



**THE FRIDTJOF NANSEN INSTITUTE**

**Coastal State Jurisdiction  
and Vessel Source Pollution**

**The International Law of the Sea  
Framework for Norwegian Legislation**

**Øystein Jensen**

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# Coastal State Jurisdiction and Vessel Source Pollution

The International Law of the Sea Framework  
for Norwegian Legislation

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**Abstract**

The main objective of this report is the current geographical extent and scope of Norway's right to regulate vessel source pollution under international law and relevant Norwegian legislation. The law of the sea recognises the freedom of navigation, yet limits in varying degrees the operation of vessels in the maritime areas of a coastal State. This report portrays the aim under international law at reconciling the opposing interests of the flag State and the coastal State. It analyses Norwegian jurisdiction over vessel source pollution in ports and internal waters, the territorial sea and the exclusive economic zone. A separate part is devoted to coastal State jurisdiction with regard to maritime casualties and special areas.

In the assessment of the existing legal regime, the United Nations Convention on the Law of the Sea Part XII is the point of departure. Where necessary, account is taken of the impact of regulatory conventions and the important role of the International Maritime Organization.

**Key Words**

coastal state jurisdiction, vessel source pollution, law of the sea,

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# 1 Introduction

## 1.1 Presentation

The topic of this report is coastal State jurisdiction over vessel source pollution, with special focus on shipping along the Norwegian coastline. The legal investigation I propose to undertake concerns first of all the framework under the United Nations Convention on the Law of the Sea<sup>1</sup> (hereinafter LOS Convention) Part XII for the protection and preservation of the marine environment from such pollution. In this regard I will analyse the coastal State's right to regulate shipping under international law and relevant Norwegian legislation.

Due to the global nature of shipping, coastal State jurisdiction over vessel source pollution must be considered under general international law. Thus, the international legal framework for this work is provided by the relevant provisions of Part XII of the LOS Convention.

My rationale for the choice of this topic is the large, and increasing, scale shipping activity within waters under Norwegian jurisdiction. This raises the importance to prevent, reduce and control pollution from such activities. Taking into consideration the latest developments along Norway's coast, a clarification of Norwegian legislation in light of the current international legal framework regarding vessel source pollution, is necessary.

For this purpose I will also briefly present information about the navigational characteristics along the Norwegian coastline and to what extent it is at risk from vessel source pollution.

## 1.2 Delimitations

When investigating coastal State jurisdiction over vessel source pollution, it is essential to differentiate from other types of pollution. Part XII of the LOS Convention concerns many sources of pollution not directly relevant within the scope of this report, including pollution from land-based sources, from sea-bed activities, dumping *etc.*<sup>2</sup>

Although jurisdiction over vessel source pollution with regard to ice-covered areas is provided for in Article 234 of the LOS Convention and is of relevance to Norway, this topic is beyond the theme of this study. Furthermore, the jurisdiction in the maritime areas of Spitsbergen will not be examined as these predominantly are important with regard to fishing.

Only legislative and enforcement jurisdiction is relevant here, that is, respectively the coastal State's right to establish and give effect to rules with regard to pollution from vessels. Private international law is not subject to this report, such as liability and compensation.

## 1.3 Sources and methodology

The Norwegian sources used to establish norms are predominantly statutory acts related to pollution from vessels. Case law is rather sparse. However, arguments from legal theory and *travaux préparatoires* are relevant. The sources are interpreted in accordance with Norwegian legal methodology.

Article 38 of the Statute of the International Court of Justice<sup>3</sup> is widely recognised as an authoritative statement of the relevant sources of international law.<sup>4</sup> It enumerates treaty law, customary law and the general principles of law as the primary sources. Additionally, judicial decisions and the legal theory of the most qualified jurists are used for the determination of relevant sources of international law.

Most customary rules with regard to coastal State jurisdiction over vessel source pollution are already codified in treaties. Thus, the predominant source is treaty law, under this report specifically the LOS Convention.

State practice is nevertheless an important element in creation and application of international environmental law and an essential component of custom. State practice is also relevant with regard to interpretations of treaties, as affirmed by the 1969 Vienna Convention on the Law of Treaties Article 31(3)(b).<sup>5</sup>

In the study of vessel source pollution one should also take notice of international soft-law rules, which in principle are not legally binding. However, for the complete understanding of the subject matter one must take into consideration resolutions, declarations and recommendations by international institutions. They often contain value statements and entrance of international trends.<sup>6</sup>

#### **1.4 Structure of the work**

I will explore my report in 6 parts. After this introduction section, in part 2 I will briefly introduce the characteristics of navigation and vessel source pollution. Part 3 concerns the framework of international law relating to such pollution. Part 4 introduces the concept of jurisdiction under international law and the important role of the flag State. The coastal State's right and duties under the LOS Convention to regulate vessel source pollution in the different maritime zones is contained in part 5, while a separated part (part 6) is devoted coastal State jurisdiction with regard to maritime casualties and special areas. Some of the parts have their own conclusions, while key traits are drawn together in Final remarks (part 7).

## **2 Navigation and vessel source pollution**

The Norwegian coastline extends in the length of more than 55 000 kilometres, fjords and islands included. Around 80 per cent of the Norwegian population lives near the coast and the maritime area is six times larger than the land area. The coastal zone and resources play a major role in the national economy and in settlement and employment patterns. As avenues of commerce, sources of food and energy and important areas of scientific studies, Norway has a significant interest in the management of the marine areas and resources.

The importance of coastal State jurisdiction over vessel source pollution is only obvious after these factors are taken into account. Under this part I will briefly look upon some navigational characteristics and how our coastline may be threatened by pollution from vessels.



## 2.1 Navigational characteristics along the Norwegian coastline

In *Stortingsmelding nummer 14*,<sup>7</sup> the results from an analysis on the risks of navigation along the Norwegian coastline were presented. The report presents detailed information about the navigation along our coastline and lay foundation for the Government's future work relating safety and shipping in Norway.

Two thirds of all transportation within Norwegian waters relate to the production of oil and gas.<sup>8</sup> First and foremost, transportation is by exporting vessels. Today, Norway is the world's third largest exporter of oil, after Saudi Arabia and Russia.<sup>9</sup> In the North Sea and the Norwegian Sea, almost 3 billion barrels of crude oil are produced daily from more than 50 installations. More than 90 per cent of this production is exported, mainly by large oil tankers from Norwegian oil refineries. They regularly navigate in all parts of Norwegian waters, within ports and internal waters, in the territorial sea, within the contiguous and the exclusive economic zone (hereinafter EEZ).

Moreover, our coastline is also exposed to extensive transit passage, by a large margin represented by vessels sailing from Russian ports. The Russians transport oil to the European market along most of the Norwegian coast. Regional Headquarters North Norway (hereinafter RHQNN) keep track of transit passages in the northern coastal areas of Norway. Statistics from RHQNN show that in May 2005 nearly 800 000 tonnages of oil products were transported from Russia along the Norwegian coast. There were about 30 oil tankers in transit in that period, most of them headed for the port of Rotterdam. According to observations from RHQNN, this transit passage mainly took place outside the outer limit of the territorial sea but within the Norwegian EEZ. One cannot underrate the fact that this transit passage may constitute an additional threat upon our marine environment.

In the future, this shipping activity is expected to increase.<sup>10</sup> Nevertheless, the growth depends on many factors. The activity on the Norwegian continental shelf is indeed relevant in this respect. Currently, there are plans to search for oil and gas in the Barents Sea and near the Lofoten Islands, indicating that Norwegian authorities are willing to increase the sea-bed activities and open up for involvement by international companies. Furthermore, transit from Russia may increase substantially with more extensive oil production in the north. *Fearnley Consultants* estimate more vessel movements over the next years especially from Pechanga and the ports in the White Sea and Kara Sea. Even though pipelines are built to the Baltic Sea, the growth is expected in the northern coastal areas of Norway.<sup>11</sup>

Despite the concerns for the marine environment, it is important to note that shipping is still considered the safest and most environmentally benign form of commercial transport. Along with awareness of the severe impact vessel source pollution may have on the marine environment, a

comprehensive shipping activity in Norwegian waters will continue also in the future. The focus should thus be how to prevent, minimize and control the environmental risks arising from this activity.

## 2.2 Vessel source pollution

There was in fact little legal concern with pollution of the seas until the 1960s. This situation changed prompted by many severe accidents related to oil transport. The disasters of *Torrey Canyon* and *Amoco Cadiz* brought attention to the need of improved protection of the marine environment. In Norway, the blow-outs from oil wells in the Ekofisk field in 1977 resulted in large oil spills in the North Sea.

The response of international law was already brewing. Potential harm from shipping led to international rules that aimed to limit environmental consequences. Most important was the adoption of the 1973 International Convention for the Prevention of Pollution from Ships with the 1978 Protocol (hereinafter MARPOL 73/78).<sup>12</sup>

However, the development of the global legal framework to preserve and protect the environment was among the key issues at the Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS III) and the resultant LOS Convention. Part XII sets out general as well as more specific rules for protecting and preserving the marine environment, including the coastal State's right and duties to regulate vessel source pollution.

### 2.2.1 'Pollution' under the LOS Convention

Article 1(1)(4) of the LOS Convention defines 'pollution of the marine environment' as

'...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 and water and reduction of amenities'.

The criterion determining the fact of pollution is the consequence ensuing as a result of introducing a pollutant into the marine environment. According to the definition, only human behaviour can cause marine pollution. Furthermore, *how* substances are introduced to the environment is irrelevant. Both direct and indirect influence is included. There is no doubt that oil released from ships qualifies as 'pollution' under the definition.

Questions can be asked whether introduction of marine organisms caused by ballast water procedures fulfils the definition. Living organisms or pathogens cannot be considered as 'substances or energy' in the terminology of LOS Convention. This problem is addressed specifically in Article 196 and differentiates the problem of harmful introduction of alien species from problems relating to pollution in its paragraph 2. Implicitly,

the LOS Convention recognizes that these are two different problems. Consequently, the provisions of Part XII relating vessel source pollution therefore do not directly apply to the introduction of harmful alien species. This problem illustrates that coastal States may have concerns that not necessarily can be addressed through the measures provided for in the LOS Convention alone.<sup>13</sup>

### *2.2.2 Pollution from vessels as understood in this report*

Although pollution from vessels can be both biological and chemical, only the latter will be in focus here. As regards to such pollution there is a need to differentiate between accidents and operational discharges. The latter is deliberate and 'routine' operations, such as tank cleaning. Most often they can be controlled and negative impacts avoided, yet mostly by vessel personnel, thus flag State.

Accidental discharges occur when vessels collide or come in distress at sea. A lot can be done to avoid accidental discharges, but there will always be unfortunate circumstances that cause accidents to happen. Averages visualize the impact chemical pollution may have on the environment. The accidents of *Torrey Canyon* and *Prestige* are prime examples. When an accident occurs, the consequences in the immediate area are severe and cause great damage. However, this is a relatively small part of the pollution from vessels. Altogether, intentional operational discharges from ships make up the largest part of impact on the marine environment from vessel based pollution.<sup>14</sup> Focus should thus be to minimize risks from regular activity that virtually is the biggest problem.

## **3 International law framework relating to vessel source pollution**

In this part I will review the most important sources of international law that make up the legal framework with regard to the coastal State's rights and duties to regulate pollution from vessels. I will also address the role of the International Maritime Organization (hereinafter IMO) and briefly comment on recent developments of relevance to navigation and safety.

### **3.1 The sources of international law for vessel source pollution**

Regulation of vessel source pollution is often very technical. This implies difficulties with regard to the development of customary rules. Thus, related to marine pollution, the majority of relevant rules are contained in treaties. Some conventional rules in force with regard to vessel source pollution may nevertheless have obtained the status of customary law. Likewise they can reflect codified customary law. This requires, however, acceptance by States other than only Parties to the relevant conventions.

One example is the obligation to protect and preserve the marine environment as laid down in Article 192 of the LOS Convention.

