dynamic, flexible standard as a general matter, and then argues specifically for the geography-dependent standard. A brief conclusion follows.

## I. BACKGROUND

### A. *What Is Ballast Water and Why Is It Regulated?*

“A ship takes on and discharges ballast water to compensate for changes in its weight caused by activities such as loading and unloading cargo or consuming fuel or supplies.”<sup>28</sup> Compensating for changes in weight stabilizes the vessel at sea.<sup>29</sup> A vessel carrying a lighter load will carry more ballast water.<sup>30</sup> Depending on its size, a vessel can take on upwards of twenty-five million gallons of ballast water.<sup>31</sup> A vessel usually takes on ballast water at the most recent port of call and relinquishes the ballast water either at the next port or “en route in shallower water or calmer seas.”<sup>32</sup> Regulating ballast water transfer in ports and shallow water is imperative because these are effectively the only places where a vessel can safely take on or release ballast water.<sup>33</sup>

While estimates vary, global commercial shipping activity transfers several billion tons of ballast water annually.<sup>34</sup> Given this immense volume, the incidental collection of organisms, pollutants, and sediments during ballast water intake may come as no surprise.<sup>35</sup> Among the “hitchhikers” are aquatic invasive species, considered to be one of the most serious threats to the world’s aquatic ecosystems.<sup>36</sup> As defined in the BWMC, aquatic invasive species, or

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28. *Nat. Res. Def. Council v. U.S. EPA*, 808 F.3d 556, 561 (2d Cir. 2015).

29. See *Ballast Water FAQs*, TROJAN MARINEX, <https://www.trojanmarinex.com/faqs/> [<https://perma.cc/VP2Y-QFBW>].

30. MICHAEL BYERS WITH JAMES BAKER, *INTERNATIONAL LAW AND THE ARCTIC* 188 (2013).

31. *Nat. Res. Def. Council*, 808 F.3d at 561.

32. BYERS WITH BAKER, *supra* note 30, at 188.

33. See *id.* at 189; see also TAN, *supra* note 15, at 170.

34. See, e.g., Bostrom, *supra* note 25, at 872.

35. See *Nat. Res. Def. Council*, 808 F.3d at 561 (citing *Nw. Env'tl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1013 (9th Cir. 2008)); Bostrom, *supra* note 25, at 872.

36. Bostrom, *supra* note 25, at 872, 913; see also MARIA HELENA FONSECA DE SOUZA ROLIM, *THE INTERNATIONAL LAW ON BALLAST WATER: PREVENTING BIOPOLLUTION* 9 (2008) (“[T]he alien species carried in ballast water are one of the greatest agents of global marine environmental biopollution.”).

“Harmful Aquatic Organisms and Pathogens[,]” means aquatic organisms or pathogens which, if introduced into the sea including estuaries, or into fresh water courses, may create hazards to the environment, human health, property or resources, impair biological diversity[,] or interfere with other legitimate uses of such areas.”<sup>37</sup>

Ranging from goby to toxic algae, and of course, zebra mussels,<sup>38</sup> aquatic invasive species can cause severe environmental and economic harm in non-native ecosystems.<sup>39</sup> Aquatic invasive species diminish native species populations by (1) out hunting them for food, or simply hunting them; (2) “interbreeding with them;” or (3) “introducing harmful pathogens and parasites” into the ecosystem.<sup>40</sup> Invasive species also impair ecosystems by disturbing natural processes such as hydrological or nutrient cycles.<sup>41</sup>

Invasive species invasions carry a staggering price tag. In the United States alone, land-based and aquatic invasive species cause an estimated \$137 billion in damage annually.<sup>42</sup> Introduced to the Black Sea via ballast water transfer in the early 1980s, the comb jelly decimated the fishing industry and cost the region an esti-

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37. BWMC, *supra* note 19, art. 1, ¶ 8. Other domestic and international definitions are substantively similar. See, e.g., National Invasive Species Act of 1996 (NISA), 16 U.S.C. § 4702(1) (2012).

38. See Steve Raaymakers & Liz Gould, *Ten of the Most Unwanted*, GLOBAL BALLAST WATER MGMT. PROGRAMME, [http://archive.iwlearn.net/globallast.imo.org/wp-content/uploads/2015/01/TenMostWanted\\_English.pdf](http://archive.iwlearn.net/globallast.imo.org/wp-content/uploads/2015/01/TenMostWanted_English.pdf) [<https://perma.cc/4CNB-CRQ8>]; see also Benson et al., *supra* note 1.

39. See, e.g., 16 U.S.C. § 4701(a)(4); see also Sabrina J. Lovell et al., *The Economic Impacts of Aquatic Invasive Species: A Review of the Literature*, 35 AGRIC. & RES. ECON. REV. 195, 195-96 (2006) (reviewing economic literature regarding the costs associated with invasive species invasions); Benson et al., *supra* note 1.

40. *What are ANS?*, ANS TASK FORCE, <http://anstaskforce.gov/ans.php> [<https://perma.cc/3Z7N-LLBP>].

41. See *id.* For a brief introduction to hydrology, the scientific study of water’s properties and movement on Earth, see generally *What is Hydrology and What Do Hydrologists Do?*, U.S. GEOLOGICAL SUR., <https://water.usgs.gov/edu/hydrology.html> [<https://perma.cc/GD9W-6E7G>] (last modified Dec. 2, 2016). For information on nutrient cycles, the processes by which the Earth recycles vital nutrients, see generally Regina Bailey, *How Nutrients Cycle Through The Environment*, THOUGHTCO., <https://www.thoughtco.com/all-about-the-nutrient-cycle-373411> [<https://perma.cc/68QX-QMX5>] (last updated Nov. 7, 2017).

42. Eric V. Hull, *Climate Change and Aquatic Invasive Species: Building Coastal Resilience Through Integrated Ecosystem Management*, 25 GEO. INT’L ENVTL. L. REV. 51, 56-57 (2012); Linsey M. Ajubita, Note, *Regulating the Treatment and Discharge of Ballast Water to Protect the Economy and Ecology of the United States*, 16 LOY. MAR. L.J. 223, 224 (2017).

mated \$250 million.<sup>43</sup> Invasive species implicate public health as well: ballast water can transfer cholera bacteria or pollutants such as polychlorinated biphenyls (PCBs), which can be subsequently consumed by humans.<sup>44</sup>

As “the primary distributor of aquatic invasive species,” commercial shipping relocates thousands of nonindigenous invasive species each year via ballast water exchange.<sup>45</sup> Although the majority of organisms do not survive the trip,<sup>46</sup> survival rates are increasing;<sup>47</sup> the resilient species that do survive can cause severe damage.<sup>48</sup> In addition, although invasive species are less likely to survive in deep water, the dangers of deep water ballast water exchange limit vessels to shallower waters or ports, where non-indigenous invasive species are more likely to survive.<sup>49</sup> Further, researchers have found that invasive species’ presence, and therefore the probability of significant harm, in coastal ecosystems increases as shipping volume increases.<sup>50</sup>

Perhaps one of the most troublesome aspects of aquatic invasive species invasions is the irrevocableness of the invasion itself. Indeed, “[i]t is a basic fact that established aquatic nonindigenous species are permanent arrivals.”<sup>51</sup> Remedial measures rarely result in complete eradication.<sup>52</sup> As such, preventing aquatic invasive

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43. Viktoras Didžiulis, *NOBANIS—Invasive Alien Species Fact Sheet: Mnemiopsis leidyi*, EUR. NETWORK ON INVASIVE ALIEN SPECIES (2013), [https://www.nobanis.org/globalassets/speciesinfo/m/mnemiopsis-leidy/mnemiopsis\\_leidy.pdf](https://www.nobanis.org/globalassets/speciesinfo/m/mnemiopsis-leidy/mnemiopsis_leidy.pdf) [<https://perma.cc/USS7-WY4X>].

