VESSEL-SOURCE POLLUTION IN THE DISPUTED AREA OF THE BARENTS SEA

Norway’s access to administrate prevention initiatives

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## Content

1. **INTRODUCTION**

   1.1 The aims of the thesis  
   1.2 The legal framework on marine pollution  
   1.3 The Structure and Limits of the Thesis

2. **LEGAL REGIME OF NORWEGIAN WATERS, THE EEZ AND THE HIGH SEAS**  

   2.1 Introduction  
   2.2 Norwegian Waters; the Internal Waters and the Territorial Sea  
   2.3 The Contiguous Zone  
   2.4 Svalbard  
   2.5 The Exclusive Economical Zone (EEZ)  
      2.5.1 Overview  
      2.5.2 Delimitation of EEZ and the occurrence of dispute in relation to delimitation  
   2.6 The sea border against Russia. The disputed area  
      2.6.1 Overview  
      2.6.2 The Grey Zone Agreement between Norway and Russia  
   2.7 The High Seas  
   2.8 The Continental Shelf

3. **FIGHTING VESSEL-SOURCE POLLUTION**

   3.1 Introduction
3.2 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) 29

3.3 Norwegian Law on Vessel-Source Pollution 32

3.4 Port State Control 34

3.5 Coastal State Control 35

3.6 Acute Pollution Response 37

3.6.1 International Convention on Oil Pollution Preparedness, Response and Co-operation ("OPRC Convention") 38

3.6.2 Bilateral agreement between Norway and Russia concerning the Combatment of Oil Pollution in the Barents Sea 40

3.6.3 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 40

3.7 Conclusions on Norway’s possibilities and obligations in the Exclusive Economical Zone 44

4 NORWAY’S ACCESS TO REGULATE AND ENFORCE POLLUTION REGULATION IN THE DISPUTED AREA OF THE BARENTS SEA 47

4.1 Introduction 47

4.2 Norwegian legislation concerning pollution in the EEZ and the applicability to the disputed area 48

4.3 International Law – guidelines from the International Court of Justice interesting to regulation in a disputed area 49

4.4 The need for pollution regulation in the disputed area of the Barents Sea. Legislative reasoning 52

5 CONCLUSIONS: STATUS QUO AND FUTURISTIC PERSPECTIVE 54

REFERENCES 56
Abbreviations

CDEM – Construction, Design, Equipment and Manning
CLCS – (UN) Commission on the Limits of the Continental Shelf
EEZ – Exclusive Economical Zone
GAIRAS – Generally Accepted International Rules And Standards
HNS – Hazardous and Noxious Substances
ICJ – International Court of Justice
LOSC – Law of the Sea Convention
MARPOL – International Convention for the Prevention of Pollution from Ships
NLS – Noxious Liquid Substances
OILPOL – International Convention for the Prevention of Pollution of the Sea by Oil
OPRC – International Convention on Oil Pollution Preparedness, Response and cooperation
UN – United Nations
1 Introduction

1.1 The aims of the thesis

This thesis examines the vessel-source pollution regulation in the High North and Norway’s chance to take measures against and prevent pollution in the Barents Sea. The special problem of marine environmental protection arises from a dispute between Norway and Russia on the delimitation of the maritime border in the Barents Sea. It is interesting to see how the dispute can be an obstacle for regulation and environmental protection of the area. The disputed area, often referred to as the Grey Zone, is a result of Norway and Russia both claiming the area to be part of their exclusive economical zone, due to the countries applying different principles for delimitation of their adjacent maritime zones. There is a great uncertainty as to how the countries can and shall administrate this area with respect to vessel-source pollution. This thesis will look into the matter by examining if and how pollution can be dealt with in the disputed area.

The topic is not only of a theoretical interest. The Barents Sea is rich on natural resources, both living and non-living resources. There are long traditions for exploiting the living resources in the area. This naturally involves fishing vessels. In addition to this both Norway and Russia are engaged in offshore drilling for petroleum in the Barents Sea today\(^1\). All together there is quite a lot of traffic in the Barents Sea. However the increasing amount of oil tankers represents the most serious threat as the potential damage is far more severe than those of fishing vessels. Vessels carrying oil from Russia to Europe and USA is today representing a considerable part of the traffic in the Barents Sea. In 2009 it is estimated that 20 million tons of oil- and gas products will be carried through the Barents

\(^1\) Vidas, Protecting the Polar Marine Environment, p. 131, containing further referrals
Sea. The gas-field “Shtokman” is situated on the Russian side of the disputed area and quite close to the area in question. The running and further development of Shtokman represents potential implications to the marine environment of the Barents Sea, through an increased number of oil tankers and consequently increased threat of casualties and discharge from a larger amount of vessels.