However, one cannot say that this rule implies prohibition of any form of pollution. The freedom of navigation and the conventional rights to use the marine resources will always imply a certain amount of influence according to the definition of the term 'pollution'. Furthermore, Article 194(1) of the LOS Convention obliges States not necessarily to prevent pollution, but also to 'reduce and control' it. This implies that pollution to a certain degree is accepted as a matter of fact.

In addition to treaty and customary law, also general principles of law as recognized by civilized nations need to be taken into consideration. For instance, the sovereignty principle of international law provides each State the sovereign right to freely dispose its own resources in accordance with environmental policies and obliges other States to respect this right. This is codified in Article 193 of the LOS Convention. However, by exploiting its own resources one should not impact the environment commonly used in this connection. The latin maxim *Sic utere tuo ut alienum non laedas* is often referred to. *Inter alia*, in the *Corfu Channel* case where the ICJ held that each State had an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of others'.<sup>15</sup> Furthermore, in the *Trail Smelter* arbitration, the Arbitral Tribunal held that no State had the right to use or permit the use of its territory 'in such a manner as to cause injury by fumes in or to the territory of another' State.<sup>16</sup> This principle is also to be identified in Article 194(2) of the LOS Convention and in Principle 21 of the Stockholm Declaration.<sup>17</sup>

With regard to vessel source pollution, it is of importance that there exists an obligation to always exercise its freedoms with reasonable regard to the interests of others. To a large extent, international shipping takes place within different maritime zones, and the legal regime of marine areas under the control and jurisdiction of States differs significantly from the regime of areas in the common use. However, the maxim of *Sic utere tuo ut alienum non laedas* is very general in formulation and thereby lending itself to varying interpretations. With regard to vessel source pollution it might oversimplify rather complicated issues. At least it offers sparse guidance to specific State obligations.

### 3.2 Treaty law

Given the deficiencies of customary law and general principles of law, the international law relating marine pollution from vessels is predominantly contained in treaties. These may be systemized into different categories. The first category could be treaties that aim to prevent accidental pollution by regulating construction, equipment and the operational standards of vessels, including training and qualification of the crew. The most important treaties in this respect are the 1974 International Convention for the Safety of Life at Sea,<sup>18</sup> the 1978 International Convention on Standards of Training, Certification and Watchkeeping<sup>19</sup> and the 1972 Convention on International Regulations for Preventing Collisions at Sea.<sup>20</sup>

Secondly, there are treaties that aim to prevent operational pollution from vessels by prohibiting and limiting discharges of oil and other polluting substances. The first convention to deal with such pollution was the

International Convention for the Prevention of Pollution of the Sea by Oil in 1954.<sup>21</sup> This convention is merely of historical interest today. MARPOL 73/78 supersedes between parties the 1954 Convention and is up to date relating technical standards of ships carrying oil. It was adopted under the auspices of the IMO in 1973 and deals with all forms of operational pollution from ships other than dumping. Norway ratified MARPOL 73/78 on 15 July 1980.

A final category could be treaties with the purpose of mitigating pollution following maritime casualties by defining the right of intervention by coastal States. Customary rules exist for this purpose but there are also specialised conventions. The most important are the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (hereinafter 1969 Intervention Convention)<sup>22</sup> and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (hereinafter OPRC).<sup>23</sup>

### 3.3 The 1982 United Nations Law of the Sea Convention

Apart from the 1958 Geneva Conventions,<sup>24</sup> conventional regulation of vessel source pollution was merely rudimentary and not satisfactory. First and foremost, the regime of regulation was not very well harmonized. A ship could meet different pollution standards within the territorial seas of Norway and Sweden. This might have made it impossible for a vessel to comply with all laws to which it might become subject to during a voyage. Shipping is a global phenomenon and needs uniform global rules.

Furthermore, many flag States did not enforce the provisions of conventions to which they were parties. In case of pollution outside the territorial sea, the flag States were the only ones that could take action against environmental detrimental activity.

After years of negotiation, UNCLOS III adopted in 1982 a treaty to deal comprehensively with the use and the resources of the ocean. The LOS Convention entered into force on 16 November 1994. *Inter partes*, it supersedes the previous Geneva conventions adopted in 1958.<sup>25</sup> As of 1 November 2005 there were 149 parties to the Convention.<sup>26</sup> Norway ratified the LOS Convention on 24 June 1996.

Updating the law of the sea had become necessary. The preamble of the LOS Convention notes in paragraph 2 that the 'developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea'. Additionally, conflicts of jurisdiction between flag States and coastal States were inevitable with the growth in international trade and numbers of vessels navigating the seas.

Pollution from vessels is mainly dealt with in Part XII. However, relevant provisions are also found in parts that deal with different maritime zones, for example the right of innocent passage in the territorial sea as provided for in Article 17. Many of the provisions of the LOS Convention, however, are quite general. They are results of the compromises made by the lawmakers in order to establish a 'Constitution for the Oceans'.<sup>27</sup> This

made it possible to do what few international agreements have been able to do, that is, to create a convention for a wide range of potential disputes that is acceptable to most States.

In this respect, an important issue that should be observed in light of the LOS Convention is the tension between the coastal State's interest in regulating vessel source pollution and the flag State's resistance to it. This old conflict perhaps did not find its definite solution with the Convention. Nevertheless, a framework under which these interests are balanced, was created.<sup>28</sup>

### **3.4 Development of regulatory mechanisms with regard to vessel source pollution: The role of the International Maritime Organization**

Understanding the legal regime for protecting the marine environment from vessel source pollution necessitates knowledge about recent developments within international environmental law. With regard to jurisdiction over vessel source pollution, the role of the IMO cannot be underestimated. Many treaties concerned with pollution from vessels are adopted under the auspices of this Organization.

The important role of the IMO should not come surprisingly in light of the LOS Convention. Many provisions in Part XII require elaboration from the so-called 'competent international organization'. One example is Article 211(1), which reads:

'States, acting through the *competent international organization* or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels...' (emphasis added).

Although not specifically said anywhere in the LOS Convention, 'the competent international organization' must be a reference to the IMO. Many scholars seem to take this stand,<sup>29</sup> and it has also been stated by a legal study by the secretariat of IMO:

'It is generally agreed that the term 'competent international organization', when it is used in the singular in provisions of the Convention relating to international regulations and rules applicable to navigation, the prevention, reduction and control of marine pollution from vessels or by dumping, refers to the International Maritime Organization, which is the agency of the United Nations with a global mandate to adopt international standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships'.<sup>30</sup>

Thus, the general obligation for all States to establish rules and standards at the international level, gives IMO a key role in the regulation of vessel source pollution under the LOS Convention. Delegating legislative powers seemed perhaps as a good alternative to a fourth conference on the law of the sea with the long years of negotiating fresh in mind.<sup>31</sup>

Today, the agenda of the Organization is rather complex as compared to the purposes provided for in Article 1 of the IMO Convention.<sup>32</sup> Changes

in international shipping have also changed the IMO. The *Torrey Canyon* accident was a dramatic proof of the fact that international shipping no more could be left to chance and that regulatory efforts should be made through cooperation.

Naturally, the main task of the IMO has been adoption of treaties. The Organization developed a standard-setting role, first and foremost with regard to operational pollution from vessels.

The major recent developments in IMO are the field of prevention and response to accidental pollution. With regard to preventive measures the most important achievements are the adoption of rules requiring double-hull and segregated ballast tanks in vessels. This process has recently been supplemented by 'Guidelines on places of refuge for ships in need of assistance and guidelines on maritime assistance services'.<sup>33</sup> These were adopted in 2003 and are obviously prompted by the *Erika* and *Prestige* accidents. The purpose of these Guidelines is to provide a framework to assist coastal States when major accidents threaten its sea and coastline.

As regards to preparedness and response to pollution accidents, the *Exxon Valdez* spill initiated the OPRC Convention in 1990. The primary objectives were to provide for cooperation and assistance in preparing for and responding to major accidents.

The environmental risks arising from introduction of invasive species by ships' ballast water was also recently addressed by the IMO and a diplomatic conference in 2004 adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments.<sup>34</sup> The convention aims to minimize the potentially devastating effects of the spread of harmful aquatic organisms carried by ships' ballast water and is the most important treaty regulating intentional biological pollution from vessels. The short lifetime of the convention makes it nevertheless difficult to predict the effectiveness of its regulations.

Furthermore, the necessity of IMO approval is still growing. In recent years much attention has been given the protection of special sea areas, *inter alia*, under Article 211(6) of the LOS Convention and under the IMO 'Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas'.<sup>35</sup> In both cases States act through the IMO.

The increasing value of the ocean and international shipping seems to make the division of competences even more important. No indication exists that the role of IMO with regard to regulation of international shipping will diminish in the future. Much will nevertheless depend on the States participating. However, the LOS Convention refers as well to 'general diplomatic conference' and thereby preserves the opportunity to restore negotiations.

## 4 Jurisdiction over vessel source pollution

### 4.1 The concept of jurisdiction

I will under this part examine the concept of jurisdiction over vessel source pollution and jurisdictional conflicts that may arise when two or more States claim to have legal competence over the same vessel. Furthermore, before proceeding to the substantial rules of the coastal State, the flag State's jurisdiction shall be introduced.

For the purpose of the analysis under this report, jurisdiction may be defined as the power of a State to affect under international law the conduct of others, by measures of regulation, adjudication or enforcement.<sup>36</sup> This will in principle include any type of conduct. It should thus be noted that the present study only concerns the coastal State's legislative and enforcement jurisdiction with regard to pollution from vessels. In the following I will give a brief presentation of the traditional construction of State jurisdiction necessary for the understanding of the further examination.

Territorial jurisdiction gives a State full legal competence over activities taking place within the territory of a State. It is the most traditional form of jurisdiction and it is in principle unqualified. This was affirmed by the PCIJ in the *Lotus Case*. The Court held that

‘...restrictions upon the independence of States cannot...be presumed’.<sup>37</sup>

Additionally, territorial jurisdiction is exclusive. Other States have in principle no jurisdiction within another State's territory.

Jurisdiction that is not territorial is often referred to as extra-territorial.<sup>38</sup> Jurisdiction is then exercised over legal subjects beyond a State's own territory and is consequently only allowed under the conditions set by international law.

Extra-territorial legislative jurisdiction can be exercised under the personality principle or the universality principle. On the basis of the universality principle, a State may invoke jurisdiction irrespective of the nationality of the criminal or victim and regardless of the *locus* of the offence. Such offences are however limited. With regard to maritime jurisdiction, piracy is a commonly used example.<sup>39</sup> Moreover, the personality principle allows a State to exercise jurisdiction over its own nationals in territories beyond its own sovereignty. A good example is *Almindelig Borgerlig Straffelov* Section 12(3).<sup>40</sup>

Extra-territorial enforcement jurisdiction is only allowed under the consent of the State in the territory of which the enforcement is carried out. This is a deflection of a State's sovereignty over its own territory. For instance, the right of hot pursuit under Article 111 of the LOS Convention ceases as soon as the pursued vessel enters the territorial sea of the State whose flag the vessel flies or a third State. The consent of the other State may be given *ad hoc* or by treaties.



## 4.2 Conflicting jurisdiction of the seas

Before proceeding to the substantial rules of legislative and enforcement jurisdiction over vessel source pollution, a few words should be said regarding the possible conflicts of jurisdiction. The relevant situation in our respect is when a foreign vessel navigates within the maritime zones of Norway. Not only Norway will have reasons to exercise jurisdiction over the vessel, but also the flag State in which the ship is registered.

Such conflicts of jurisdiction arise if two or more States claim to have a certain legal competence with regard to the same vessel. Subsequently, coastal State jurisdiction over foreign vessels will always imply a potential conflict of jurisdiction with the flag State. Thus, the situation in practice arises frequently, while international law contains only general rules.