44. ANS TASK FORCE, *supra* note 40; see Benson et al., *supra* note 1.

45. Bostrom, *supra* note 25, at 871-72.

46. Ajubita, *supra* note 42, at 225.

47. U.S. ENVTL. PROT. AGENCY, *AQUATIC NUISANCE SPECIES IN BALLAST WATER DISCHARGES: ISSUES AND OPTIONS 4* (2001), <https://www.epa.gov/sites/production/files/2015-09/documents/ballast14h.pdf> [<https://perma.cc/9PL3-U6S3>] (draft report for public comment); see also ROLIM, *supra* note 36, at 19 (describing factors contributing to an increase in invasive species introductions).

48. See Bostrom, *supra* note 25, at 872; Hull, *supra* note 42, at 54-55.

49. See BYERS WITH BAKER, *supra* note 30, at 189; see also TAN, *supra* note 15, at 170.

50. John M. Drake & David M. Lodge, *Global Hot Spots of Biological Invasions: Evaluating Options for Ballast-Water Management*, 271 *PROC. ROYAL SOC'Y LONDON B* 575, 575, 578 (2004); see also Arthur J. Niimi, *Environmental Assessment: Environmental and Economic Factors Can Increase the Risk of Exotic Species Introductions to the Arctic Region Through Increased Ballast Water Discharge*, 33 *ENVTL. MGMT.* 712, 713 (2004) (“[E]xotic species ... introductions have commonly been associated with human activities.” (citation omitted)).

51. ROLIM, *supra* note 36, at 19.

52. *Id.* at 19-20.

species from reaching foreign ports via ballast water is effectively “the only solution.”<sup>53</sup>

### *B. The Ballast Water Management Convention*

The International Maritime Organization (IMO), a United Nations agency charged with “the safety and security of shipping and the prevention of marine pollution by ships,”<sup>54</sup> adopted the BWMC in 2004.<sup>55</sup> The BWMC entered into force on September 8, 2017, one year after reaching its threshold for ratification.<sup>56</sup> To enter into force, the BWMC required “ratification by a minimum of 30 States, representing 35 percent of world merchant shipping tonnage.”<sup>57</sup> Although the treaty easily passed the thirty-country minimum by 2016, Finland’s entry as the fifty-second contracting nation raised the shipping tonnage above the 35 percent threshold.<sup>58</sup> Between 2004 and 2017, guidelines for the BWMC’s implementation were developed as ballast water treatment technology progressed, causing more countries to join.<sup>59</sup> As of August 6, 2018, the BWMC had seventy-six “Contracting States,” representing 77.08 percent of world merchant shipping tonnage.<sup>60</sup>

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53. *Id.* at 19; see also Hull, *supra* note 42, at 57 (“[T]he most effective strategy to address species invasion is to identify and close critical pathways through which species are initially introduced.”).

54. *Introduction to IMO*, INT’L MAR. ORG., <http://www.imo.org/en/About/Pages/Default.aspx> [https://perma.cc/EEB3-QFES].

55. *International Convention for the Control and Management of Ships’ Ballast Water and Sediments (BWM)*, INT’L MAR. ORG., [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships-Ballast-Water-and-Sediments-\(BWM\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships-Ballast-Water-and-Sediments-(BWM).aspx) [https://perma.cc/Z3HV-637G].

56. *Global Treaty to Halt Invasive Aquatic Species Enters into Force*, INT’L MAR. ORG., (Sept. 8, 2017) <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/21-BWM-EIF.aspx> [https://perma.cc/Z3AX-RLF3]; see also *Ballast Water Convention to Enter into Force in 2017*, MAR. EXECUTIVE (Sept. 9, 2016), <https://www.maritime-executive.com/article/ballast-water-convention-to-enter-into-force-in-2017> [https://perma.cc/3VGA-MEW9]. For a brief overview of the IMO’s convention adoption and entry into force processes, see ROLIM, *supra* note 36, at 78-79.

57. MAR. EXECUTIVE, *supra* note 56.

58. *Id.*

59. See *Ballast Water Management*, INT’L MAR. ORG., <http://www.imo.org/en/OurWork/Environment/BallastWaterManagement/Pages/Default.aspx> [https://perma.cc/44JY-F5LL].

60. INT’L MAR. ORG., STATUS OF IMO TREATIES 515-16 (2018), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf> [https://perma.cc/4QRW-QSFL].

A binding, multilateral international convention, the BWMC seeks “to prevent, minimize[,] and ultimately eliminate the risks to the environment, human health, property[,] and resources arising from the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships’ Ballast Water and Sediments.”<sup>61</sup> To achieve this end, BWMC parties agree to myriad obligations regarding ballast water exchange, treatment, and management procedures, including: data collection, monitoring, reporting, compliance inspections, and enforcement.<sup>62</sup> Parties must further “ensure that Ballast Water Management practices used to comply with this Convention do not cause greater harm than they prevent to their environment, human health, property or resources, or those of other States.”<sup>63</sup> The BWMC dictates that “[e]ach Party shall, with due regard to its particular conditions and capabilities, develop national policies, strategies or programmes for Ballast Water Management in its ports and waters under its jurisdiction that accord with, and promote the attainment of the objectives of this Convention.”<sup>64</sup> A related and noteworthy, yet sometimes exercised,<sup>65</sup> provision grants BWMC parties the ability to institute stricter standards:

Nothing in this Convention shall be interpreted as preventing a Party from taking, individually or jointly with other Parties, more stringent measures with respect to the prevention, reduction or elimination of the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships’ Ballast Water and Sediments, consistent with international law.<sup>66</sup>

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61. BWMC, *supra* note 19, annex at 2. The BWMC further seeks “to avoid unwanted side-effects from that control.” *Id.*

62. See Jeremy Firestone & James J. Corbett, *Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species*, 7 SUSTAINABLE DEV. L. & POL’Y 45, 45-47 (2006).

63. BWMC, *supra* note 19, art. 2, ¶ 7. For the definition of “Ballast Water Management,” see *id.* art. 1, ¶ 3.

64. BWMC, *supra* note 19, art. 4, ¶ 2.

65. See Firestone & Corbett, *supra* note 62, at 47, 83 n.52.

66. BWMC, *supra* note 19, art. 2, ¶ 3.

BWMC Article 12 addresses the undue detention or delay of ships: “All possible efforts shall be made to avoid a ship being unduly detained or delayed under Article 7.2, 8, 9[,] or 10.”<sup>67</sup> In addition to Article 12’s broad coverage, Article 9 itself reiterates the concern over “port state[s]”<sup>68</sup> unduly delaying or detaining ships during compliance inspections.<sup>69</sup> Specifically, in the context of ballast water sampling, Article 9 states that “the time required to analyse the samples shall not be used as a basis for unduly delaying the operation, movement[,] or departure of the ship.”<sup>70</sup>

Article 10 covers contingencies in the event a violation of the BWMC occurs.<sup>71</sup> Should a violation be found, either the “flag state”<sup>72</sup> or port state may conduct an Article 9 inspection, or otherwise “warn, detain, or exclude the ship.”<sup>73</sup> The port state may also allow the ship in question to leave port to release its ballast water, “provided doing so does not present a threat of harm to the environment, human health, property[,] or resources.”<sup>74</sup> If an Article 9, paragraph 1(c) ballast water sampling test shows that the ship “poses a threat to the environment, human health, property[,] or resources,” the port state “shall prohibit such ship from discharging Ballast Water until the threat is removed.”<sup>75</sup> Article 10’s provisions are, of course, subject to Article 12’s prohibition against undue detention and delay.<sup>76</sup>

Thus, the BWMC prohibits undue detention and delay, and provides for compensation for any damage or loss sustained by an “unduly detained or delayed” ship.<sup>77</sup> Yet, importantly, the BWMC

67. *Id.* art. 12, ¶ 1. Article 7 and 8 undue delay and detention lies beyond this Note’s scope. *See supra* note 21.