Furthermore the world is in a situation of global warming. There is a tendency where the ice in Arctic is melting, leaving more open sea areas. This may in principle imply that the Northern sea route can be open for even more traffic. The environment in the High North is of an exposed character and it will be an important task for the enclosing countries to preserve and protect the nature and the resources. However the task is complicated by the dispute in regard to delimitation of the maritime border. There is uncertainty as to how a country can administrate an area of which is not for sure part of a country’s jurisdiction. This restricts the work of fighting vessel-source pollution.

The bilateral agreements between Norway and Russia concerning environmental protection illustrate the countries’ awareness of the risk of pollution in the sensitive area. The awareness of the involved parties is by all means not a bad starting point to improve the environmental protection of the Barents Sea.

1.2 The legal framework on marine pollution

The UN Convention on the Law of the Sea is the fundamental convention in regard to exploitation and preservation of the sea. Quite elegant it has been said that the UN Convention on the Law of the Sea is a “constitution for the oceans”, in short stating how essential the Convention is. The UN Convention on the Law of the Sea (hereinafter referred

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2 “Oil transport from the Russian part of the Barents Region. Status per January 2009.” p.5
3 Falkanger, Noen Folkerettslige problemstillinger i nordområdene – i fortid og nåtid, p. 332
4 Commented on in 3.6.2
5 Vidas, chapter 6
6 Tan, Vessel-source Marine Pollution, p. 192 and containing further references. The phrase is attributed to Ambassador Tommy Koh of Singapore, President of UNCLOS III, speaking at the final session of the Conference
to as UNCLOS or LOSC) establishes a legal regime of different maritime zones which determines the rights and obligations of the States. In the various zones the coastal State’s jurisdiction decreases correspondingly with the distance from shore.

In addition to prescribing a coastal State’s general prescriptive and enforcement jurisdiction, UNCLOS specifically deals with States’ opportunity and obligation to protect the environment. In Article 192 it is shortly stated that “States have the obligation to protect and preserve the marine environment”. Additionally Article 194 states that States shall take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source”. Thus it is clear that the Parties not only have the opportunity of preserving the marine environment, but also have a duty to do so.

The obligations in respect of prevention of vessel-source pollution attaches to Norway as a coastal State and a port State, but also as a flag State. A flag State’s legislative jurisdiction is not questioned under customary international law and in LOSC there is even an obligation for States to adopt pollution regulation for their vessels which “at least have the same effect as that of generally accepted international rules and standards”. A flag State may prescribe anti-pollution rules applicable to its vessels wherever they might be in the oceans. In regard to enforcement jurisdiction LOSC Article 217 prescribes that flag States not only may, but must enforce violations of pollution laws by vessels flying their flag. As will be outlined in this thesis, a coastal States enforcement jurisdiction can be limited and consequently flag State jurisdiction has an important role in fighting vessel-source pollution. For this thesis however, flag State jurisdiction is not of high interest, as the topic concerns how Norway as a coastal State can deal with pollution in one particular maritime zone. Thus, throughout the thesis the focus is on the ability Norway has to prevent vessel-source pollution as a coastal State, in addition to comments on port State control in chapter 3.4.

In LOSC Article 211(1) it is established that “States, acting through the competent international organization or general diplomatic conference, shall establish international

7 Churchill and Lowe, The law of the sea third edition, p. 344
8 LOSC Article 211(2)
rules and standards to prevent, reduce and control pollution of the marine environment from vessels”. Together with an awareness of the harmful consequences of pollution in the marine environment, the result is extensive regulation both nationally and internationally. Roughly the regulations can be divided in two groups; (I) Conventions on prohibition of pollution where the MARPOL Convention is the primary convention and (II) Conventions on preparedness and response to incidents of pollution, where Intervention Convention is essential. The Conventions covered in the thesis is selected because of their high relevance to the subject, and the selection is limited both to maintain a sharp focus and because of the limits of the thesis.