Agreement on distribution of jurisdiction is however a possibility and the LOS Convention is a good example. *Inter alia*, Article 228(1), which provides the flag State competence to suspend and restrict institution of proceedings with regard to its own vessels. The coastal State must act in conformity with this rule.

Under any circumstances a vessel needs to be associated with a State, since a ship in itself is no international legal subject. Part XII of the LOS Convention differs between jurisdiction by flag State, coastal State and port State.

## 4.3 Flag-state

### 4.3.1 Introduction

The ship shall always carry a flag of a State. This is regularly the flag of a State in whose register the ship is. As well as identifying the nationality of the ship, the flag also indicates which State is authorized to exercise flag State jurisdiction over the vessel.

Under customary international law, the flag State has in principle unrestricted legislative and enforcement jurisdiction over vessel source pollution from ships flying their flags. But when the ship enters a maritime zone where another State exercises jurisdiction under international law, there may exist concurrent jurisdiction as noted above.

The reason for the exclusive flag State jurisdiction was in earlier days that the vessel was considered a part of the State's territory. Today, the reason is rather that the flag State is presumed more suitable to exercise jurisdiction over the ship. There exists a factual link between the ship and the State in which it is registered.

The principle that the flag State has the primary responsibility for the regulation of the ship carrying its flag is still intact. With regard to navigation on the high seas, this is reflected in Article 92 of the LOS Convention, the relevant parts of which reads:

‘Ships shall sail under the flag of one State only and...shall be subject to its exclusive jurisdiction on the high seas’.

Consequently, the flag State possesses legislative and enforcement jurisdiction over the ship and other States must act in conformity with this rule. Some exceptions are nevertheless provided for. This count, *inter alia*, with regard to the coastal State's right of hot pursuit as provided for in Article 111 of the LOS Convention.

#### 4.3.2 *Flag State legislative jurisdiction*

Flag State legislative jurisdiction is provided for in Article 211(2) of the LOS Convention, which calls for the flag State to adopt laws and regulations for the

‘...prevention, reduction and control of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference’.

Together with Article 94, Article 211(2) redefines in stronger terms the principle of flag State jurisdiction. The provision applies to all types of pollution standards, which at a minimum shall have ‘the same effect’ as that of generally accepted international rules and standards. A certain margin of appreciation is entitled the flag State since the rules do not need to be identical, but only have the same effect. The purpose seems to be that the rules of, *inter alia*, MARPOL 73/78 shall represent a minimum level of regulation.

The 1958 Convention on the High Seas (hereinafter High Seas Convention)<sup>41</sup> also obliges the flag State to give rules for protection of the environment. Article 24 reads:

‘Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships...’.

Additionally, Article 10 provides that the flag State shall ensure that ships sailing under their flag fulfil certain technical standards.

With regard to pollution from vessels Norway has adopted detailed regulations over ships that carry the Norwegian flag. *Sjøloven* of 1994<sup>42</sup> provides for rules of registration. With regard to vessel source pollution, *Forurensningsloven* of 1981 Section 5(2)<sup>43</sup> provides that *Sjødyktighetsloven* of 1903<sup>44</sup> is exclusive. *Sjødyktighetsloven* Chapter Eleven concerns pollution from vessels and apply to all Norwegian ships of a certain size regardless of where they might be.<sup>45</sup>

#### 4.3.3 *Flag State enforcement jurisdiction*

The flag State is obliged to enforce its regulation under Article 217(1) of the LOS Convention. This includes both national and international regulations. Additionally, Article 94(1) imposes on the flag State a duty to exercise effective jurisdiction over its vessels. This obligation includes the responsibility to

‘...maintain a register of ships containing the names and particulars of ships flying its flag ...’ and to ‘...assume jurisdiction under its internal law over each ship flying its flag...’.<sup>46</sup>

Flag States obligations are also found in regional conventions concerning pollution from vessels, relevant here is Article 4(1) and 6(4) of MARPOL 73/78. Sanctions shall be established and proceedings may be instituted, however, only when ‘sufficient evidence is available’.

#### 4.3.4 *Flags of convenience*

Articles 90 and 91 of the LOS Convention confirms respectively the right of every State under international law to sail ships under its own flag and fix the conditions for the use of it.

Ships have nevertheless increasingly ceased flying the flags of their owners’ nations and a problem within international shipping is still the number of ships sailing under so-called ‘flags of convenience’. Some States allow ships to register in their registers, ships that in other respect have no connection to that State. This causes jurisdictional difficulties, well illustrated by *Curtis*:

‘A vessel may strand on the high seas and cause pollution in two neighbouring States...She may be owned say, by a Liberian Company, bareboat chartered to a Bermudan company, managed by an English company, time chartered to a Greek company and voyage chartered to an American company. Her cargo may have been sold during the voyage by the American company to a Japanese one. The officers may be English and the crew, Indian. The international nature of shipping business creates such diversity of interests, with potential conflicts of law and jurisdiction, daily’.<sup>47</sup>

Rather than criteria of management, ownership, the nationality of the crew *etc.*, the only connection between the State and ship, is the registration. Vessel operators turn to flags of convenience for a variety of reasons. Flagging out may enable an operator to evade taxation and avoid the necessity of employing the mariners of the nations concerned.<sup>48</sup> Additionally, many States offering a flag of convenience are not part in important conventions protecting the environment. This may be decisive for the choice of which of the open registers will best suit any given ship operator.

Thus, international law has sought to establish the obligation of a ‘genuine link’ between the flag State and the vessel. The first attempt is codified in Article 5(1) of the High Seas Convention. The flag State shall in particular effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flags. Moreover, under Article 10(1) measures shall be taken with regard to the prevention of collisions and the construction, equipment, and seaworthiness of ships. In taking such measures, Article 10(2) requires States to conform to ‘generally accepted international standards’ and to take steps necessary to ensure the observance of these standards.

The wording of Articles 5 and 10 makes it, however, clear that the duties of all States are not equal as these duties are predominantly contained in

treaties. Also, the measures which States are obliged to take depend upon the merely vague notion of ‘generally accepted international standards’.<sup>49</sup>

The issue was left unchanged by the LOS Convention, however, subject to structural changes. Article 91(1) confirms the obligation of a ‘genuine link’ but the requirement of effectively exercising jurisdiction has been removed to Article 94(1) under the title ‘Duties of the flag State’. Relevant with regard to pollution from vessels is the more accurate obligation under paragraph 4 to ensure safety of navigation and the prevention of collisions and reduction and control of marine pollution.

The content of the obligation of a ‘genuine link’ seems nevertheless not very clear. Vessels flying flags of convenience have rarely difficulties with recognition. However, the recent developments with regard to coastal and port State jurisdiction over vessel-source pollution seem to have removed some attention from this problem.

#### *4.3.5 Coastal State and port State*

Though the primary responsibility of the flag State, a ship will also be subject to coastal State jurisdiction. As ports usually lie within the territory of the coastal State, the concept of port State jurisdiction is only relevant when the coastal State exercise jurisdiction in relation to its ports. When a State exercises jurisdiction over foreign ships navigating in the different maritime zones adjacent to its coastline, the State acts in the capacity of coastal State. This competence is subject of the analysis in the further sections.

## **5 Coastal State jurisdiction over vessel source pollution: International law and Norway**

### **5.1 Introduction**

International law recognises navigation as a freedom and a right of a flag State, yet limits in varying degrees the operation of vessels in the maritime areas of a coastal State. In this part I will analyse Norway’s rights and obligations under the LOS Convention to regulate vessel source pollution. Relevant Norwegian rules will also be reviewed.

A brief introduction is however necessary. In internal waters the coastal State enjoys sovereignty and foreign vessels enjoy in principle no right of navigation. They are subject to the jurisdiction of this State’s courts as well as its legislative and enforcement jurisdiction.

Coastal States also claim authority over the territorial sea, generally characterised as sovereign. The jurisdiction extends specifically to exclusion or regulation of passage by foreign ships, to prescription and application of law to practically all activities within the area and to exclusive exploitation of resources. The major opposing claim on behalf of all States in the territorial sea is customarily expressed in terms of a right of innocent passage. The law must thus strike a reasonable balance between the interests of the coastal State and the needs of international navigation.

Beyond the territorial sea all vessels enjoy, in principle, freedom of navigation. However, the coastal State has sovereign rights over the natural resources within its EEZ and jurisdiction with regard to the protection and preservation of the marine environment.

The contiguous zone covered by Article 33 of the LOS Convention seems irrelevant for coastal State jurisdiction over vessel source pollution. Likewise, the legal regime of the high seas is characterised by the principles of free use and exclusivity of flag State jurisdiction. Third States share only limited legislative and enforcement jurisdiction, *inter alia*, with regard to hot pursuit<sup>50</sup> and major pollution accidents.<sup>51</sup> In the following I will therefore not provide separated sections for the regimes of the high seas and the contiguous zone.

## 5.2 Coastal State jurisdiction in internal waters

### 5.2.1 Introduction

Foreign ships in the internal waters of a coastal State fall within the territorial jurisdiction of that State. The internal waters of a coastal State is the sea on the landward side of the baselines from which a territorial sea is measured.<sup>52</sup> This is a part of its territory, where a State is recognised full sovereignty and jurisdiction as codified in Article 2(1) of the LOS Convention. This implies that the coastal State is free to regulate vessel activity in its internal waters in the same way as on its land territory. Consequently, there are not many international rules limiting coastal State jurisdiction here.

However, there are certain limitations. Some States, including Norway, operate with straight baselines. The rules applying to straight baselines systems are codified in Article 7 of the LOS Convention. The wording of the provision is virtually a description of the Norwegian coastline<sup>53</sup> and much influenced by the judgement in the *Fisheries case*.<sup>54</sup> Straight baselines represent an artificial construction and has the effect of enclosing as internal waters areas which had not previously been considered as such. The right of innocent passage shall exist in those waters.<sup>55</sup> As will be elaborated below, this right implies certain restrictions on the jurisdiction of the coastal State.

Enforcement jurisdiction within internal waters is in principle also unrestricted. Enforcement though takes place only in cases where the coastal State's interests to any extent are threatened. Internal affairs onboard a ship, are most often left to the jurisdiction of the flag State.<sup>56</sup> Contrary, in cases where the marine environment is threatened by pollution, the coastal State will have good reasons to intervene.

### 5.2.2 Legislative jurisdiction

Article 2(1) of the LOS Convention acknowledges the coastal State unrestricted legislative competence within internal waters. Port State legislative jurisdiction is also provided for in Article 25(2) of the LOS Convention, stating:

‘In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject’.

There is little support in state practice and case law for a different view. However, the ICJ in the *Aramco* arbitration stated that, ‘according to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require’.<sup>57</sup> Belonging to the internal waters of the coastal State, a right of free access to a port can nevertheless in principle only arise by virtue of an international agreement or by unilateral allowance. There are further specific rules regulating this matter, *inter alia*, with regard to land locked States.<sup>58</sup>

However, there exists a right for the coastal State to prescribe conditions for the entry into ports. The ICJ stated in the *Nicaragua* case that it is ‘by virtue of its sovereignty that the coastal State may regulate access to its ports’.<sup>59</sup> Furthermore, the LOS Convention provides for legislative jurisdiction in Article 211(3). States may establish ‘particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters’. However, Article 211(3) is of procedural character. The only requirement laid upon the port State when more stringent regulation is established, is the duty to inform the IMO. When two or more States harmonize their requirements for entry into ports, the IMO is also to be informed of the cooperation and which States participating.<sup>60</sup>

Norway has detailed regulations concerning non-military vessels entry into Norwegian internal waters and ports. They are set out in the Royal Decree of 23 December 1994 given under *Almindelig Borgerlig Straffelov* of 1902 Section 418.<sup>61</sup> The regulations provide that foreign vessels of a certain size shall notify Norwegian military authorities in advance of entry.<sup>62</sup> Some ships must also have permission in writing in advance from Norwegian authorities. This counts, for example, for nuclear-powered vessels.<sup>63</sup>

The port State sovereignty over its internal waters may include the right of denying ships access to port. There is much doubt if the right of denying access also applies when vessels are in distress. The disaster of *Prestige* illustrated the importance of clarity in this respect. The Spanish Government rejected the request of entry from the ship. It sank in the EEZ and polluted the coasts of Portugal, France and Spain. In order to preserve human life, it can be argued for a clear customary right of entry to ports.<sup>64</sup> One should, however, be careful to extend this principle any further. Consequently, on the brink of a major pollution accident, there is much doubt to whether a right of entry can be claimed. If the crew has been rescued, the port State may have good reasons to deny access in respect of the environmental consequences that can follow.