68. A “port state” is the nation “whose ports and internal waters a vessel sails into.” TAN, *supra* note 15, at 23. The BWMC refers to port states using language such as “the Party in whose port or offshore terminal the ship is operating.” *E.g.*, BWMC, *supra* note 19, art. 10, ¶ 2.

69. *See* BWMC, *supra* note 19, art. 9, ¶ 1(c).

70. *Id.*

71. *See id.* art. 10, ¶ 2.

72. A “flag state” is the nation “with whom a vessel is registered or whose flag the vessel flies.” TAN, *supra* note 15, at 23. The BWMC refers to flag states using such language as “the Party whose flag the ship is entitled to fly.” *E.g.*, BWMC, *supra* note 19, art. 10, ¶ 2.

73. BWMC, *supra* note 19, art. 10, ¶ 2.

74. *Id.*

75. *Id.* art. 10, ¶ 3.

76. *Id.* art. 12, ¶ 1.

77. *Id.* art. 12.

lacks a formal definition, or any guidance for that matter, as to what would make a detention or delay “undue.” This gap—and the internal tension it creates—has not gone unnoticed: “Although it is unclear what the scope of the undue delay requirement is, the provision has the potential to undermine the port state’s ability to board the vessel and enforce the provisions of the Convention.”<sup>78</sup> Indeed, the undue detention and delay provision “stands in contradistinction to the general obligation standard, which mandates that ‘the practices used ... do not cause greater harm than they present to their environment, human health, property or resources[,] or those of other states.’”<sup>79</sup> In the ballast water sampling context,<sup>80</sup> “ballast tank sample analysis requires varying amounts of time depending upon the number of ships and the local testing facility capacity.”<sup>81</sup> Port states with nascent infrastructure may cause undue delay through no fault other than the realities of being a developing country.<sup>82</sup>

These criticisms demonstrate the sharpness of the BWMC’s double-edged sword. A party must endeavor to meet the BWMC’s objectives without unduly detaining or delaying a vessel.<sup>83</sup> However, the vagueness of “undue” and differences in capabilities may undermine a party’s ability to achieve the BWMC’s objectives.<sup>84</sup> At the same time, a party fearful of “undue” delay that does not hold a ship long enough risks the release of invasive species in contravention of that party’s obligations under Article 2, paragraphs 6 and 7, among others.<sup>85</sup>

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78. Bostrom, *supra* note 25, at 891.

79. Tony George Puthucherril, *Ballast Waters and Aquatic Invasive Species: A Model For India*, 19 COLO. J. INT’L ENVTL. L. & POL’Y 381, 404 (2008) (quoting BWMC, *supra* note 19, art. 2, ¶ 7).

80. *See* BWMC, *supra* note 19, art. 9, ¶ 1(c).

81. Puthucherril, *supra* note 79, at 403.

82. *See id.* at 403-04. Puthucherril proposed that the BWMC should have mandated that BWMC parties assist developing member countries erect infrastructure such as testing facilities to remedy this problem. *Id.* at 404.

83. BWMC, *supra* note 19, art. 12.

84. *See supra* text accompanying notes 78-82.

85. “Parties taking action pursuant to this Convention shall endeavour not to impair or damage their environment, human health, property or resources, or those of other States.” BWMC, *supra* note 19, art. 2, ¶ 6. For the text to Article 2, paragraph 7, see *supra* text accompanying note 63.

To eliminate this tension—or to at least begin on that path—Parts II and III argue that the BWMC’s undue detention and delay provisions regarding compliance inspections can and should be read to contemplate a geography-dependent standard. That is, when determining whether a ship’s delay or detention was “undue,” the location of the compliance inspection can and should be factored into the calculus.

## II. THE BWMC’S UNDUE DETENTION AND DELAY PROVISIONS CAN BE READ TO CONSIDER WHERE THE COMPLIANCE INSPECTION OCCURRED

As environmental and natural resources attorney Suzanne Bostrom highlighted, the BWMC fails to delineate the scope of its undue detention and delay requirements.<sup>86</sup> Given this lack of definition or guidance, the proposition that this scope can include a geographic consideration must find support elsewhere. Indeed, it would be easy to claim that virtually anything could be within the scope of “undue,” but such claims must be grounded in and consistent with the BWMC. Looking at the BWMC’s text reveals support for the geographic consideration.<sup>87</sup>

This Note will analyze the BWMC using the Vienna Convention on the Law of Treaties (VCLT). The VCLT’s rules of interpretation are commonly applied to myriad international agreements, including conventions.<sup>88</sup> VCLT Article 31, paragraph 1 states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>89</sup> Article 31, paragraph 2 defines the context referred to in paragraph 1 to include the treaty’s text, which includes the preamble and annexes.<sup>90</sup> The balance of Article 31, paragraphs 2, 3, and 4 (when applicable) broaden

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86. See Bostrom, *supra* note 25, at 891.

87. See *infra* Parts II.A-B.

88. For an explanation regarding the VCLT’s applicability to international instruments, see RICHARD K. GARDINER, *TREATY INTERPRETATION* 20-21 (2d ed. 2015). As a convention, the BWMC is a “treaty” for VCLT interpretive purposes. See *id.* at 21.

89. Vienna Convention on the Law of Treaties art. 31, ¶ 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

90. *Id.* art. 31, ¶ 2.

“context” beyond mere text.<sup>91</sup> Should the full application of Article 31 ultimately lead to an “ambiguous or obscure,” or “manifestly absurd or unreasonable” result, the interpreter may also refer to “supplementary means of interpretation” such as the treaty’s “preparatory work.”<sup>92</sup> Preparatory work, or *travaux préparatoires* in French, includes, among other things, treaty drafts, conference minutes, and memoranda.<sup>93</sup> Although a full interpretation of the BWMC’s undue detention and delay provisions would venture beyond the BWMC’s “four corners,” the analysis here is limited to the BWMC’s text. To show that further interpretive analysis would be worthwhile, this Note focuses on demonstrating that the BWMC’s text supports a geography-dependent undue delay and detention standard.

Part II.A uses the VCLT to elucidate the meaning of “undue” as it is used in the BWMC. Part II.B uses the VCLT to demonstrate that a geography-dependent standard can be included within the meaning of “undue” as it is used in the BWMC.

### *A. Ordinary Meaning of an Individual Term*

Finding the meaning of “undue” as it is used in the BWMC begins with establishing its ordinary meaning. The ordinary meaning of a term serves as a reasonable starting point for interpretation of that term as it is used in the subject treaty.<sup>94</sup> A term’s dictionary definition can be the term’s ordinary meaning.<sup>95</sup> To see if the dictionary definition can be accepted as the ordinary meaning, the interpreter must check the dictionary definition in the treaty’s context.<sup>96</sup> Should the dictionary definition make sense in context, the interpreter’s job of establishing the ordinary meaning is essentially complete, and the interpretation may continue.<sup>97</sup> However, the interpreter must abandon the dictionary definition as a reasonable starting point if

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91. *See id.* art. 31, ¶¶ 2-4.