In Norway there is a system of dualism. In short this implies that ratified conventions has to implemented through national legislation for the regulation to become binding. For this thesis it is of core interest to note that Norway is a party to UNCLOS\(^9\) and the MARPOL Convention. In national legislation the Ships’ Safety Act and the Pollution Control Act is the central legislation in regard to vessel-source pollution together with the MARPOL Regulation.

1.3 The Structure and Limits of the Thesis

This thesis will start by giving an overview of the legal regime of the waters adjacent to Norwegian land, in chapter 2. The focus is set on the Exclusive Economical Zone (EEZ) and the special area in the Barents Sea where the dispute of delimitation is a hot topic. In chapter 3 the legal framework concerning prevention of vessel-source pollution will be outlined. In the same setting the enforcement jurisdiction of Norway as a coastal State and a port State will be clarified and all together chapter 3 seeks to present Norway’s access to regulate vessel-source pollution in its waters and in particular in the EEZ. On basis of chapter 2 and 3 I will proceed to the analysis of Norway’s admission of regulation and preservation of the disputed area in the Barents Sea in chapter 4. Hereunder I will outline

\(^9\) In force as of Regulation of 24\(^{th}\) of July 1996
the practise of International Court of Justice and draw lines between early establishment of Norway’s EEZ and a potential expanded regulation in the disputed area today. This leads on to chapter 5 of conclusions and thoughts on the futuristic perspective.

By this outline and in aim of clarifying the thesis’ topic, a number of related and interesting subjects have been left out. The thesis will not be covering other aspects of safety regulation such as safety of life, technical safety of vessels and the like. The aim of the thesis is to detect Norway’s access to prevent marine pollution in the disputed area of the Barents Sea. In the LOSC “pollution of the marine environment” is in Article 1(4) defined 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 water and reduction of amenities”. Pollution as this may stem from a variety of sources. The thesis will only deal with vessel-source pollution of the marine environment, excluding other sources of pollution to the marine environment, in our case the Barents Sea. It is the International and Norwegian regulation on vessel-source pollution that will be examined in the thesis, while Russian domestic regulation will be left uncovered.
2 Legal regime of Norwegian Waters, the EEZ and the High Seas

2.1 Introduction

Norway’s rights and obligations in the waters adjoining the coast are governed by International Law and in particular UNCLOS. UNCLOS operates with different maritime zones to regulate both the coastal States’ and foreign States’ right to take advantage of the waters. Traditionally the freedom of navigation for all ships of all States has been a fundamental principle to take into account when establishing rights of the coastal State. At the same time, it has been generally accepted that coastal States have some rights to regulate in the waters adjacent to their coasts. Thus the freedom of navigation can be restricted by which waters a vessel chooses to sail through. The compromises between freedom of navigation and a coastal State’s rights in the waters are found in UNCLOS 1982.

In this chapter I describe the legal regime of different maritime zones, starting with a description of the Norwegian Waters in 2.2 and the contiguous zone in 2.3. In 2.4 the special situation of Svalbard is commented on to fulfil the outline of Norwegian jurisdiction in the Barents Sea. Most importantly for the thesis’ subject is the Exclusive Economical Zone and this is outlined in 2.5. The Norwegian EEZ meets the Russian EEZ in the Barents Sea, as Russia is an adjacent State to Norway in the High North. This fact calls for a delimitation of the countries’ maritime boundary, which in itself has led to a dispute between the two countries. The subject of delimitation and the dispute will also be covered in this chapter’s 2.5.2 and 2.6. Lastly the legal regime of the high seas and the continental shelf is commented on in 2.7 and 2.8.

10 Churchill and Lowe, p. 81
11 Churchill and Lowe, p. 71
12 The Convention, third edition 1982, is ratified by Norway and has been in force as from 24th of July 1996. The Law of the Sea Convention is a widespread convention with 155 contracting states per 31st of July 2008. The broad allocation of the convention together with the well established system it contains makes the convention customary international law and it is thus affecting non-contracting states as well.
2.2 Norwegian Waters; the Internal Waters and the Territorial Sea

The ports of Norway are undoubtedly part of the State and the sovereignty attaches, making both prescriptive and enforcement jurisdiction as broad as on land. The full sovereignty continues for the internal waters, cf. Article 2 of LOSC. As it follows from Article 8(1), “waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.” Due to the geography of the Norwegian coast, the principle of straight baselines attaches, see Article 7. In this matter it can be important to keep in mind Article 8(2) which states that when straight baselines has “the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.” This has an impact on the sovereignty by the coastal States ability to give prescriptive regulation. This will be explained in connection to the right of innocent passage through the territorial waters.