### 5.2.3 *Enforcement jurisdiction*

#### 5.2.3.1 Port State enforcement

Prompted by the need to cope with substandard vessels, new approaches emerged in the early 1980s to solve the problems for the marine environment. The maritime authorities of the Western European States agreed by the 1982 Paris Memorandum of Understanding on Port State Control<sup>65</sup> to maintain a system with a view to ensure that foreign vessels comply with the standards on ports laid down in a number of important conventions, *inter alia*, MARPOL 73/78. The optimistic vision was that world wide compliance with environmental and safety regulations could gradually be enhanced.<sup>66</sup> Legal efforts made also radical changes with regard to the enforcement jurisdiction by port States under the LOS Convention. Port State jurisdiction is provided for in Article 25(2) and Article 218 (1).

Article 25(2) gives a port State the right to take ‘necessary steps’ to prevent breach of the conditions for entry. ‘Necessary steps’ indicates the full range of enforcement powers but, importantly, these should be proportional to the breach involved.

The port State may undertake investigations in respect of any discharge from the ship *outside* the internal waters, territorial sea or the EEZ when vessels are voluntarily within its ports. The criterion is that the pollution is a violation of applicable international rules and standards, see Article 218 of the LOS Convention.

The same provision regulates the situation when a vessel within ports has polluted *another State’s* EEZ, territorial sea or internal waters. Proceedings may only be instituted when requested by the flag State, or the State damaged or threatened by discharge. However, if the maritime zones of the port State itself is polluted or threatened by pollution, proceedings may be effectuated. Investigations with respect to Article 218 (1) can take place in both cases.

Consequently, Article 218 of the LOS Convention contains an important jurisdictional tool: a flag State have no longer exclusive competence over discharges on the high seas.<sup>67</sup> There is no evidence that port States have resorted to this extended method of enforcement, however, it is clearly a novel development.<sup>68</sup>

The right to inspect violations of marine pollution standards is also contained in MARPOL 73/78. Article 6(2) reads that a ship may, in any port of a Party, be subject to inspections for the purpose of verifying whether the ship has discharged any harmful substances in violation of the provisions of MARPOL 73/78. Furthermore, with legal basis in Article 6(5) such inspections may be undertaken if a request is received from another Party, supported by sufficient evidence.

#### 5.2.3.2 Coastal State enforcement jurisdiction

Article 220(1) of the LOS Convention states:

‘When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may...institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State’.

Similar to Article 218(1), enforcement competence is recognised only over vessels that are ‘voluntarily’ within ports. Vessels forced to port are obviously not present voluntarily. Whether the same counts for ships in distress is not clear. ‘Distress’ is not defined in the LOS Convention, neither is the term of *force majeure*.<sup>69</sup>

A vessel threatening the marine environment should be subject to enforcement jurisdiction by the coastal State. However, interpreted in accordance with the ordinary meaning of the word ‘voluntarily’, ships entering the ports due to emergency situations, are not voluntarily present and thereby not subject to the enforcement jurisdiction of the coastal State. Views expressed by scholars support this conclusion.<sup>70</sup> In this respect one should take notice of Article 221 of the LOS Convention, which provides for measures in order to avoid pollution arising from casualties. This provision gives the coastal State competence to intervene over foreign vessels threatening the marine environment.

Different than Article 218, Article 220 of the LOS Convention does not explicitly provide for the right to conduct investigations. However, Article 226 implies that such a right exists also under Article 220(1). Additionally, there seems to be no good reasons why the right to conduct investigations should be excluded from the coastal State’s jurisdiction.

Remarkably, the Convention has no provision for coastal State enforcement jurisdiction within internal waters. However, due to the State’s sovereignty, this is not necessary either.

The right to conduct investigations over vessels within ports and other internal waters are provided for in *Sjødyktighetsloven* of 1903 Section 121(1)(7). It gives the Norwegian Maritime Directorate<sup>71</sup> the right to investigate if a ship in Norwegian ports or elsewhere in internal waters has made discharges in violation of international agreements to which Norway is a party. Investigations must however not needlessly delay the ship or put it to unnecessary expenses.<sup>72</sup>

### **5.3 Coastal State jurisdiction in the territorial sea**

#### *5.3.1 Introduction*

Part II of the LOS Convention largely codifies the regime of the territorial sea. The coastal State sovereignty extends beyond its land territory and internal waters to that adjacent belt of sea measured from the baselines to the maximum of 12 nautical miles (miles).<sup>73</sup> This rule reflects general customary international law, and thus applies to every coastal State, whether Party to the LOS Convention or not.<sup>74</sup>



Subsequently, in *Lov om Norges territorialfarvann og tilstøtende sone* of 2003 Section 2,<sup>75</sup> Norway claims the breadth of its territorial sea to 12 miles measured from the baselines.

The territorial sea of Norway is delimited with Russia and Sweden, who both claim the breadth of their territorial sea to 12 miles. The border with Russia is regulated in a Treaty of 15 February 1957 between Norway and the Soviet Union. However, Norway and Russia still dispute their maritime limits in the Barents Sea.

The border with Sweden was settled in *Griseblådommen*, an arbitration decision of 23 October 1909<sup>76</sup> when Norway and Sweden both had 4 miles territorial sea. The result of this decision is also reflected in an agreement of 5 April 1967 concerning the delimitation of the fishery areas of Norway and Sweden in the North-Eastern Skagerak.

Norway asserts the right to enforce national legislation within the territorial sea as part of its territory. For example, *Almindelig Borgerlig Straffelov* of 1902 applies to actions taking place within the territory, including the territorial sea.<sup>77</sup>

Despite recognising the coastal State full sovereignty, there are essential exceptions. The concept of innocent passage is of key importance in that respect. Article 17 of the LOS Convention states that ships of all States 'enjoy the right of innocent passage through the territorial sea'.

### 5.3.2 *The right of innocent passage*

If an old oil tanker of poor technical condition enters the territorial sea of Norway and poses an environmental threat, may Norway interfere with the passage in defence of its environmental interests?

Not necessarily. This depends on Article 19(2)(h) of the LOS Convention. The coastal State is subject to significant limitations with regard to jurisdiction over foreign vessels in passage through the territorial sea. An essential safeguard of navigational rights is the right of 'innocent passage'. Flag States cherish it as a customary rule of international law while coastal States recognize it as a limitation to their own competence. If the coastal State establishes rules that restrict or ban navigation in its territorial sea, other States may invoke their right to innocent passage.

The right of innocent passage is today reflected in *Lov om Norges territorialfarvann og tilstøtende sone* of 2003 Section 2(2). Every ship navigating the territorial sea, either in transit or from Norwegian internal waters, enjoys the right of innocent passage. However, there are a number of questions that need further analysis.

#### 5.3.2.1 The meaning of 'passage'

Article 18 of the LOS Convention defines the meaning of 'passage'. Ships must traverse the sea 'without entering internal waters' or 'port facility outside'. Passage shall also be 'continuous and expeditious'. Ships

that merely cruise around in an area are obviously not ‘in passage’ and can consequently not claim the right of innocent passage.

To the coastal State, the criterion in Article 18(1) is not very easy to approach. Thus, the most important element to the coastal State, determining whether or not the passage is innocent, is the requirement of ‘continuous and expeditious’ navigation as laid down in Article 18(2).

Passage may indeed include stopping and anchoring, but only related to ordinary navigation, necessary by *force majeure* or distress or for the purpose of assistance to persons, ships or aircraft in danger or distress, in order to remain ‘expeditious’.

Article 18(2) is exhaustive. Consequently, vessels stopping on other grounds are not protected by the rules of innocent passage and the coastal State will have full powers. Whether or not the stay is illegal will, however, depend on domestic regulations.

### 5.3.2.2 The meaning of ‘innocence’

The passage must also fulfil the requirements of Article 19 of the LOS Convention, explaining the meaning of ‘innocent’. Passage is innocent

‘...so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law’.

A clear definition of the term ‘innocence’ did not exist for a long time. Traditionally it was not necessary that coastal laws and regulations had been violated in order to remove the character of innocence. It was enough that vital interests of the coastal State were threatened. The 1930 League of Nations Conference for the Codification of International Law in Hague adopted this text:

‘Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State’.<sup>78</sup>

No violation of a coastal law was necessary, however, there is a requirement of some act other than merely passing through the area. The question was illustrated in the *Corfu Channel* case. British warships were denied to pass through the Corfu Channel. The important point was that the Court held the *manner* of passage as the decisive criterion to whether or not the passage was innocent. As long as the passage was conducted in a way that presented no threat to the coastal State, it should be regarded as innocent. Furthermore, the judgement stated that the coastal State’s view not necessarily was of importance. Decisive was an objective evaluation, amongst the factors relevant if coastal State’s laws and regulations had been violated.

The defectiveness of the term ‘innocence’ in international law led to the adoption of Article 14(4) of the 1958 Convention on the Territorial Sea and the Contiguous zone, thereupon of Article 19 of the LOS Convention.

Article 19(1) quotes Article 14(4) of the Territorial Sea Convention, but Article 19(2) of the LOS Convention provides further a number of particular activities for judging objectively whether passage is ‘innocent’ or not. A ship not taking part in any of the activities mentioned in Article 19(2) is presumed to be in innocent passage.

However, there is an open clause in Article 19(2)(l), allowing that any other activity, not having a direct bearing on passage, may be considered as not ‘innocent’. Hence, the coastal State is recognised a certain margin of appreciation in determining the innocent character of passage.

Of key importance relating marine pollution is Article 19(2)(h), stating that ‘any act of wilful and serious pollution’ contrary to the LOS Convention, is not ‘innocent’. The coastal State has power to apply national law with regard to innocent passage.<sup>79</sup> Actual violation of regulations will, however, not necessarily deprive the vessel of its right of innocent passage, as discharges must be both ‘wilful’ and ‘serious’.<sup>80</sup> ‘Wilful’ implies intention. However, the type of intent required is not defined. Neither is the term ‘serious’. It is important to note that ‘wilful’ discharges seldom are ‘serious’ when looked upon as isolated cases. Operational discharges from ships are most often intentional, but individually small. Subsequently, a discharge done with intent will not necessarily remove the innocent character of passage. Contrary, accidents will often meet the criterion of ‘serious’, but seldom ‘wilful’.

Perhaps could small discharges in already heavily polluted or vulnerable areas be considered ‘serious’. The term could be stretched so that almost any discharges were a breach to the peace, good order or security of the coastal State. Additionally, ‘pollution’ is defined in a very general sense in the LOS Convention, contributing to a larger measure of discretion.<sup>81</sup>

Moreover, an important question relating vessel source pollution is whether a *threat* of pollution is sufficient to remove the character of innocence and thereby be prohibited under Article 19. Ships carrying hazardous cargoes may obviously represent a threat to the marine environment, in many cases giving the coastal State a good reason to interfere. Such a rule, however, could undermine the right of innocent passage. Furthermore, a threat arising from ships in distress would leave the coastal State full competence to interfere. Article 221 of the LOS Convention codifies this rule concerning maritime casualties ‘beyond the territorial sea’ and where ‘pollution or threat of pollution’ is confirmed. The same rule, perhaps more extensive, should therefore apply when casualties occur within the territorial sea. Thus, there must apparently be proof of a certain activity for the passage to be categorized as non-innocent with regard to Article 19 of the LOS Convention.