92. *Id.* art. 32.

93. GARDINER, *supra* note 88, at 25.

94. *See id.* at 27, 181.

95. *See id.* at 184-86.

96. *See id.* at 185.

97. *See id.*; *see also* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 12) (citations omitted).

the application of that definition in context leads to an unreasonable result.<sup>98</sup>

Here, the treaty term in question is “unduly.”<sup>99</sup> One may notice the absence of analysis regarding “detain” and “delay.” For the sake of brevity, and because any real-world dispute would likely center on the more problematic question of whether a delay or detention was “undue,”<sup>100</sup> this Note focuses on the meaning of “unduly.”<sup>101</sup>

### *1. Aggregate Ordinary Meaning*

Subject to the potential criticism that one word may have more than one meaning,<sup>102</sup> this analysis uses several dictionaries to “convey some of the essence of [the] term” and establish an aggregate ordinary meaning.<sup>103</sup> Thus, an extra step is added in the task of establishing the ordinary meaning of “undue.” In this Part, a singular definition will be distilled from multiple dictionary definitions. This singular definition will then be tested in context to see if it can be the ordinary meaning of “undue.”<sup>104</sup>

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98. See GARDINER, *supra* note 88, at 185; see also *Arbital Award*, 1991 I.C.J. Rep. ¶ 48 (citations omitted).

99. BWMC, *supra* note 19, art. 12, ¶ 1. Regarding variations in grammatical formulation, see *supra* note 26.

100. *Cf. Angelex Ltd. v. United States*, 272 F. Supp. 3d 64, 73-74 (D.D.C. 2017) (analyzing a statute prohibiting the U.S. Coast Guard from “unreasonably” delaying a vessel).

101. This assumption does not detract from the overall thrust of the argument presented here. Indeed, if one were to run the same analysis for “delay” and “detain” as “undue,” one would readily see that the ordinary meanings of “delay” and “detain” fit neatly into the BWMC. See *infra* text accompanying notes 105-20.

102. See Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*, 9 VA. J. INT'L L. 1, 13 (1968). But see *Aguas del Tunari S.A. v. Bol.*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 91 n.51 (Oct. 21, 2005) (“From the standpoint of language, one meaning does not have preference over another. Any meaning which is possible in a semantic sense is also permissible semantically. It would be a mistake to base a doctrine of legal interpretation on dictates, as it were, of linguistics.” (quoting AHARON BARAK, JUDICIAL DISCRETION 341-42 (1987))).

103. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 153, WTO Doc. WT/DS70/AB/R (adopted Aug. 2, 1999). The Appellate Body utilized multiple dictionaries in its interpretation of “benefit” in the context of the Agreement on Subsidies and Countervailing Measures. See *id.* ¶¶ 153-54.

104. See *infra* Part II.A.2.

The dictionary meaning of “unduly” is: (1) “improperly; unjustly” or “to an undue degree; excessively”,<sup>105</sup> (2) “immoderately; excessively” or “in contradiction of moral or legal standards”,<sup>106</sup> or (3) “unwarranted or inappropriate because excessive or disproportionate.”<sup>107</sup> Aggregating these definitions and then distilling the aggregate’s common features renders the “essence” of “unduly.”<sup>108</sup> This “essence” comprehends an excessiveness, an inordinate amount as measured against a given standard,<sup>109</sup> notions of justice and morality, or lack thereof, also inhere in “unduly.”<sup>110</sup> This distilled “essence”—excessively, inordinately, or unjustly—reflects a general, ordinary meaning of the word “unduly.”<sup>111</sup>

## 2. *Applying the Ordinary Meaning in Context*

The crucial next step in the interpretation analysis calls for a check on the subject term’s ordinary meaning.<sup>112</sup> The BWMC’s text, including the preamble and annexes, provides the context for this check.<sup>113</sup> Should the ordinary meaning of “unduly,” as applied in the BWMC’s context, render the relevant provisions absurd, unreasonable, or illogical, that ordinary meaning must fail and the analysis look elsewhere.<sup>114</sup>

Article 31 “context” comprehends a treaty’s entire text; the interpreter begins with words immediately adjacent to the subject term, and then considers “more remote elements such as comparisons with other provisions on similar matters or using similar

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105. *Unduly*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 2009).

106. *Unduly*, COLLINS ENGLISH DICTIONARY (12th ed. 2014).

107. *Undue*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).

108. *Cf. Canada—Measures Affecting the Export of Civilian Aircraft*, *supra* note 103, ¶¶ 153-54.

109. *See supra* text accompanying notes 105-07.

110. *See supra* text accompanying notes 105-06.

111. *See supra* note 103 and accompanying text.

112. *See* GARDINER, *supra* note 88, at 185.

113. *See* VCLT, *supra* note 89, art. 31, ¶ 2.

114. *See* GARDINER, *supra* note 88, at 185. An extreme example illustrates the point: In addition to a general confinement, a “detention” may also be the specific punishment of being kept at school after hours. *See, e.g., Detention*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 2009). A port state should not unduly keep a student after hours. Laudable as this policy may be, it is very likely not what the IMO intended “detention” to mean in the context of the BWMC. *See generally* BWMC, *supra* note 19, annex at 1-2.

wording.”<sup>115</sup> As the interpreter widens the context, the analysis naturally gravitates toward the third element of Article 31, paragraph 1: the treaty’s object and purpose.<sup>116</sup>

BWMC Article 9, paragraph 1(c) states that “the time required to analyse [ballast water] samples shall not be used as a basis for unduly delaying the operation, movement[,] or departure of the ship.”<sup>117</sup> Here, inserting the distilled ordinary meaning of “unduly” renders a coherent result that makes sense in the immediate context of the provision. Indeed, the provision may be rewritten for this exercise as follows: “the time required to analyse [ballast water] samples shall not be used as a basis for [excessively, inordinately, or unjustly] delaying the operation, movement or departure of the ship.”<sup>118</sup> Article 12, which applies to the actions taken by port or flag states in Articles 9 and 10, states that “[a]ll possible efforts shall be made to avoid a ship being unduly detained or delayed.”<sup>119</sup> Again, substituting the distilled ordinary meaning of “unduly” into the immediate context of the provision leads to a reasonable, logical result: “All possible efforts shall be made to avoid a ship being [excessively, inordinately, or unjustly] detained or delayed.”<sup>120</sup>

### 3. *Grappling with the Ambiguity of “Undue”*

Although the distilled ordinary meaning of “undue” fits well in context,<sup>121</sup> a lack of *full* meaning plagues “undue.” By definition, something can be “undue” only as measured against a standard or norm.<sup>122</sup> “Unduly” may mean excessively, inordinately, or unjustly, but all of these words depend on something more for their full meaning.<sup>123</sup> Put another way, if “unduly” may be described as “more

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115. See GARDINER, *supra* note 88, at 197.

116. *See id.*

117. BWMC, *supra* note 19, art. 9, ¶ 1(c).

118. *Id.*

119. *Id.* art. 12, ¶ 1.

120. *Id.*

121. *See supra* Part II.A.2.

122. *See supra* text accompanying notes 105-11.