See Figure I in 2.5.1 for an illustrative map of the sea boundaries.

The territorial sea is the waters adjacent to the internal waters. Just like a coastal State’s sovereignty over the internal waters is undoubted, so is the sovereignty in the territorial sea today. It follows from Article 2 that “The sovereignty of a coastal State extends, beyond its land territory and internal waters […] described as the territorial sea.” As it follows from the second paragraph of Article 2 the sovereignty extends to the air space above and the seabed and subsoil as well.

Article 3 states that every State has the right to establish a territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention. For a long time Norway’s breadth of its territorial sea was 4 nautical miles. Today the breadth of the Norwegian territorial sea is the 12 nautical miles admissible by international law, i.e. LOSC. This follows from the Norwegian Act nr. 57 of 27th of June 2003, § 2.
Since the coastal State is secured sovereignty in the territorial sea, the coastal State is as a starting point free to give regulation concerning the territorial waters following the needs and wishes of their own. The area can be compared to a State’s soil and this can also be derived from Article 2 which states that the sovereignty extends “beyond its land and internal waters”. Hence the sovereignty of the territorial waters is comparable to the principles of international law concerning States’ sovereignty.

Nonetheless there is an important limitation on the coastal States jurisdiction in the territorial sea. The LOSC grants all States the right of innocent passage through territorial waters, cf. Article 17. What is to be understood as "passage" is explained in Article 18. Passage in the meaning of Article 18 is “navigation through” the territorial waters, either without entering internal waters or for the purpose of proceeding to or from internal waters. Further on the second paragraph states that the passage shall be “continuous and expeditious”, stopping and anchoring is only admissible when incidental, caused by a force majeure situation or distress. Simplified one can say that foreign vessels are secured the right of passage through the territorial waters, but they are not allowed to be hovering or merely cruising around in the territorial sea.

As for the criterion that the passage must be "innocent", this is developed on in Article 19. The first paragraph states that the passage is innocent “so long as it is not prejudicial to the peace, good order or security of the coastal State”. A list of activities that is deemed to be non-innocent is found in Article 19(2). There is an ongoing debate whether or not the list found in Article 19(2)(1) is exhaustive. Various conclusions are found in the legal literature, but the main opinion seems to be that the list of activities in Article 19 is non-exhaustive. The most important arguments for holding Article 19 non-exhaustive is the construction of the article; how the first paragraph gives the main rule, while the second paragraph exemplifies. If the list in the second paragraph is covering the only situation when passage is not innocent, the first paragraph would be left without meaning. In addition to this the Article does not have words like “only” or other implications in the wording of Article 19(2) that the list is exhaustive. Held together with the last alternative,

\[\text{Molenaar, Coastal State jurisdiction over vessel-source pollution, p. 197 and Johnson, Coastal State regulation of international shipping p. 64}\]
litra (l), with the wording "any other activity", it is natural to read the Article so that there are other alternative activities that can lead to non-innocence in addition to the ones listed in article 19(2).

This right of free passage through the internal waters represents a limitation on the coastal State’s prescriptive jurisdiction. Before adopting new laws, the State have to ensure that it is not in discordance with other countries vessels right of free passage.

Norway may fully apply its laws in regard to foreign ships in the territorial sea when the ship is considered not to be in passage and/or when it is non-innocent. On the basis of the State’s sovereignty the Norway can prevent the passage of a ship that is non-innocent. In cases where foreign ships are in innocent passage through the territorial waters Norway may still enforce their laws as long as it’s in accordance with LOSC\textsuperscript{14}. In regard to pollution regulation, the LOSC established a compromise in Article 21(2). The Norway may prescribe its national discharge and navigational standards in the territorial sea, but when it comes to CDEM standards the Norway is limited to implementing the international standards\textsuperscript{15}.