### 5.3.3 *Legislative jurisdiction in the territorial sea*

Coastal State legislative jurisdiction in the territorial sea is dealt with in Parts II and XII of the LOS Convention. Article 211(4) affirms the coastal State ‘sovereignty’ and thereby the competence to adopt laws and regulations for the ‘prevention, reduction and control’ of the marine environment. The laws and regulations shall however not hamper the

right of innocent passage as laid down in Part II of the Convention.<sup>82</sup> The most important jurisdictional provision in this respect is Article 21.

Paragraph 1 merely confirms the legislative competence of the coastal State with regard to innocent passage. Noteworthy is that the jurisdiction in subparagraphs a, d and f is not qualified by any particular mode. Furthermore, subparagraph f does not only apply to the marine environment and thereby indicates a wider competence in respect of pollution. Paragraph 2 should be observed, providing limitations with regard to technical conditions of the vessels. If such rules are adopted they shall only give effect to generally accepted international standards. Consequently, the coastal State may not adopt more stringent regulations.

With regard to the legislative jurisdiction, despite the seemingly wide legal basis for it relating innocent passage in Article 21, Article 24 restricts the coastal State, both with regard to adoption and the practice of laws.

The obligation of Article 24(1)(b) not to discriminate ‘in form or fact against the ships of any State’ seems clear enough. However, the obligation not to ‘hamper the innocent passage’, when this is not in accordance with the LOS Convention, is legally more complex. Hampering the passage is obviously something less than totally denying access to the territorial sea. The accepted level of regulation could vary from case to case, depending on methods of interpretation.

Given that the coastal State adopts national regulations that foreign ships must comply with, the key problem is enforcement. Since the coastal State shall not ‘hamper’ the innocent passage of foreign ships, not every violation of coastal laws will justify interference with the passage of the vessel. Interference seems nevertheless authorized in some cases. Article 24(4) of the LOS Convention provides that foreign ships exercising the right of innocent passage through the territorial sea ‘shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea’.

This is no explicit legal basis for enforcement, but it surely implies that coastal States shall be able to secure the compliance of laws and regulations adopted on the national level. With regard to vessel source pollution, Article 22 of the LOS Convention is of importance. It provides the coastal State competence to require that foreign ships in innocent passage use specific sea lanes and traffic separation schemes. This is only permitted where the safety of navigation so requires. Straits or heavy maritime traffic are examples of navigational circumstances that may invoke such measures.

#### 5.3.3.1 Ships carrying dangerous materials

Coastal State jurisdiction over vessels carrying dangerous materials provides a good example of situations where the right of innocent passage is put to a test.

Article 23 of the LOS Convention recognises the right for foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous substances to exercise innocent passage. However, they shall carry documents and observe special precautionary measures in order not to threaten the peace and security of the coastal State. As mentioned above Norway has also adopted special rules for, *inter alia*, nuclear powered ships that are about to enter the territorial sea and internal waters.

Although recognized in the LOS Convention, the problems concerning nuclear powered ships are merely of theoretical interest with regard to the territorial sea and vessel source pollution. Ships in transit within Norwegian waters are generally powered by conventional fuel. Hence, the focus should be potential harm from the cargo, as well as fuel.

Article 22(2) of the LOS Convention provides that ships carrying dangerous substances *in particular* may be referred to use specific sea lanes in the territorial sea. This is an important preventive rule in the protection of the marine environment. The coastal State does not under all circumstances know the status of ships in transit. However, with regard to Article 22 there seems to be no obligation for the flag State or the ship itself to notify the coastal State prior to entrance, unless there is a legal basis to require such notification.

Article 198 of the LOS Convention provides for an obligation to notify other States if 'the marine environment is in imminent danger of being damaged or has been damaged by pollution'. The question is whether this article is applicable only in cases of accidents already occurred. According to the provision, it comes to effect only when a State is aware of cases where there is a clear and present danger of damage to the environment. A ship carrying oil or other dangerous substances will probably not represent such a risk only by regular navigation through the territorial sea.

### 5.3.4 Enforcement jurisdiction in the territorial sea

#### 5.3.4.1 Ships in 'innocent passage'

Article 220(2) of the LOS Convention represents an exception from the exclusive jurisdiction of the flag State as laid down in Article 92. The provision should be read in conjunction with Part II of the LOS Convention, which also offers provisions to enforce jurisdiction over marine pollution. Article 220(2), the relevant parts, read:

'Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during the passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including the detention of the vessel, in accordance with its laws ...'.

With regard to ships in passage through the territorial sea, Article 220(2) provides the coastal State enforcement competence over vessels that have violated laws and regulations adopted through Article 220(1). The enforcement shall, however, take place ‘... without prejudice to the application of the relevant provisions of Part II, section 3 ...’. The relevant provisions in this respect are Articles 24 and 27.

As mentioned above, Article 24 of the LOS Convention provides an obligation for the coastal State not to hamper the innocent passage of foreign ships. There is a delicate balance with regard to which measures are considered to hampering the transit and which are not. Criminal jurisdiction onboard a ship may very well be considered as the former. However, the coastal State has powers to exercise such jurisdiction with basis in Article 27.

The provision authorizes arrest or investigation onboard a ship in innocent passage in three different situations. The first one concerns ships within the territorial sea that have violated criminal jurisdiction. This is provided for in paragraph 1, which stipulates four situations when the interests of the coastal State weigh more than those of the flag State. With regard to vessel source pollution, enforcement jurisdiction under subparagraph a, would be allowed, obviously because the crime would ‘extend to the coastal State’. The same counts with regard to subparagraph b if the ship violates obligatory routing systems. In such cases one could say that the navigation is prejudicial to the good order within the territorial sea.

The second situation (paragraph 2) concerns ships within the territorial sea that have committed violations in internal waters. The coastal State may take ‘any steps’, indicating unrestricted powers.

The third situation is provided for in paragraph 5 and concerns violations committed *before* the vessel enters the territorial sea. Criminal jurisdiction is excluded, however, exceptions are made with regard to enforcement with legal basis in Part XII of the LOS Convention, that is in Article 220 (2) and (3).

Contrary to the limited measures provided for in Article 27, Article 220(2) gives the coastal State a number of measures and allows enforcement to a more extensive category of violations, including violations of ‘international rules and standards’. The coastal State may with legal basis in Article 220(2), inspect, detain or institute proceedings towards the ship. It must however have ‘clear grounds for believing’ that a vessel during passage has violated laws and regulations. Evidences originating from aerial surveillance may be enough to constitute ‘clear grounds’. Under any circumstances there must be a concrete evaluation from the coastal State.<sup>83</sup>

The enforcement jurisdiction of the coastal State is possible in the territorial sea concerning violations committed in the EEZ.<sup>84</sup> The geographical position of the ship is in this respect not decisive for the competence. According to Article 220(3) the vessel may be within the EEZ *or* the territorial sea when enforcement takes place. Hence, the essential criterion is the *locus* of the violation, not the ship.

Finally, Article 25(2) of the LOS Convention authorizes the coastal State to take ‘necessary steps to prevent any breach’ for the entry into ports or internal waters. These steps may naturally involve enforcement within the territorial sea.

The enforcement jurisdiction to board and inspect vessels within the Norwegian territorial sea is provided for in *Sjødyktighetsloven* of 1903 Section 121. Without entering into any detail analysis of that provision one has to note the requirement not to delay the vessel or put it to unnecessary expenses in cases of enforcement, see Section 121(8) of the Law. Despite this limitation, the supervising authorities<sup>85</sup> may in accordance with Section 118 detain a ship for violating national regulations, *inter alia*, with regard to manning and construction. A ship that represents an unjustifiable risk of damage to the marine environment may also be turned away, ordered to go to port, to use a specific sea lane *etc.*. Section 118 has no reference of the *locus* of the ship when enforcement is carried out. But the competence to order a ship to go to port or use a specific sea lane, indicates that the powers could be applied also to ships navigating the territorial sea.

#### 5.3.4.2 Ships not in ‘innocent passage’

Article 25(1) of the LOS Convention provides the coastal State competence to prevent passage in the territorial sea, which is not innocent. This means that the coastal State is acknowledged full sovereignty with regard to enforcement jurisdiction. A vessel in ‘non-innocent’ passage may at any time be diverted from the territorial sea and the coastal State may institute legal proceedings against it for the behaviour. As part of the coastal State’s territory and subject to sovereignty the competence is only modified by the regime of innocent passage. As long as the enforcement complies with international law, subject to a limit of proportionality and necessity, the competence is in principle unrestricted.

#### 5.3.4.3 The coastal State’s right of hot pursuit

One of the few exceptions to the primacy of flag State jurisdiction is the coastal State’s right of hot pursuit, as provided for in Article 111 of the LOS Convention. It is implemented in *Sjødyktighetsloven* of 1903 Section 121(6)(b). This provision implies possible enforcement jurisdiction within the territorial sea.

A number of conditions must be present before the right of hot pursuit can be initiated. The coastal State must have good reasons to believe that laws and regulations have been violated. ‘Good reason to believe’<sup>86</sup> implies something more than a vague presumption. Concrete evidence is of course sufficient, but probably not necessary.

The pursuit must then be commenced when the foreign ship is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State. This does not mean that the *pursuing* ship have to be within one of these zones. By giving the ship a visual or auditory signal to stop, pursuit is begun. Furthermore, the pursuit can’t be interrupted and must be carried out hot and continuously. If the pursuit is

interrupted, it can't be undertaken again. However, it may be taken over by other ships.

The right of hot pursuit ceases as soon the pursued ship enters the territorial sea of the flag State or a third State. This is a deflection of the coastal State's sovereignty over its own territory.

### 5.3.5 Conclusions

The territorial sea regime under the LOS Convention confirms the sovereignty of the coastal State there, and its jurisdiction with regard to the control and regulation of vessel source pollution. Foreign ships' right of innocent passage is however the prime exception from full coastal State sovereignty in the territorial sea. Legislative and enforcement jurisdiction shall be 'reasonable' and with due regard to the inherent flag State right of innocent passage.

## 5.4 Coastal State jurisdiction in the exclusive economic zone

### 5.4.1 Introduction

Coastal State jurisdiction with regard to protection of the marine environment in the EEZ is provided for in Article 56(1)(b)(iii) of the LOS Convention, which must be read in conjunction with the specific rules established in Part XII.

The concept of the EEZ has historical roots in the second Truman Proclamation of 28 September 1945 as well as South American State practice after the Second World War.<sup>87</sup> Recognition of the concept took place later on, when it attracted the support of most developing States and from developed states, including Norway. Under *Lov om Norges økonomiske sone* of 1976 Section 1(2),<sup>88</sup> Norway declared an EEZ extending 200 miles from the baselines.

The EEZ is a result of the coastal State's desire to gain greater management and observation over the economic resources adjacent to the coast, particularly with regard to fishing. The vast size of the EEZ and the importance of the resources and economic uses of the area, motivate coastal States' concerns about navigation.

Within the EEZ the coastal State enjoys sovereign rights and jurisdiction as provided for in Articles 56 and 58 of the LOS Convention. For the rights and duties on the continental shelf within the 200-mile zone, the continental shelf regime and the regime of the EEZ, coexist. Subsequently, the provisions in Part VI of the LOS Convention are applicable and supplement the rules within the EEZ.

It would seem that the breadth of the zone and the rights enumerated in Articles 56 and 58 are part of customary international law. At least some writers have taken this stand.<sup>89</sup> Whether the jurisdictional provisions have passed into the status of customary law, is however more doubtful. These are nevertheless of high importance to Norway. Much of the vessel source pollution takes place within 200 miles, yet beyond the territorial



sea. Norway may of course exercise legislative and enforcement jurisdiction in the capacity of flag State. However, with regard to ships in transit, the pollution control relies on international rules.