123. *Cf. Angelex Ltd. v. United States*, 272 F. Supp. 3d 64, 74 (D.D.C. 2017) (“While it is certainly beyond argument that words found in statutes should be interpreted using their ordinary, contemporary, common meaning ... the definition of the word ‘unreasonable’ hardly sheds light on what it means to be unreasonable in a given case.” (citation omitted)).

than was called for,”<sup>124</sup> then the interpreter must know what was originally called for to know what is more, and therefore what is “undue.” As one U.S. court stated when considering the Bureau of Land Management’s statutory responsibility to “take any action necessary to prevent unnecessary or undue degradation of the lands,”<sup>125</sup> “[a]pplication of this standard is necessarily context-specific; the words ‘unnecessary’ and ‘undue’ are modifiers requiring nouns to give them meaning, and by the plain terms of the statute, that noun in each case must be whatever actions are causing ‘degradation.’”<sup>126</sup> Lastly, absent any narrowing language, the inherent subjectivity and ambiguity of “undue” can impede effective enforcement of the provision in question.<sup>127</sup>

“Undue” is inherently ambiguous, and this ambiguity raises a host of problems for the BWMC. Yet, the analysis has reached a point at which explication of what is written in the BWMC has served its useful purpose. Therefore, to further develop the scope of “undue” and ameliorate these problems, this Note will transition from interpreting what is already present in the BWMC to inserting a new provision and testing to see if it can stay.<sup>128</sup> This relates back to part of this Note’s principal argument, that the standard for what constitutes “undue” can take into account the location of the compliance inspection.<sup>129</sup> Part II.B will use the VCLT to test this assertion,<sup>130</sup> predicated on the following logic: if the VCLT directs an interpreter to dismiss a potential meaning of a word or phrase when that meaning, in context and held up to the treaty’s object and purpose, leads to an unreasonable or illogical result,<sup>131</sup> then an interpreter *may* retain a potential meaning if, in context and held up to the treaty’s object and purpose, that meaning does not lead to an unreasonable or illogical result.

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124. A fair description based on its ordinary meaning. *See supra* text accompanying note 111.

125. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (2012).

126. *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011).

127. *See infra* Part III.A.

128. *See infra* Part II.B.

129. *See supra* text accompanying note 27.

130. *See* VCLT, *supra* note 89, art. 31, ¶¶ 1-2.

131. *See* Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Sen.*), Judgment, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 12) (citations omitted); GARDINER, *supra* note 88, at 185.

### *B. Testing the Geographic Consideration*

Having outlined the VCLT's analytical framework, developed an ordinary meaning of "undue," and addressed the limitations of that ordinary meaning, this Note turns to testing whether a geographic factor can be read into the undue detention and delay provisions. Put another way, would the following hypothetical (or similar) language be reasonable and logical: while conducting ballast water sampling, no flag or port state shall unduly delay or detain the subject vessel; determining whether a delay or detention was "undue" shall include consideration of the ballast water sampling's geographic location. The following analysis, which tests the geographic factor language in context and then in light of the BWMC's object and purpose, demonstrates this language's reasonableness and logic.

#### *1. In Context, Immediate and Distant*

In the immediate context of Articles 9 and 12,<sup>132</sup> the geographic factor language does not cause an unreasonable result. Inserted into Article 9, paragraph 1(c), the factor would create a reading as follows: "[T]he time required to analyse the samples shall not be used as a basis for unduly delaying the operation, movement or departure of the ship[; determining whether a delay was "undue" shall include consideration of the ballast water sampling's geographic location]."<sup>133</sup>

One can also envision inserting the geographic factor in Article 12, paragraphs 1 and 2.<sup>134</sup> "All possible efforts shall be made to avoid a ship being unduly detained or delayed under Article 7.2, 8, 9[,] or 10[; determining whether a delay or detention was "undue" shall include consideration of the ballast water sampling's geographic location]."<sup>135</sup> "When a ship is unduly detained or delayed under Article 7.2, 8, 9[,] or 10, it shall be entitled to compensation

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132. Recall that Article 12's undue delay and detention proscription applies to Article 10 and, unlike Article 9, Article 10 does not have its own undue delay or detention provision. See BWMC, *supra* note 19, arts. 9, 10, 12, ¶ 1.

133. *Id.* art. 9, ¶ 1(c).

134. *See id.* art. 12, ¶¶ 1-2.

135. *Id.* art. 12, ¶ 1.

for any loss or damage suffered[; determining whether a delay or detention was “undue” shall include consideration of the ballast water sampling’s geographic location].”<sup>136</sup> Although the interpreter may argue that these readings do not appear absurd, unreasonable, or illogical, at this point the interpreter would be hard-pressed to argue persuasively that these readings are altogether reasonable, logical, and consistent with the BWMC without doing more.

On paper, the next VCLT step would be to consider more distant context.<sup>137</sup> However, the analysis arguably has already considered more distant context because it has already tested the geographic consideration in BWMC Articles 9 and 12, which address similar matters and use nearly identical wording.<sup>138</sup> In both provisions, the geographic factor does not seem unreasonable, but the need for affirmative confirmation remains. Therefore, the analysis moves to the last element of VCLT Article 31(1): the treaty’s object and purpose.<sup>139</sup>

## 2. In Light of the BWMC’s Object and Purpose

A treaty’s preamble serves as the starting point for establishing the treaty’s object and purpose.<sup>140</sup> However, the interpreter “needs to read the whole treaty,” as the “substantive provisions will provide the fuller indication of the object and purpose.”<sup>141</sup> Though the minority view, this Note adopts the French public law approach of treating “object” and “purpose” as two distinct, yet related, elements.<sup>142</sup> The purpose is simply “the general result which the

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136. *Id.* art. 12, ¶ 2.

137. See GARDINER, *supra* note 88, at 197.

138. See *id.* (defining distant context as including “elements such as comparisons with other provisions on similar matters or using similar wording”). Compare BWMC, *supra* note 19, art. 9, ¶ 1(c), with *id.* art. 12, ¶ 1.

139. See GARDINER, *supra* note 88, at 197.

140. See *id.* at 216-17.

141. *Id.* at 218.

142. See *id.* at 213 (citing Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311, 325-28 (1998)). For Gardiner’s rationale as to why this approach is “appropriate,” see *id.* For additional explanation of the majority approach that treats “object and purpose” as a single unit, see Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311, 322-25 (1998). I note that he adopts the French approach as it seems logical. Elucidating the BWMC’s object and purpose will necessarily involve looking at the preamble

parties want to achieve by the treaty.”<sup>143</sup> “The object of a treaty is the instrument for the achievement of the treaty’s purpose,” which “can be found in the provisions of the treaty.”<sup>144</sup> This Note will look at the BWMC’s preamble and several substantive provisions to elucidate the BWMC’s object and purpose, and then argue that inclusion of the geographic consideration is reasonable in light of that object and purpose.

In the BWMC’s preamble, the parties resolve “to prevent, minimize and ultimately eliminate the risks to the environment, human health, property[,] and resources arising from the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships’ Ballast Water and Sediments.”<sup>145</sup> It stands to reason that this is the BWMC’s purpose: “the general result which the parties want to achieve.”<sup>146</sup> To achieve this purpose, the parties then agree to the substantive provisions that follow the preamble.<sup>147</sup> These substantive provisions are the BWMC’s object.<sup>148</sup>

Preceding the BWMC’s purpose is an important paragraph that acknowledges previous state-based aquatic invasive species mitigation efforts, but also recognizes “that this issue, being of worldwide concern, demands action based on globally applicable regulations together with guidelines for their effective implementation and uniform interpretation.”<sup>149</sup> One may argue that this language precludes, as a matter of the BWMC’s purpose, geography-dependent standards. However, such a reading is illogical and inconsistent with the BWMC. That the paragraph requires a “globally applicable” regulatory scheme<sup>150</sup> does not necessarily mean that the regulations themselves must be geographically inflexible.