The overall condition is that the coastal State shall not “hamper” the innocent passage\textsuperscript{16}. The problematique of free passage arise in connection to enforcement of a coastal State’s regulation as well. At the same time as vessels of all States are granted the right of free passage Norway has sovereignty in the territorial waters and are granted rights through the LOSC, but a wide access for Norway to enforcement through i.e. inspection, would make the right of free passage undermined. In matters of violation of criminal law, Norway’s enforcement power is restricted. Article 27 states that the coastal State should not exercise criminal jurisdiction on board foreign vessels, save for specific situations listed in the article. The fourth paragraph of Article 27 paints the picture of the significance of the free passage when it states “In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation”. Civil jurisdiction against persons on board vessels and the vessel itself is also restricted, following Article 28.

\begin{footnotes}
\item[14] LOSC Articles 21-23
\item[15] Tan, p. 205
\item[16] LOSC Article 24
\end{footnotes}
Enforcement of the laws for the prevention, reduction and control of pollution\textsuperscript{17} is possible where there are clear grounds for believing that a vessel during its passage through the territorial waters has violated Norwegian pollution regulation, which is admissible by the LOSC. In these matters the Norwegian government may physically inspect the vessel, and if the evidence so warrants, it may institute proceedings, including detention of the ship.

2.3 The Contiguous Zone

The contiguous zone is, naturally, the continuation of the territorial sea at the seaward side. The contiguous zone is regulated through LOSC § 33. The purpose of the contiguous zone is to give the coastal State an improved ability for control. The zone is limited to reach maximum 24 nautical miles from the baselines\textsuperscript{18}.

The contiguous zone does not form part of a coastal State’s territory and is not an area where the coastal State has sovereignty. To be able to carry out the State’s rights in this area it is absolutely necessary with LOSC Article 33. Since the coastal State does not automatically have rights in the area adjacent to the territorial waters, this has to be explicitly claimed, as the situation is for the exclusive economical zone, see below in point 2.3. Norway has claimed a contiguous zone reaching out until 24 nautical miles, by the Act nr. 57 of 27th of June 2003, § 4.

Within the contiguous zone Norway has the ability to prevent infringements of its laws in customs, fiscal, immigration and sanitary within its territory, including the territorial sea. Furthermore the State may punish these infringements if they are committed within the territory or the territorial sea\textsuperscript{19}. In addition to these coastal State rights explicitly

\begin{footnotesize}
\begin{enumerate}
\item Art 220(2)
\item LOSC Article 33(2)
\item LOSC Article 33(1) a) and b)
\end{enumerate}
\end{footnotesize}
regulated in LOSC Part II, Section 4 for the contiguous zone, the rights and obligation for the EEZ also attach to the contiguous zone as they overlap\textsuperscript{20}.

2.4 Svalbard

Svalbard has a special status under international law. It has given rise to disputes and it shows the complexity of the Norwegian-Russian relationship in the North\textsuperscript{21}. As will be described in the following, Norway has sovereignty today and this has an impact on the issue of delimitation between Norway and Russia. In addition to this, there is a very recent decision from the UN Commission on the Limits of the Continental Shelf (CLCS) regarding Norway’s continental shelf which gives a new aspect and makes it an interesting discussion. Lastly, like with the subject of the continental shelf in 2.8, it is needed to comment on the subject to complete the overview of the legal regime of maritime zones in the Barents Sea. For these reasons I will discuss Norway’s jurisdiction in the waters surrounding Svalbard.

Consistent to the Svalbard Treaty, as of 1920 and in force from 14\textsuperscript{th} of August 1925, Norway enjoys sovereignty over the Svalbard Island Group\textsuperscript{22}. Article 1 establishes that Svalbard is part of the Kingdom of Norway. The sovereignty is not questioned in itself and is supported by the founding fathers conscious choice of wording\textsuperscript{23}. The Treaty nevertheless regulates a special regime where the sovereignty has to be practised in cooperation with the limitations following the Treaty’s Articles 2-9. The articles of most interest are article 2 and 3, where it is stated that the contracting parties shall have equal right to the natural resources on land and in the territorial sea. These restrictions have not caused any particular problems for matters ashore and in the territorial waters. The question

\textsuperscript{20} See the following section, 2.6
\textsuperscript{21} An outline of Svalbard’s history can be found in Pedersen, The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries
\textsuperscript{22} Article 1, Svalbard Treaty
\textsuperscript{23} Fleicher, Studier i Folkret, p. 187
that has been raised is whether the restrictions following the Treaty’s article 2-9 shall apply to the EEZ and the Continental Shelf as well, in particular article 2 and 3.