When it comes to impacting navigation in the EEZ, the coastal State should take several factors into consideration. First and foremost, one should try to analyse the shipping activity in the area and to what extent vessel source pollution may harm the marine environment. The basis for jurisdictional provisions within the EEZ should always be with regard to the sovereign rights the coastal State enjoys within the zone. Secondly, legislative and enforcement action should be with accurate basis in the LOS Convention. Regulations outside the territorial sea may be objected by flag States and not necessarily without good reasons.

#### 5.4.2 Legislative jurisdiction

Article 211(2) of the LOS Convention affirms the primary and traditional responsibility of the flag State with regard to adoption of regulations with the purpose of protecting the marine environment.

Moreover, within the EEZ, the coastal State has jurisdiction with regard to the protection and preservation of the marine environment. The relevant provisions regarding prescriptive jurisdiction are found in Part XII. Article 211(5) reads:

‘Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference’.

The coastal State has no obligation to regulate pollution within the EEZ, as indicated by the term ‘may’. However, if the competence is used, there are limitations. The rules shall only conform and give effect to rules and standards with basis in international law. In this respect, *Lov om Norges økonomiske sone* of 1976 Section 7(a) authorizes legislative jurisdiction with regard to protection of the environment, but only in accordance with international law. If national legislation is violated, this authorizes the coastal State, *inter alia*, to commence hot pursuit as provided for in Article 111(2) of the LOS Convention.

The phrase ‘conforming to and giving effect to’<sup>90</sup> is different to those used elsewhere in the LOS Convention.<sup>91</sup> The coastal State is limited to implementation with regard to legislative jurisdiction in the EEZ. Furthermore, the wording provides for a maximum and minimum level of regulation, so that the coastal State only may give rules identical to those on the international level. Thus, the margin of appreciation seems rather limited.

Legislative jurisdiction shall be to the purpose of preventing, reducing and controlling pollution from vessels. Within the frame of generally accepted international rules and standards, any rule regulating vessel source

pollution could be adopted. This will probably also include navigational measures in the EEZ, of which the importance is emphasized in Article 211(1). However, it seems to be unclear whether or not navigational measures can meet the criterion of 'generally accepted'. A traffic separation scheme will have to be designed for a particular area and cannot be used anywhere. However, if such navigational measures are adopted on the international level through the IMO, they may be considered as accepted internationally.

As a consequence of coastal State legislative jurisdiction within the EEZ, a certain overlap with regard to the flag State jurisdiction may occur if regulations are adopted in accordance with Article 211(5) and (6). Neither, the flag nor the coastal State has unrestricted discretion in the adoption of rules and standards. The laws and regulations of the flag State must at least have the same effect as that of generally accepted international regulations, and those of the coastal State must conform and give effect to generally accepted international rules and standards.

Hence, the term of 'generally accepted' is of major importance with regard to the jurisdiction prescribed by States. It is not defined within the LOS Convention and the exact legal implications of this rule of reference are not easily ascertainable. Authors address this issue differently but a broad categorization might be suggested. The most restrictive point of view would be to rely on the classic notion of customary law and that 'generally accepted' is merely a reference to customary principles and rules of international law.<sup>92</sup>

Another, far more progressive view, is given by Sohn<sup>93</sup> to whom a general acceptance implies that rules are fairly balancing the interests of all States and adopted by a majority of them, including most States with any special interest in the rule. According to Sohn, this would make the LOS Convention more dynamic and capable of adjusting to a constantly changing regime where new dangers to the environment require rapid adoption. Such a wide interpretation could nevertheless likely discourage ratification of both the LOS Convention and regulatory conventions. Altogether, the uncertain approach with regard to the term of 'generally accepted' contains a threat to undermine the LOS Convention's purpose of effectiveness.

#### 5.4.3 *Enforcement jurisdiction*

The enforcement jurisdiction of a coastal State to undertake measures in relation to vessels navigating the EEZ is provided for in Article 220(3), (5) and (6) of the LOS Convention. They must be read in conjunction with Part V. The provisions are exceptions from the flag State jurisdiction over vessels navigating in another State's EEZ, implying concurrent jurisdiction. The relevant parts of them read:

'3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or in the territorial sea of a State has, in the exclusive economic zone, 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’.

‘5. Where there are clear grounds for believing that a vessel...has, in the exclusive economic zone 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 can justify such inspection’.

‘6. Where there is clear objective evidence that a vessel...has, in the exclusive economic zone, 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 exclusive economic zone, that State may ...provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with international law’.

The coastal State’s measures within the EEZ apply to violations of applicable international rules and standards, or the coastal State’s laws and regulations compatible with such rules and standards. Measures are graded according to the degree of harm threatened or caused by violations committed within the EEZ, in order to prevent impediments to the freedom of navigation.

Where there are ‘clear grounds for believing’ that a ship has violated international rules and standards or the legislation of the coastal State, the coastal State may require information in order to establish whether a violation has occurred. This is provided for in Article 220(3) of the LOS Convention and reflected in *Sjødyktighetsloven* of 1903 Section 121(4). By suspicion of violation within Norwegian EEZ, the Norwegian Maritime Directorate<sup>94</sup> may request information of the identity of the ship, prior and next port of entry and other relevant information. In this respect, the flag State also has a duty under Article 220(4) of the LOS Convention to adopt laws so that vessels flying their flags comply with such a request. This obligation is incorporated in *Sjødyktighetsloven* of 1903 Section 121(a) and Norwegian ships navigating within the EEZ of another State have a duty to comply with requirements from the coastal State.

Furthermore, where there are ‘clear grounds for believing’ that a vessel has committed a violation ‘resulting in a substantial discharge causing or threatening significant pollution’, the coastal State may undertake physical inspection of a vessel.<sup>95</sup> Such inspection may only be undertaken if the ship has refused to offer information required or if the information is at variance with the evident factual situation. *Sjødyktighetsloven* of 1903 Section 121(5) incorporates this provision authorizing cessation and boarding.

Finally, where there is ‘clear objective evidence’ that a vessel has committed a violation ‘resulting in a discharge causing major damage or threat of major damage’, the coastal State may, provided that the evidence so warrants, institute proceedings, including detention of the vessel as laid down in Article 220(7). *Sjødyktighetsloven* of 1903 Section 121 provides not for detention to environmental detrimental activities within the EEZ. Enforcement is limited to inspections and must not unduly delay the ship or put it to needless expenses.<sup>96</sup>

Subsequently, Article 220 stipulates that the coastal State can take a number of enforcement measures in respect of violations within the EEZ. However, as shown above, some distinctions must be made between paragraphs 3, 5 and 6.

With regard to the quality of evidence required to enforce jurisdiction, paragraph 3 and 5 require only ‘clear grounds for believing’ while paragraph 6 requires ‘clear objective evidence’. Practically, there is of course a problem to obtain evidences without physically inspection of the ship. However, ‘clear grounds for believing’, could be obtained by, *inter alia*, surveillance or notifications. ‘Clear objective evidence’ can probably only be obtained through inspections, for instance with legal basis in paragraph 5.

Furthermore, paragraph 5 and 6 only allow enforcement jurisdiction when the violation has *resulted* in pollution of the marine environment. No such consequence is required in paragraph 3 and information can be asked for regardless of any actual damage.

#### 5.4.4 Installations and structures in the EEZ and on the continental shelf

The extensive marine activity within the EEZ and on the continental shelf of Norway requires construction and use of installations and structures. The coastal State’s exclusive right to establish such installations is provided for in Article 60 of the LOS Convention and applies also with regard to the continental shelf.<sup>97</sup> The question in this respect is whether the establishment of such constructions has any effect on the jurisdiction over vessel source pollution.

Article 60(2) gives the coastal State exclusive jurisdiction over installations and structures. Most important with regard to vessel source pollution is paragraph 4 where the right to establish reasonable safety zones around installations is provided for. These must only be established ‘where necessary’ and shall be ‘reasonable’. Paragraph 5 does not strictly require a maximum breadth of such zones, only that the safety zones shall be ‘determined by the coastal State, taking into account applicable international standards’. The zone shall however not exceed 500 metres around them.

Article 60(4) stipulates that the coastal State shall ensure not only the safety of the installations itself but also the safety of navigation around them. The measures shall in this respect be ‘appropriate’. Certainly, this may include relevant measures for protecting the marine environment as established in Part XII of the LOS Convention. A collision between a

vessel and an installation will obviously be a threat to the safety of navigation, and possibly a threat to the environment or resources as well.

Paragraph 7 prohibits the safety zones to interfere with 'recognised sea lanes essential to international navigation'. Aside from this there seems to be no restrictions on measures that can be adopted in such zones, subject to the limitations in paragraph 4. Nevertheless, the broadly formulated competence with regard to jurisdiction in such safety zones and the geographical limitations make it difficult to stipulate the exactly nature of coastal State jurisdiction.

#### 5.4.5 Conclusions

The deficiencies of flag State enforcement and insufficient regime of port State control have, in the words of *Valenzuela*,<sup>98</sup> 'resulted in a legalistic compromise between two extremes' within the EEZ. Coastal States are not given full jurisdiction to enforce international regulations against foreign ships, their powers are graded according to the likely harm.

Furthermore, characteristic for the pollution regime within the EEZ is the coastal State's obligation to implement and conform to 'generally accepted' international rules and standards. Uniformity and internationalism lay at the basis of this, leaving the coastal State little margin of appreciation with regard to national regulations. In consideration of the enforcement competence, the overriding aim of uniformity can be difficult to fulfil. It all depends on how national States interpret the merely vague terms of, *inter alia*, 'clear objective evidence'. Noteworthy is however that the limitations on coastal State jurisdiction within the EEZ to some extent is compensated by less restrictive powers within special areas. This counts especially with regard to Article 211(6) of the LOS Convention. The coastal State may under special circumstances adopt more extensive regulations to protect vulnerable marine areas. Consequently, the regime here is more comparable to that of the territorial sea.

## 6 Coastal State jurisdiction in respect of maritime casualties, special areas and Particularly Sensitive Sea Areas

Regulatory initiatives of magnitude seem to emerge proportional to the size of major accident at sea. The latest example in this respect is the EU reaction to the *Prestige* accident.<sup>99</sup> In Norway, accidents are most likely to occur along the coast in west and north.<sup>100</sup> Since 1989 there have been approximately 10 severe accidents along our coast. Naturally, the legal aspects to intervention in cases of accidental pollution are multiple as compared to those concerning regular operational discharges. However, regulations emphasising compliance with operational requirements and qualifications of the crew have proved to be successful in preventing accidents as well.<sup>101</sup>

## 6.1 Maritime casualties

Article 221(1) of the LOS Convention provides the coastal State powers to avoid pollution arising from maritime casualties. The coastal State has a right both to take and enforce measures beyond the territorial sea in order to protect the coastline and other related interests, including fishing. Article 221 shall first and foremost give the coastal State a clear legal basis to intervene when its coast is threatened or damaged by pollution. But it will also protect international shipping from intervention without any reasons. In respect of this, Article 232 of the LOS Convention determines that States shall be liable for damage or loss arising from unlawful measures.

The provision codifies important principles related to the situations of necessity. These are also laid down in the 1969 Intervention Convention. The measures initiated by the coastal State must, however, be proportional to the threatened damage or actual pollution. A concrete valuation is necessary with regard to which measures can be carried out.

Article 221 applies only in cases of considerable damage and as a measure of protection after the time of an accident. Enforcement jurisdiction can be carried out but no proceedings may be initiated. Thus, it varies from other provisions in Part XII, Section 6 of the LOS Convention.

The definition of ‘maritime casualty’ in Article 221(2) is comprehensive. It is not limited to collisions, stranding or other incidents of navigation, but also includes other occurrences on board a vessel or external to it which result in material damage or imminent threat of material damage to vessel or cargo. The wide definition means that the coastal State may intervene when a ship obviously is out of control. However, maritime casualties may often only be obvious to the crew itself.