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and substantive provisions—the former containing language regarding purpose but no substantive obligations, the latter containing substantive obligations engineered to achieve that which is set out in the preamble. *See infra* text accompanying notes 145-64. In the end, the same provisions will be analyzed no matter which conceptual approach I adopt. All else being equal, as constructed, the BWMC seems fit for the French approach and the French approach for the BWMC.

143. GARDINER, *supra* note 88, at 213 (quoting Buffard & Zemanek, *supra* note 142, at 326).

144. *Id.* (quoting Buffard & Zemanek, *supra* note 142, at 326).

145. BWMC, *supra* note 19, annex at 2.

146. GARDINER, *supra* note 88, at 213.

147. *See* BWMC, *supra* note 19, annex at 2.

148. *See supra* text accompanying note 146.

149. BWMC, *supra* note 19, annex at 1.

150. *Id.*

Indeed, it reasons that, depending on the thing being regulated, a truly “globally applicable” regulation would have to recognize the many differences found across the globe.<sup>151</sup> In sum, this paragraph is not precluding geography-dependent standards. Rather, this paragraph calls for a centralized system of standards that can be applied across the globe, whatever those standards may contain, to advance the BWMC’s purpose.

With the BWMC’s purpose in hand, the analysis next examines the BWMC’s object, its substantive provisions.<sup>152</sup> Articles 9 and 12 create obligations for the parties to not unduly delay or detain a vessel while fulfilling other BWMC obligations, namely compliance inspections.<sup>153</sup> Other BWMC provisions support the proposition that the BWMC will fail in its purpose unless the standard used to determine the undue-ness of a delay or detention under Articles 9 or 12 takes the location of the inspection into account.<sup>154</sup> Further, certain other BWMC provisions have express or implied geography-dependent elements.<sup>155</sup> Thus, recognizing a geography-dependent undue delay and detention standard would not be inconsistent with the BWMC’s object or purpose.

BWMC Article 2, paragraph 3 provides that the parties are not precluded from taking “more stringent measures” to advance the BWMC’s purpose.<sup>156</sup> If, when assessing the undue-ness of a delay or detention, the BWMC was incapable of taking into account the compliance inspection location, then Article 2, paragraph 3 would be an empty grant of power. A short hypothetical demonstrates this point. Port state A and port state B are BWMC parties, each subject to a fixed, geography-*independent* undue delay and detention standard for compliance inspections. For simplicity, assume that the standard considers a delay of more than twenty-four hours “undue.” Port state B uses its Article 2, paragraph 3 power to establish a ballast water tank sampling test that is more rigorous than the BWMC’s default test. The results of this test are available no earlier

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151. The BWMC expressly recognizes this in at least one of its substantive provisions, as do other bodies of international law. *See infra* note 163 and accompanying text.

152. *See supra* text accompanying note 144.

153. *See BWMC, supra* note 19, arts. 9, ¶ 1(c), 12, ¶ 1.

154. *See infra* text accompanying notes 156-61.

155. *See infra* text accompanying notes 162-65.

156. BWMC, *supra* note 19, art. 2, ¶ 3.

than thirty-six hours post-test. Port state B holds a ship in port and runs the test. By mere operation of its test, port state B has unduly delayed the ship.<sup>157</sup> In contrast, an undue delay standard that takes into account port state B's more rigorous test would not, at least by default, undermine Article 2, paragraph 3.

Article 2, paragraphs 6 and 7 present a similar issue to Article 2, paragraph 3. Under Article 2, paragraph 6, “[p]arties taking action pursuant to [the BWMC] shall endeavour not to impair or damage their environment, human health, property or resources, or those of other States.”<sup>158</sup> Under Article 2, paragraph 7, “[p]arties should ensure that Ballast Water Management practices used to comply with [the BWMC] do not cause greater harm than they prevent to their environment, human health, property or resources, or those of other States.”<sup>159</sup> If the undue detention and delay standard is the same for every member port state, then some port states may find themselves in an inescapable predicament.<sup>160</sup> Marine and environmental law scholar Tony George Puthucherril identified this issue in the context of Article 2, paragraph 7, specifically with respect to ballast water sampling in port states with developing infrastructure.<sup>161</sup> Port states with particularly delicate ecosystems and unique geographies, such as Arctic coastal states and Australia, may be similarly disadvantaged because their environments necessarily require more effort to protect from aquatic invasive species invasion.<sup>162</sup> A geography-independent undue delay and detention standard would ignore these differences, adversely impacting port states that must take extra efforts to comply with Article 2, paragraphs 6 and 7.

Moving on from the obligations in Article 2, the BWMC already contains geography-dependent provisions. For one, BWMC Regulation C-1 provides that BWMC parties may implement special

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157. Cf. Bostrom, *supra* note 25, at 891 (“[T]he undue delay requirement ... has the potential to undermine the port state’s ability to board the vessel and enforce the provisions of the Convention.”)

158. BWMC, *supra* note 19, art. 2, ¶ 6.

159. *Id.* art. 2, ¶ 7.

160. See TAN, *supra* note 15, at 169; Simpson-Wood, *supra* note 8, at 1252-53.

161. See *supra* notes 76-79 and accompanying text.

162. See TAN, *supra* note 15, at 169-70; Pamel & Wilkins, *supra* note 9, at 341 (citing R. Douglas Brubaker, *Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice*, in PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION 221-43 (Davor Vidas ed., 2000)); Simpson-Wood, *supra* note 8, at 1252-53.

requirements in areas needing more invasive species protection than the BWMC baseline can provide.<sup>163</sup> Further, under Article 4, paragraph 2, “Each Party shall, *with due regard to its particular conditions and capabilities*, develop national policies, strategies or programmes for Ballast Water Management in its ports and waters under its jurisdiction that accord with, and promote the attainment of the objectives of this Convention.”<sup>164</sup> Given that these provisions were adopted to achieve the BWMC’s purpose,<sup>165</sup> it can be said that provisions containing geography-dependent elements can and do advance the BWMC’s purpose. It would therefore be consistent with the BWMC’s provisions (its object) and purpose to also include a geography-dependent undue delay and detention standard.

Between the general obligations and specific examples of geography-dependent language, these provisions demonstrate that if the scope of the standard for what constitutes “undue” does not take the location of the compliance inspection into account, the BWMC would stand at great risk of failing to achieve its stated purpose. In contrast, a geography-dependent standard would be consistent, reasonable, and logical in light of the BWMC’s object and purpose.

Concluding Part II, the ordinary meaning of “unduly” fits in the context of the BWMC. Recognizing, however, the inherent ambiguity of “unduly,” room exists to shape and refine what “unduly” could comprehend as used in the BWMC.<sup>166</sup> As applied in context and in light of the BWMC’s object and purpose, the standard for what constitutes “undue” with respect to compliance inspection delays or detentions can include consideration of the inspection’s geographic location.<sup>167</sup>

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163. See BWMC, *supra* note 19, annex at 20. Recognition of “special areas” is not uncommon. See *Special Areas Under MARPOL*, INT’L MAR. ORG., <http://www.imo.org/en/OurWork/Environment/SpecialAreasUnderMARPOL/Pages/Default.aspx> [<https://perma.cc/Y85K-WBY9>] (noting that the International Convention for the Prevention of Pollution from Ships recognizes “special areas [that] are provided with a higher level of protection than other areas of the sea”).