The Norwegian position has been that the Svalbard Treaty does not apply outside the territorial water. On the continental shelf it is the ordinary Norwegian laws that regulate activities. This can be seen by the royal decree of 31st of May 1963 that the regulation of the Norwegian continental shelf attaches to the continental shelf of “the Kingdom of Norway”. According to the Svalbard Treaty this includes Svalbard24. The same view applies to the EEZ, as the Norwegian Act on the Exclusive Economical Zone of 17th of December 1976 applies to “the Kingdom of Norway”.

There has been an ongoing debate whether Norway’s position can be accepted under international law and several parties to the Treaty have made their objections25. A strong argument in favour of Norway’s position is the wordings and construction of the Svalbard Treaty. The Treaty ensures Norway sovereignty over Svalbard with the exception of the limitations put forward within the Treaty. As long as there are no limitation to the continental shelf following the Treaty, the main rule of Norwegian sovereignty attaches26. Now Norway’s position has been strengthened by the UN Commission on the Limits of the Continental Shelf (CLCS) decision that the continental shelf around Svalbard is the continuation of the Norwegian continental shelf and hence the whole continuous continental shelf belongs to Norway, with the admissible jurisdiction following the LOSC27.

Norway has avoided some difficulties in regard to the EEZ as they have not established an exclusive zone, but rather a non-discriminating 200 miles fishery zone. Nevertheless the 200 miles zone is claimed for the matter of delimitation in the Barents Sea versus Russia. This will be developed on in 2.6.2.

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24 Treaty Art. 1  
25 Ruud, Innføring i Folkeretten, p. 159  
26 Fleicher(1997)  
27 See 2.8 below
2.5 The Exclusive Economical Zone (EEZ)

2.5.1 Overview

The legal regime of the exclusive economical zone (EEZ) is complex because the coastal State has considerably more limited jurisdiction, while flag States enjoy the rights of the high sea and free navigation. The coastal State can give prescriptive jurisdiction in several matters, but it is not always an exclusive competence, as is the case for pollution questions (discussed below). This exemplifies the complexity of the EEZ. On this background it is said that the EEZ is a zone *sui generis*, meaning that it is unique. Said in the wordings of the Law of the Sea Convention it is a “specific legal regime established” where “rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention”, cf. Article 55.

The EEZ has origins from 1945 when it was claimed and described in the Truman Proclamations\(^28\). Together with the Latin American State practice from the 1940s and 1950s, this was the first foundation of the doctrine of the EEZ\(^29\). The EEZ has a close relationship to the doctrine of the continental shelf, which have been said to pave way for the establishing of the EEZ. Concerning the continental shelf, see 2.8. It is now widely recognized that the EEZ is firmly rooted in customary international law and for the States members to the LOSC it is governed by Part V in the Convention\(^30\).

The EEZ reaches 200 nautical miles out, measured from the same baselines as limits the territorial sea\(^31\). In this area the coastal State has sovereign rights in regard to the natural resources that exist in the waters, the seabed and its subsoil, as prescribed by Article 56 (1) (a). As for prescriptive jurisdiction, the coastal State can regulate their sovereign rights and in addition the coastal State is free to regulate matters of building installations in the EEZ, marine scientific research and protection and preservation of the marine

\(^{28}\) Molenaar, p.361 and Churchill and Lowe, p. 143-144
\(^{29}\) Op.cit
\(^{30}\) Op.cit
\(^{31}\) LOSC Article 57
environment\textsuperscript{32}. At the same time the second paragraph of Article 56 gives a reminder that the coastal State shall have due regard to the rights and duties of other States, like it follows from Article 58.