Norwegian rules with regard to acute pollution are provided for in the Royal Decree of 19 September 1997, adopted under *Forurensningsloven* of 1981 Section 74(5). The rules apply to all ships within the EEZ or the high seas that poses an environmental threat to the Norwegian coastline in cases of accidents.<sup>102</sup>

## 6.2 Special Areas

### 6.2.1 Introduction

The focus of international law relating marine pollution has during the last years shifted from trying to reduce and prevent pollution to actually take more positive measures in the conservation of the marine environment and its resources. In many areas, the competence of the coastal State should be more extensive in order to protect their special environment from vessel source pollution.

Article 194(5) of the LOS Convention confirms this development, providing that measures under Part XII

‘...shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life’.

The LOS Convention provides for the designation of special areas in Article 211(6).<sup>103</sup> The regulatory instrument of Particularly Sensitive Sea Areas (hereinafter PSSA) is also of significant interest and will be analysed separately. What can already be observed is that the coastal State's desire to establish special areas is always subject to the approval within the IMO. The coastal State will not act on its own. Furthermore, there are no special enforcement rules with regard to the designation of such areas.

Special areas are highly relevant from a Norwegian point of view. In connection with the increasing shipping activity in the Barents Sea, the question has been raised whether Norway should apply for the establishment of special protection areas through mechanisms provided for in the LOS Convention and other regulatory instruments. Currently, relevant ministries within the Norway Government evaluate the feasibility of designating some types of special areas, this in connection with a management plan for the Barents Sea. The aim would be to obtain concrete measures to prevent accidents and pollution from vessels. These may include vessel traffic services, traffic separation schemes, but also such measures like the extended limit of the jurisdictional regimes, *etc.*

#### 6.2.2 *Special areas under the LOS Convention 211(6)*

Article 211(6) of the LOS Convention provides the coastal State the right to establish a

‘...clearly defined area of their exclusive economic zones...where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic...’.

Article 211(6) indicates that special areas may only be within the EEZ. There is no explicit mention of the territorial sea in this respect. However, it seems that parts of the territorial sea also could be established as a special area. Otherwise, the regulation within the EEZ could turn out stricter than within the State's territory and this was probably not intended.

There is a question if the entire EEZ can be categorised as a special area. No sound arguments within Article 211(6)(a) indicate the opposite view. To Norway, this is nevertheless of merely theoretical interest. The EEZ reach from north to south and the reasons for establishing one part of the EEZ as a special area would not be equally relevant in all parts. Article 211(6)(a) seems under any circumstances to exclude designation of special areas outside the border of the EEZ.

##### 6.2.2.2 Legislative jurisdiction

Article 211(6) provides two alternatives for prescription of special measures. The first is regulated in subparagraph a. With regard to this the coastal State may implement international rules and standards or navigational practices as are made applicable through the IMO for special areas.

The wording indicates that the coastal State is limited to merely implement such regulations. They will of course be at a higher level of stringency than those provided for in paragraph 5 of Article 211. Otherwise, there would be no need for this process. The phrases of ‘special mandatory measures’ and ‘international rules and standards or navigational practices’ indicate no restrictions with regard to the type of regulations that can be adopted. Consequently they may include, *inter alia*, technical requirements for vessels.

The clarity with regard to the role of the IMO is not very obvious under subparagraph a. The Organization shall approve or reject the application of the coastal State, but it is not clear whether or not the IMO is recognised a legislative role, thereby deciding the relevant measures that can be adopted. Indeed, IMO may adopt measures that apply for special areas, such as under MARPOL 73/78 Annexes. The question in this respect is if the Organization in *specific* cases shall decide on what measures that can be provided for, or if the coastal State itself can choose between them after the application is approved. This latter point of view seems rather unlikely, taking into consideration that the coastal State perhaps would choose to adopt regulations more restrictive than necessary. The consent of all relevant stakeholders is perhaps only possible if IMO individually decides for the measures.

Combined with subparagraph a of Article 211(6), the coastal State may under subparagraph c, and subject to IMO’s approval, adopt ‘additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels’, which ‘may relate to discharges or navigational practices...’. There exists no obligation to implement rules within subparagraph c. Thus, it concerns national legislation and the IMO shall only approve the measures provided for. With regard to rules of design, construction, manning or equipment, these shall only be ‘generally accepted’. Subsequently, the coastal State has in this respect no wider range of measures than in subparagraph a and Article 21(2) and 211(5) of the LOS Convention.

#### 6.2.2.3 Enforcement jurisdiction

According to Article 220(8), enforcement powers in the EEZ also apply to the special areas in Article 211(6). The special character of these areas may of course imply that enforcement action more frequently is carried out.

### 6.3 Particularly Sensitive Sea Areas

#### 6.3.1 Introduction

A PSSA is an area that needs special protection because of its recognised significance for ecological, socio-economic or scientific reasons. Identification of PSSA and the adoption of associated protective measures requires consideration of three components. Firstly, the particular conditions of the sea area to be identified. Secondly, the vulnerability of that area to damage by international shipping activities. Finally, the availability of associated protective measures within the competence of the IMO.<sup>104</sup>



The formal legal basis for the designation of PSSAs is found in the 'Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas', adopted as IMO Resolution A.927(22).<sup>105</sup>

The purpose of the PSSA-Guidelines is provided for in its paragraph 1.4. First and foremost they shall assist both IMO and Member States in the identification and designation of areas that need special protection. Furthermore, they intend to reflect the interests of all actors involved in activities within the area. This means that the interests of the flag State, the coastal State and the environmental and shipping communities, all shall be taken into consideration.

The Norwegian Government has for some time discussed the possibility of having parts of the Barents Sea and the Norwegian Sea proposed as PSSA. In 2002 the Norwegian Maritime Directorate was requested by the Ministry of Environment to examine this option.

Environmental organizations in Norway have expressed concerns about the marine environmental status, as the shipping activity is expected to increase with further industrial developments in the Barents Sea and the Norwegian Sea. They have therefore supported initiatives of designating areas along the coastline under the PSSA-Guidelines. However, the work has just begun and time will show whether or not areas in Norwegian waters will obtain this status. Currently, 10 areas in the world are designated as such.

### *6.3.2 Legality and the relationship with special areas under the LOS Convention Article 211(6)*

Being adopted as resolutions, the Guidelines are in principle without binding effect. The legality of PSSA measures was raised when the Australian Government proposed a system of compulsory pilotage in the Great Barrier Reef. Violations were sanctioned by criminal penalties. IMO called upon its Member States to recognise the need for effective protection and inform the ships flying their flag that they should act in accordance with the Australian system. The implementation of compulsory pilotage by Australia was legitimised by the recommendation of the IMO. It can, however, be questioned whether States were legally bound by the Australian national rules.<sup>106</sup>

The PSSA-Guidelines may very well have been influenced by the regulatory concept in the LOS Convention Article 211(6). However, the question can be raised whether the designation of PSSAs have legal basis in the LOS Convention alone. The IMO itself has never linked the designation of any PSSA with relevant provisions of the LOS Convention. Neither, the Guidelines introduce much clarity to resolve this question.

Furthermore, the Guidelines differ from Article 211(6) of the LOS Convention in a number of respects. Article 211(6) does not refer to many of the criteria within the Guidelines decisive to designate an area as particularly sensitive. Social, cultural or economic, educational or scientific cri-

teria are not mentioned. Additionally, Article 211(6) refers to ‘international rules and standards to prevent, reduce and control pollution’, while under a PSSA proposal any associated protective measure under competence of the IMO can be adopted.

The scope of the area is another difference. While a PSSA can be designated within and beyond the limits of the territorial sea,<sup>107</sup> and may include a buffer zone, Article 211(6) of the LOS Convention only addresses the adoption of special measures in a ‘clearly defined area’ of the EEZ. This also results in differences with regard to enforcement of measures. A PSSA may span various maritime zones and consequently involve different levels of jurisdiction. However, under the LOS Convention the rights of enforcement of the coastal State vary from one maritime zone to another.

### 6.3.3 *The process in the IMO*

Member States of IMO may apply for the designation of an area as PSSA. MEPC considers the application, which should be thoroughly prepared by the applying State or States. The application to IMO shall address all relevant criteria in the Guidelines and consist of two parts. Firstly, a description of the area, with its significance and vulnerability. Secondly, existing and/or associated protective measures, which are available through IMO.

Three key elements are decisive. First, as laid down in paragraph 4 of the Guidelines, the area must have certain characteristics. The criteria determining the sensitive character of the area could be of ecological, social, cultural, economic, scientific or educational nature. Secondly, the area must be at risk from international shipping activities. For example, if serious damage could occur in case of oil spills and the area has a history of collisions or spills, this might be sufficient to categorize the area as particularly sensitive.<sup>108</sup> Finally, there must be measures that can be adopted by IMO to provide protection of the area. The associated protective measures are limited to actions within the purview of IMO. This includes designation of the area to be avoided, adoption of routing systems and development and adoption of other measures aimed at protecting the environment from vessel source pollution.<sup>109</sup> These measures are evaluated/adopted by other committees of the IMO, before the PSSA proposal is ready for final adoption in MEPC.

### 6.3.4 *A PSSA in Norway’s seas?*

Arguments exist both for and against a PSSA-application in the northern areas of Norway. Arguments were outlined in the report *Norges Offentlige Utredninger 2003:32: ‘Mot nord’*<sup>110</sup> concerning the developments in the northern areas. The report notices that the Barents region and the northern part of the Norwegian Sea are ‘politically sensitive’ areas with Russian, Norwegian and international interests. One should of course take into consideration the different opinions with regard to a legal regime that may lay further restrictions upon international shipping. Norwegian authorities may perhaps decide not to proceed with PSSA designation considering the weight of a good relationship with Russia and other actors participating in shipping in the northern areas.<sup>111</sup>

Furthermore, the fragile legal basis of the Guidelines and the fact that many of the measures under a PSSA already can be adopted under other conventions already ratified by Norway, give reason to question whether a PSSA-application is necessary along our coastline. State practice shows that a PSSA sometimes can be mostly a political signal, while protection can be adopted by IMO independently of its proclamation.

Norway seems also still rather modest with regard to the designation of a PSSA in Norwegian waters although thorough evaluations have been made.<sup>112</sup> The agenda of today seems to be more concentrated on industrial developments in these areas, related shipping interests, and on already existing measures.

## **7 Final remarks**

The extent and scope of coastal State jurisdiction over vessel source pollution has been the main objective of this study.

Part XII of the LOS Convention seemingly recognizes coastal State jurisdiction within a larger area in comparison with the 1958 Geneva Conventions. The concept of the EEZ is particularly relevant for Norway.

Altogether, the regime under the LOS Convention reflects the balance between navigation and environment, the flag State and coastal State. Competence is only affirmed where the coastal State has legitimate interests in protecting and preserving the marine environment. 'Universal' port State jurisdiction in Article 218 seems to be the only exception.

In the territorial sea, coastal State sovereignty and jurisdiction is limited by the concept of innocent passage. Within the EEZ, the coastal State is limited to adopt generally accepted international rules and standards, while the enforcement jurisdiction is limited to specific situations. The less prominent interest of the coastal State to regulate vessel source pollution is obvious within the EEZ. No unilateral legislation is provided for and enforcement actions are limited to request for information unless considerable damage threatens to occur.

Furthermore, Part XII of the LOS Convention affirms the importance of protecting special vulnerable areas. Although state practice is sparse with regard to Article 211(6), this study has proved that the coastal State under international law may adopt special measures to combat with pollution from vessels. Part XII of the LOS Convention also emphasises the important role of the IMO in the developments of rules and standards on the international level. The IMO has actively exercised this role so far, and developments in recent years, especially as related PSSAs and ballast water issues, are of high importance for Norway to closely follow and analyse, regarding its own situation.