164. BWMC, *supra* note 19, art. 4, ¶ 2 (emphasis added).

165. See *id.*

166. See *supra* Part II.A.3.

167. See *supra* Part II.B.

III. THE BWMC'S UNDUE DETENTION AND DELAY PROVISIONS  
SHOULD BE READ TO CONSIDER WHERE THE COMPLIANCE  
INSPECTION OCCURRED

Recall Suzanne Bostrom's observation: "Although it is unclear what the scope of the undue delay requirement is, the provision has the potential to undermine the port state's ability to board the vessel and enforce the provisions of the Convention."<sup>168</sup> Including inspection location in the "undue" calculus would obviate, or at least begin to obviate, this conflict in a manner that is reasonable and consistent with the BWMC as a whole.<sup>169</sup> That is, the BWMC's undue delay and detention provisions can be read to consider where the compliance inspection occurred.<sup>170</sup> This Part briefly lays out why, in light of this ability, the BWMC *should* be read this way. "Should" can be taken in two ways. Generally, "undue" should be developed and refined to avoid self-defeat and to incentivize compliance.<sup>171</sup> Specifically, the geography-dependent standard should be used because it reflects the realities that BWMC parties face in complying with the BWMC.<sup>172</sup>

*A. Refining the Scope of "Undue" Will Avoid Self-Defeat and  
Incentivize BWMC Compliance*

The problem of vague, subjective modifiers such as "undue" is not one unique to the BWMC. Indeed, the BWMC's older, broader cousin, the International Convention for the Prevention of Pollution from Ships (MARPOL), shares nearly identical undue delay and detention language with the BWMC.<sup>173</sup> The difficulties caused by such language have not escaped the academy's notice:

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168. See Bostrom, *supra* note 25, at 891.

169. See *supra* Part II.B.

170. See *supra* Part II.

171. See *infra* Part III.A.

172. See *infra* Part III.B.

173. See International Convention for the Prevention of Pollution from Ships art. 7, *opened for signature* Nov. 2, 1973, 1340 U.N.T.S. 184 (entered into force Oct. 2, 1983) [hereinafter MARPOL].

Parties to [MARPOL] installed this safeguard to protect themselves from overzealous enforcers and from countries intentionally delaying transport of a competitor's goods. However, this "safeguard" diminishes a port state's incentive to rigorously attempt to uncover pollution violations. In addition, [MARPOL] provides no definition of the word "undue." Such subjective terms need clarification to ensure uniform understanding between the flag and port states.<sup>174</sup>

Without more in the treaty text to define, or at least shape, such a subjective term, courts are left scratching their heads, and counsel's arguments are sometimes as vague and unhelpful as the term itself.<sup>175</sup>

The ambiguity of a subjective term such as "undue" has implications for treaty compliance. In a study included in their monograph on the "managerial school" of compliance theory, scholars Abram Chayes and Antonia Handler Chayes found that compliance was generally the norm amongst parties to international treaties.<sup>176</sup> Observing that willful disobedience rarely formed the basis for non-compliance, Chayes and Chayes attributed instances of noncompliance to certain insufficiencies that made compliance more difficult for parties that would otherwise have an incentive to comply.<sup>177</sup> One such insufficiency was "ambiguity and indeterminacy of treaty language."<sup>178</sup>

Given the known concerns regarding the ambiguity of "undue"<sup>179</sup> and the observation that ambiguous language may contribute to

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174. Rebecca Becker, Note, *MARPOL 73/78: An Overview in International Environmental Enforcement*, 10 GEO. INT'L ENVTL. L. REV. 625, 637 (1998); see also Andrew Rakestraw, Note, *Open Oceans and Marine Debris: Solutions for the Ineffective Enforcement of MARPOL Annex V*, 35 HASTINGS INT'L & COMP. L. REV. 383, 400 (2012) ("'[U]ndue delay' is not defined and subject to the interpretation of each captain, ... thereby reducing incentives for port states to conduct thorough inspections for fear of having a claim filed against them." (footnote omitted)).

175. See *Angelex Ltd. v. United States*, 272 F. Supp. 3d 64, 74 (D.D.C. 2017).

176. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3-9 (1995). For a critical response to Chayes' "managerial school" of compliance, see generally George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?* 50 INT'L ORG. 379 (1996).

177. See CHAYES & CHAYES, *supra* note 176, at 10.

178. *Id.*

179. See *supra* notes 174-76 and accompanying text.

noncompliance,<sup>180</sup> absent some refinement, the BWMC is poised for self-defeat. One may rebut this argument by claiming that the argument assumes “that states will comply with precise obligations better than with those that are more generally stated,”<sup>181</sup> and proffer that this assumption is not always true.<sup>182</sup> However, this rebuttal discusses specific obligations and “generally stated” obligations, not *ambiguous* provisions.<sup>183</sup> A “generally stated” provision is not necessarily ambiguous.<sup>184</sup> States may comply with generally stated obligations better than specific obligations in some circumstances.<sup>185</sup> However, compared to obligations that are clear notwithstanding their level of specificity, ambiguous obligations create a different problem altogether.<sup>186</sup> Consider a hypothetical provision in the BWMC that provides for compliance inspections consisting of (1) a ballast water sample collection, and (2) a review of the ship’s ballast water exchange log. The provision does not expressly state, among other things, the order in which to conduct these two elements. Here, the lack of procedural specificity would likely not impact compliance.<sup>187</sup> In contrast, a provision that prohibits “undue delay or detention” during an inspection, without saying more about what constitutes “undue,” creates *ambiguity*<sup>188</sup> that would likely negatively affect compliance.<sup>189</sup> Incorporating inspection location into the “undue” delay or detention analysis will ameliorate some of this ambiguity in the BWMC.<sup>190</sup> This will, in turn, help the BWMC avoid self-defeat vis-à-vis noncompliance caused by ambiguous language.

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180. CHAYES & CHAYES, *supra* note 176, at 10.

181. Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths*, 32 U. RICH. L. REV. 1555, 1572 (1999).

182. *See id.* at 1573.

183. *See id.* at 1572-73.

184. *See id.* at 1573.

185. *See id.*

186. *See* CHAYES & CHAYES, *supra* note 176, at 10.

187. *Cf.* Weiss, *supra* note 181, at 1573 (citing World Heritage Convention Article 4 as an example in which “[c]ompliance with the more generally stated obligations does not necessarily suffer because of the wording”).

188. *See supra* notes 174-76 and accompanying text; *see also* Bostrom, *supra* note 25, at 891.

189. *See* CHAYES & CHAYES, *supra* note 176, at 10.

190. *See supra* Part II.B.

*B. Incorporating Inspection Location Acknowledges Differences in States' Needs and Capabilities*

In addition to ambiguous language, Chayes and Chayes observed that “limitations on the capacity of parties to carry out their undertakings” also contributed to noncompliance with international treaties.<sup>191</sup> In the BWMC context, these limitations can be directly related to the compliance inspection port’s geographic location.<sup>192</sup> In addition to varied capacities to carry out a compliance inspection without unduly delaying a ship,<sup>193</sup> some states simply face higher stakes when it comes to potential aquatic nuisance species invasion.<sup>194</sup> The Arctic is particularly susceptible to invasive species.<sup>195</sup> It reasons that Arctic states would want more leeway in conducting compliance inspections to protect the fragile Arctic ecosystem. If the IMO hopes “to prevent, minimize[,] and ultimately eliminate”<sup>196</sup> aquatic invasive species invasions, then the IMO should construe the BWMC as recognizing these varied capacities and elevated risks in the BWMC’s “undue” delay and detention standard. Thus, if “unduly” may be described as “more than was called for,” applied to an inspection in the Arctic the standard for an undue delay *should* be “more than was called for in an inspection in the Arctic.”<sup>197</sup> Taking geographic location into account would reflect the reality that circumstances in one geographic location are different than in another.