The coastal State’s jurisdiction in regard to protection and preservation of the marine environment seems absolute in Article 56, but the access to exercise prescriptive jurisdiction over vessel-source pollution is specifically governed by Article 211(5). Here it is stated that in the EEZ the coastal State can adopt laws and regulation concerning pollution, but it is only in so far as it is “conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference”. By virtue of this sentence it appears that the coastal States’ prescription ability is limited to implementation of international standards. The primary purpose of this rule is to ensure conformity in international shipping and uphold the right to enjoy free passage. The effect is that for the jurisdiction in the EEZ it is mainly international law that is of importance and applies to matters of pollution.

On the other hand, if pollution incidents affect the natural resources, Norway’s access to regulate it follows clearly from LOSC Article 56(1)(a). This section could potentially be used as an admission for the Norway to regulate vessel-source pollution in the EEZ as well. The necessity to adopt laws and regulations of its own is though not that pressing because of the large amount of international regulation of pollution\textsuperscript{33}. In any event the basic principle of \textit{lex specialis} provides that Article 211 supersedes Article 56.

It is necessary for a coastal State to declare its jurisdiction in the EEZ through legislation. Norway has done so by the Act No. 91 of 1976, “on the Norwegian exclusive economical zone”.

Enforcement jurisdiction follows the ability to prescribe closely. The principal provisions governing enforcement against vessels at sea are set out in LOSC Article 220 and 221. The starting point is that intervention by Norway as a coastal State is limited to situations where there are clear grounds for believing that a vessel has committed a

\textsuperscript{32} Prescribed in Article 56 (1) (b)
\textsuperscript{33} Pollution regulation is commented on in chapter 3
violation in the EEZ. Furthermore, for the matter of prevention, reduction and control of pollution, the infringed regulation has to be applicable international rules\textsuperscript{34}. Like we recently saw that Norway’s access to prescribe regulation in the EEZ is limited to implementation of international pollution regulation, the enforcement jurisdiction follows naturally the same pattern; only regulation admissible by the LOSC can be enforced. The enforcement jurisdiction will be more thoroughly discussed in chapter 3.

In short it can be stated that Norway has an access to enforce their pollution regulation in the EEZ, according to the LOSC, but that there is clearly a high standard for intervention.

\textsuperscript{34} LOSC Article 220(3)
Figure I: the maritime zones outside Norway

http://www.statkart.no/filestore/Landdivisjonen_ny/Kart Og Produkter/Grenser/Prod_10/ProductspesifikasjonGrenserForNorgemedbi.pdf
2.5.2 Delimitation of EEZ and the occurrence of dispute in relation to delimitation

Where a coastal State has opposite or adjacent coast with another State, LOSC prescribes guidelines for delimitation of the EEZs in Article 74. The Article declares how delimitation should be affected by agreement between the States and that it should be based on international law. By the second paragraph it is visible that a settlement of delimitation is the parties’ responsibility. Here it is stated that if no agreement can be reached within a reasonable period of time, the parties shall resort to the procedures provided for in part XV of LOSC. Part XV of LOSC contains regulation concerning peaceful settlement of disputes and procedural rules. By virtue of Article 74 the impression is that a dispute concerning delimitation is not acceptable under the LOSC. A solution is necessary, preferably by agreement between the States concerned and if it’s not achievable, then by dispute settlement following the rules of LOSC.

The third paragraph of Article 74 further underlines the parties’ responsibility; while waiting for the permanent delimitation, the parties shall “make every effort to enter into provisional arrangements of a practical nature”. Thus signaling the parties’ responsibility to achieve agreement and that a practical solution should only be temporary.

Norway is in a pending dispute with Russia, concerning the delimitation of their EEZs in the Barents Sea. The parties cannot agree on delimitation, but has sought a provisional agreement of a practical nature as provided for in Article 74, third paragraph. Next follows an overview of the situation of the delimitation dispute in the Barents Sea.

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35 Known as the Grey Zone Agreement
2.6  The sea border against Russia. The disputed area

2.6.1  Overview

Norway established an exclusive economical zone as of 17th of December 1976 with Act no. 91, while Russia claimed its exclusive economical zone in 1984. Norway and Russia disagree on which principle to be applied to delimitation of their EEZs. Hence the countries apply different delimitation principles and the countries’ claims overlap geographically. The result is a disputed area in the Barents Sea.