## 8 Abbreviations

AJIL	American Journal of International Law
Cmdnd.	Command Paper of the United Kingdom
DNV	Det Norske Veritas
EEZ	Exclusive Economic Zone
EPIL	Encyclopedia of Public International Law
EU	European Union
FNI	The Fridtjof Nansen Institute, Norway
GESAMP	Group of Experts on the Scientific Aspects of Marine Environmental Protection
ICJ	International Court of Justice
ICJ Rep.	ICJ Reports.
ILM	International Legal Materials
ILR	International Law Reports
IMO	International Maritime Organization
LSI	The Developing order of the oceans, Proceedings of Law of the Sea Institute Eighteenth Annual Conference held at San Francisco, October 24-27 1984, ed. by R.B. Krueger and S.A. Riesenfeld (Honolulu: Law of the Sea Institute, University of Hawaii 1985).
MARPOL	International Convention for the Prevention of Pollution from ships
MEPC	The IMO Marine Environment Protection Committee
OPRC	International Convention on Oil Pollution Preparedness, Response and Co-operation
PCIJ	Permanent Court of International Justice
RGDIP	Revue générale de droit international public
RHQNN	Regional Headquarters North Norway
RIAA	United Nations Reports of International Arbitral Awards
UN	United Nations
UNCLOS III	The Third United Nations Conference on the Law of the Sea
UNTS	United Nations Treaty Series

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**Notes**

- <sup>1</sup> UN doc. A/CONF.62/122. ILM, Vol. 21, 1982, pp. 1,261 ff.
- <sup>2</sup> See further Boyle, 'Protecting the marine environment', pp. 79-85.
- <sup>3</sup> 'Charter of the United Nations, Statute and Rules of Court and Other Documents', in *Acts and Documents concerning the Organization of the Court, No.5*, the Hague, 1989.
- <sup>4</sup> Ruud, Ulfstein and Fauchald, *Utvalgte emner i folkerett*, p. 15.
- <sup>5</sup> ILM, Vol. 8 (1969) pp. 679-735.
- <sup>6</sup> See further Thürer, 'Soft Law', pp. 452-460.
- <sup>7</sup> Report no. 14 to the Storting (2004-2005), p. 7.
- <sup>8</sup> *Ibid.*, p. 10.
- <sup>9</sup> [www.eia.doe.gov/](http://www.eia.doe.gov/).
- <sup>10</sup> Report no. 14 to the Storting (2004-2005), p. 11.
- <sup>11</sup> Estimations by Fearnley Consultants at the Arctic Operational Platform Conference in Oslo, 28 September 2005.
- <sup>12</sup> ILM, Vol. 12, 1973, pp. 1,319ff (Convention) and ILM, Vol. 17, 1978, pp. 546ff (Protocol).
- <sup>13</sup> IMO doc. BWM/CONF/9, paras. 2.10-2.13.
- <sup>14</sup> GESAMP Report No. 50, p. 25.
- <sup>15</sup> ICJ Reports 4, 1949, pp. 22-23.
- <sup>16</sup> RIAA, Volume 3 (1949), p. 1965.
- <sup>17</sup> UN doc. A/CONF.48/14, p. 118.
- <sup>18</sup> UNTS, Vol. 1184, p. 2.
- <sup>19</sup> British Command Papers, Cmnd. 9266, Treaty Series, No. 50, 1984.
- <sup>20</sup> British Command Papers, Cmnd. 6961, Treaty Series, No. 77, 1977.
- <sup>21</sup> UNTS, Vol. 327, p. 3.
- <sup>22</sup> ILM, Vol. 9 (1970), p. 25.
- <sup>23</sup> ILM, Vol. 30 (1991) p. 733.
- <sup>24</sup> Convention on the High Seas (UNTS, Vol. 450, p. 82), Convention on the Continental Shelf (UNTS, Vol. 499, p. 311) and Convention on the Territorial Sea and The Contiguous Zone (UNTS, Vol. 516, p. 205).
- <sup>25</sup> LOS Convention, Art. 311(1).
- <sup>26</sup> See [www.un.org/Depts/los/](http://www.un.org/Depts/los/).
- <sup>27</sup> Mensah, 'The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law', p. 90.
- <sup>28</sup> Johnson, *Coastal State Regulation of International Shipping*, pp. 2-3.
- <sup>29</sup> Molenaar, *Coastal State Jurisdiction over Vessel-source pollution*, p. 136, Churchill and Lowe, *The Law of the Sea*, pp. 346-347, Ruud, Ulfstein and Fauchald, *Utvalgte emner i folkerett*, p. 125.

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- <sup>30</sup> IMO doc.LEG/MISC/1, 'Implications of the LOS Convention for IMO', p. 2.
- <sup>31</sup> Molenaar, *Coastal State Jurisdiction over Vessel-source pollution*, p. 528.
- <sup>32</sup> UNTS, Vol. 289, p. 3.
- <sup>33</sup> IMO doc. A.949(23).
- <sup>34</sup> IMO doc. BWM/CONF/36.
- <sup>35</sup> IMO doc. A.927(22).
- <sup>36</sup> Hakapää, *Marine Pollution in International Law*, p. 151.
- <sup>37</sup> PCIJ, Ser. A, No 10, p 18 (1927).
- <sup>38</sup> Hakapää, *Marine Pollution in International Law*, p. 151.
- <sup>39</sup> LOS Convention, Art. 105.
- <sup>40</sup> Norwegian Penal Act of 22 May 1902, in *Norges Lov*.
- <sup>41</sup> UNTS, Vol. 450, p. 82.
- <sup>42</sup> Maritime Act of Norway of 24 June 1994 Number 39, in *Norges Lov*.
- <sup>43</sup> Pollution Act of Norway of 13 March 1981 Number 6, in *Norges Lov*.
- <sup>44</sup> Act of Seaworthiness of 9 June 1903 Number 7, in *Norges Lov*.
- <sup>45</sup> See Section 1 of the Law.
- <sup>46</sup> This duty is reflected in *Sjøloven* Chapter 2.
- <sup>47</sup> J. Curtis, 'Vessel Source Oil Pollution and MARPOL 73/78: An International Success Story?', pp. 679-692.
- <sup>48</sup> J. Ignarski, Flags of convenience, in: R. Bernhardt (ed.), *EPIL*, Volume II, p. 404.
- <sup>49</sup> Vukas and Vidas, 'Flags of Convenience and High Seas Fishing', pp. 57-61.
- <sup>50</sup> LOS Convention, Art. 211.
- <sup>51</sup> LOS Convention, Art. 221.
- <sup>52</sup> LOS Convention, Art. 8(1).
- <sup>53</sup> Scovazzi, 'Straight Baselines: Rules and Practice', p. 451.
- <sup>54</sup> ICJ Reports 1951, p. 116.
- <sup>55</sup> LOS Convention, Art. 8(2).
- <sup>56</sup> The reservation of the coastal States arises first and foremost from French practice. The view derives from Conseil d'Etat's decisions in the cases of *Sally* and *Newton* in 1806.
- <sup>57</sup> ILR, Vol. 27, p. 212.
- <sup>58</sup> LOS Convention, Art. 131.
- <sup>59</sup> ICJ Report 1986, p.14, at p. 111, para. 213.
- <sup>60</sup> LOS Convention, Art. 211(3).
- <sup>61</sup> The Norwegian Penal Code of 22 May 1902, in *Norges Lov*.
- <sup>62</sup> Section 17 of the Royal Decree.

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- <sup>63</sup> Section 13(f) of the Royal Decree.
- <sup>64</sup> Churchill and Lowe, *The Law of the Sea*, p. 63.
- <sup>65</sup> ILM, Vol. 21, p.1.
- <sup>66</sup> Valenzuela, 'Vessel-Source Pollution', p. 500.
- <sup>67</sup> Art. 228 of the LOS Convention authorizes, however, the flag State to a certain extent to suspend and restrict institution of proceeding initiated by the others.
- <sup>68</sup> See further Valenzuela, 'Vessel-Source Pollution', p. 496.
- <sup>69</sup> The expressions are nevertheless used both in Art. 18(2) and Art. 39(1).
- <sup>70</sup> Hakapää, *Marine Pollution in International Law*, pp.179-180. Molenaar, *Coastal State Jurisdiction over Vessel-source pollution*, p. 187.
- <sup>71</sup> See Section 10 of the Law.
- <sup>72</sup> See Section 121(9) of the Law.
- <sup>73</sup> LOS Convention, Art. 2 and Art. 3.
- <sup>74</sup> Churchill and Lowe, *The Law of the Sea*, p. 80.
- <sup>75</sup> Territorial Sea Act of 27 June 2003 Number 57, in *Norges Lover*.
- <sup>76</sup> RIAA, Volume 11 (1961), pp. 147-166.
- <sup>77</sup> See Section 12(1) of the Law.
- <sup>78</sup> League of Nations doc. C. 351(b). M. 145(b).1930, p. 213. Reprinted in Rosenne, *League of Nations Conference for the Codification of International law (1930)*, p. 1414.
- <sup>79</sup> LOS Convention, Art. 21(4).
- <sup>80</sup> Valenzuela, 'Vessel-Source Pollution', p. 493.
- <sup>81</sup> Molenaar, *Coastal State Jurisdiction over Vessel-source pollution*, p. 197.
- <sup>82</sup> LOS Convention, Art. 211(4).
- <sup>83</sup> Molenaar, *Coastal State Jurisdiction over Vessel-source pollution*, p. 246.
- <sup>84</sup> LOS Convention, Art. 220(3).
- <sup>85</sup> The Norwegian Maritime Directorate, see Section 10 of the Law.
- <sup>86</sup> LOS Convention, Art. 111(1).
- <sup>87</sup> Hakapää, *Marine Pollution in International law*, p. 233. See further Parkinson, 'The Latin American Contribution to the Law of the Sea', pp. 139-172.
- <sup>88</sup> Act of 17 December 1976 Number 91, in *Norges Lover*.
- <sup>89</sup> Churchill and Lowe, *The Law of the Sea*, p. 161.
- <sup>90</sup> LOS Convention, Art. 211(5).
- <sup>91</sup> E.g., Art. 211(2), 'having at least the same effect as'.
- <sup>92</sup> *Inter alia*, Hakapää, *Marine Pollution in International Law*, pp. 120-121.
- <sup>93</sup> Sohn, 'Implications of the Law of the Sea Convention regarding the protection and preservation of the marine environment', pp. 108-109.
- <sup>94</sup> See Section 10 of the Law.

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- <sup>95</sup> LOS Convention, Art. 220(5).
- <sup>96</sup> See Section 121(9) of the Law.
- <sup>97</sup> LOS Convention, Art. 80.
- <sup>98</sup> Valenzuela, 'Vessel-Source Pollution', p. 495.
- <sup>99</sup> See further Frank, 'Consequences of the Prestige Sinking', pp. 1-64.
- <sup>100</sup> Report No. 14 to the Storting (2004-2005), p. 10.
- <sup>101</sup> Valenzuela, 'Vessel-Source Pollution', p. 486.
- <sup>102</sup> See Section 1 of the Royal Decree.
- <sup>103</sup> Also with regard to ice-covered areas in LOS Convention, Art. 234. See further Brubaker, *Environmental Protection of Arctic Waters, Specific Focus the Russian Northern Sea Route*.
- <sup>104</sup> 'A PSSA IN A NUTSHELL', Internal FNI document, by Dr. Davor Vidas.
- <sup>105</sup> The revised Guidelines were adopted by MEPC in July 2005, but still need to be approved by the IMO Assembly at its annual session in the end of November 2005.
- <sup>106</sup> See further 'Particularly Sensitive Sea Areas: an important environmental concept at a turning point?', p. 465.
- <sup>107</sup> Guidelines, para. 3.3.3.
- <sup>108</sup> Guidelines, para. 5.
- <sup>109</sup> Guidelines, paras. 6.1.1., 6.1.2. and 6.1.3.
- <sup>110</sup> Official Norwegian Reports 2003:32, 'To the north! Challenges and possibilities in the northern areas', pp. 25-26.
- <sup>111</sup> See further Brubaker, 'Legal Status of the NSR and Westover', internal FNI document presented at Arctic Operational Platform Conference in Oslo, 28 September 2005.
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