One may counter argue that a standard that does not take location into account is the proper way to reduce the ambiguity of “undue” because it is necessary for optimal operation of the BWMC. After all, it is plausible to think that in allowing for location to inform what is “undue,” the expectations of flag states and their

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191. CHAYES & CHAYES, *supra* note 176, at 10.

192. *See, e.g.*, Puthucherril, *supra* note 79, at 403.

193. *See id.*

194. *See* TAN, *supra* note 15, at 169-70; Pamel & Wilkins, *supra* note 9, at 341 (citing Brubaker, *supra* note 162, at 221-43); Simpson-Wood, *supra* note 8, at 1253.

195. *See* Pamel & Wilkins, *supra* note 9, at 341 (citing Brubaker, *supra* note 162, at 221-43); Simpson-Wood, *supra* note 8, at 1253.

196. BWMC, *supra* note 19, annex at 1.

197. *Cf.* Theodore Roosevelt Conservation P’ship v. Salazar, 661 F.3d 66, 76 (D.C. Cir. 2011) (“[D]efining ‘unnecessary’ in the mining context [would be] ‘that which is not necessary for mining.’” (citing Utah v. Andrus, 486 F. Supp. 995, 1005 n.13 (D. Utah 1979))).

vessels would be frustrated.<sup>198</sup> However, a fixed standard would undermine the BWMC's purpose and object.<sup>199</sup> Further, a fixed standard would ignore the reality that different states have different environmental needs and capacities to comply with the BWMC.<sup>200</sup> Lastly, given that vessels transport aquatic invasive species,<sup>201</sup> and the BWMC seeks to eliminate vessel-borne transfer of said species,<sup>202</sup> it reasons that the port states tasked with regulating and inspecting these vessels would win in a weighing-of-the-interests analysis. Since the geography-dependent standard is in the port states' best interest, which in turn is in the BWMC's best interest,<sup>203</sup> the geography-dependent standard should take precedence. This is not to say that vessels and their flag states do not also have valid interests. Indeed, their interests are vindicated by the presence of the prohibition on undue delays and detentions in the first instance.<sup>204</sup> Regarding the inherent ambiguity of "undue," however, this Note demonstrates that a proposed solution representing the interests of the port states—the geography-dependent standard—does more to advance the BWMC as a whole,<sup>205</sup> and therefore should be adopted.

The environmental, economic, and public health ramifications associated with an aquatic invasive species invasion are also cause to embrace a geography-dependent "undue" delay and detention standard. The environmental harm to any region invaded by a nonindigenous species is staggering.<sup>206</sup> Equally staggering is the economic damage suffered by local economies and industries.<sup>207</sup>

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198. As a simple example, one can imagine the frustration of a ship's captain who could recover for a three-day delay in a Mediterranean port but not for the same delay in an Arctic port. *Cf.* BWMC *supra* note 19, art. 12, ¶ 2.

199. *See supra* Part II.B.2.

200. *See* TAN, *supra* note 15, at 169-70; Pamel & Wilkins, *supra* note 9, at 341 (citing Brubaker, *supra* note 162, at 221-43); Puthucherril, *supra* note 79, at 403; Simpson-Wood, *supra* note 8, at 1253.

201. *See supra* Part I.A.

202. *See* BWMC, *supra* note 19, annex at 1.

203. *See supra* Part II.B.

204. *See supra* text accompanying note 174. Given their similar structure and objectives, it is likely that the reasons for which MARPOL parties included an undue delay prohibition are also at play in the BWMC context.

205. *See supra* Part II.B.

206. *See supra* notes 38-41 and accompanying text.

207. *See supra* notes 42-44 and accompanying text.

Humans may also suffer adverse health effects from an invasive species invasion.<sup>208</sup> If a given port state cannot effectively inspect a vessel for fear of unduly delaying or detaining the vessel under an ambiguous, subjective standard, the port state may violate other BWMC obligations,<sup>209</sup> and the risk of an invasion could rise.<sup>210</sup> If the BWMC is going to prevent any of these consequences, as stated in its purpose,<sup>211</sup> the BWMC should be read to include a geography-dependent undue delay and detention standard.

### CONCLUSION

Capable of causing vast environmental harm, economic catastrophe, and human sickness, nonindigenous aquatic invasive species are one of the largest threats facing aquatic ecosystems around the globe.<sup>212</sup> Ballast water transfer incident to commercial shipping relocates thousands of these nuisance species annually.<sup>213</sup> Once relocated, those strong enough to survive are nearly impossible to eradicate.<sup>214</sup> Given the direct link between increased human activity and increased risk of aquatic invasive species invasion,<sup>215</sup> the threat of such invasion looms increasingly higher over regions like the Arctic—a pristine, relatively undisturbed wilderness now subject to increased human activity due to climate change.<sup>216</sup>

The BWMC seeks “to prevent, minimize[,] and ultimately eliminate the risks to the environment, human health, property[,] and resources arising from the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships’ Ballast Water and Sediments.”<sup>217</sup> The BWMC also seeks “to avoid unwanted side-effects from that control.”<sup>218</sup> Accordingly, the parties

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208. See *supra* notes 44-45 and accompanying text.

209. See *supra* Part I.B.

210. See ROLIM, *supra* note 36, at 19-20 (describing that proactive, preventative measures are imperative in stopping invasive species transfer through ballast water exchange).

211. See BWMC, *supra* note 19, annex at 2.

212. See *supra* Part I.A.

213. See *supra* Part I.A.

214. See *supra* Part I.A.

215. See *supra* Part I.A.

216. See *supra* notes 8-17 and accompanying text.

217. BWMC, *supra* note 19, annex at 2.

218. *Id.*

agree that “[a]ll possible efforts shall be made to avoid a ship being unduly detained or delayed under Articles 7.2, 8, 9[, and] 10.”<sup>219</sup>

Unfortunately, as written, the BWMC leaves open the question of what exactly “undue” means.<sup>220</sup> Scholars have keenly identified this problem and its implications,<sup>221</sup> though suggestions for a potential solution are generally lacking.<sup>222</sup> As one potential solution, the standard for what constitutes “undue” *can* and *should* be read to be a geography-dependent standard. That is, when determining whether a delay or detention was “undue,” the ballast water inspection location—in particular the condition of its ecosystem and the capabilities of the relevant port state—*can* and *should* be taken into consideration. The BWMC’s text supports the proposition that undue delay and detention *can* be a geography-dependent standard. The desire to avoid self-defeat, incentivize compliance, and recognize the reality that different states have different needs and capabilities support the proposition that undue delay and detention *should* be a geography-dependent standard.

If the BWMC is going to achieve its purpose, those responsible for its operation, enforcement, and interpretation must confront the inherent ambiguity of “undue.” A reasonable, consistent, and ultimately feasible reading of “undue” that resolves this ambiguity is necessary. Notwithstanding whether a geography-dependent standard ultimately proves workable, the most important work this Note will have done is call more attention to and encourage further evaluation of this important issue as the BWMC begins its second year in force.

*John R. Bobka*\*

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219. *Id.* art. 12, ¶ 1.

220. *See supra* Part II.A.3.

221. *See, e.g.,* Bostrom, *supra* note 25, at 891.

222. *But see supra* note 85.

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