International law does not lay down a consistent rule for delimitation of EEZs. This situation of different methods of delimiting the maritime zone is the origin for the dispute between Norway and Russia. Norway claims that the principle of the median line applies to the delimitation in the Barents Sea. The median line is a fictive line measured to be in equal distance from both Parties coast. Russia on the other side claims the sector principle. The latter is based on a straight line from Russia’s western borderline along the meridian up to the North Pole, with only small adjustments due to Svalbard. Originally Russia used this principle in connection to a claim for their continental shelf and it has its origin from a decree of 1926. The decree and claims according to the sector principle were later extended to the EEZ as well in 1984 when Russia established its EEZ.

The picture in the map is a straight line further to the west according to Russia’s claim and a line further east heading in an east-north direction that is the borderline according to Norway. The area in between the two lines is the disputed area in fact. This area forms part of the area known as the Grey Zone (square with dotted line in the illustration below), where Norway and Russia has an agreement of joint fisheries.

It is a fact that Norway and Russia’s claims overlap outside the EEZ of 200 nautical miles as well, as the borderline between Norway and Russia needs to be delimited all the

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36 Kovalev, Contemporary issues in the law of the sea: modern Russian approaches, p. 177
37 Østreng, Delelinjene I Barentshavet, planlagt samarbeid versus uforutsett konflikt, Perspektiv 04/07
38 Op.cit and , Falkanger, p. 333
39 The Grey Zone Agreement is described in 2.6.2
way up to the North Pole. In this context however, only the disputed area within the EEZ will be concerned with. Outside 200 nautical miles only the continental shelf needs to be delimited and the sea areas are considered as the ‘High Seas’. For this thesis’ topic, which focuses on vessel-source pollution, only EEZ delimitation is interesting and this is the area referred to as the “disputed area” within this thesis.

Figure II: Illustration of the Grey Zone and the disputed area. The Grey Zone is the area within the dotted line and the disputed area is the triangle in darkest grey colour.

40 The legal concept of the High Seas is described in 2.7. What is important in this context is that a coastal state has no jurisdiction on the seas and can thus not deal with vessel-source pollution, as a starting point.
Although there is not a consistent rule for delimitation, international law is generally in favour of the median line. The Law of the Sea has a combined rule, but with the median line as a starting point for delimitation in the territorial zone. In regard to delimitation of the EEZ the LOSC Article 74 states:

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

According to Article 38 of the Statutes of the International Court of Justice, the court shall apply international conventions, international custom, general principles in law recognized by civilized States and judicial decisions and the teachings of the most highly qualified publicists.

Even though Russia has not accepted the competence of the ICJ in the dispute in question, the applicability of Article 38 cannot be circumvented. The ICJ is one of UN’s main bodies and according to the UN-Charter’s Article 72, the statues of the ICJ shall be accorded as an integrated part of the Charter. Further on, Article 73 of the Charter states that all members shall be deemed to have accepted the Statutes by the ratification of the Charter. Hence Russia, as member to the UN-Charter, is bound by the Statues of the ICJ and Article 38 is determining the application of law in the disputed question of delimitation in the Barents Sea.

The primary solution of LOSC is agreement between the parties. If agreement cannot be reached, the LOSC does not indicate which principle is to determine the delimitation. It does not favor the median line nor the sector principle, or other solutions. Nevertheless the article refers to the Statutes of ICJ Article 38 which implies that international conventions will apply to the question. Among the international conventions

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41 Falkanger, p. 334 and resent decisions by the ICJ, the Qatar-Bahrain Case from 2001 and Cameroon-Nigeria Case from 2002.
42 LOSC Art. 17
43 http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&PHPSESSID=893d3f4f181e10843da1c41903f3b3a7 (last visited 24.08.09)
44 UN Charter, Article 7
the Geneva Convention of 29th of April 1958 must be counted, hereinafter named the Continental Shelf Convention. The Continental Shelf Convention is ratified by both Norway and Russia.

Directly, the Continental Shelf Convention only applies to questions related to the continental shelf. Now, the border between Norway and Russia in the Barents Sea is disputed both in regard to the EEZ and the continental shelf. It could be possible with separate delimitation of the maritime zone and the shelf, but it would both be impractical and the parties seem to seek a united solution for the delimitation of the border in the Barents Sea. Furthermore the ICJ seems to avoid delimiting several borderlines. In this situation the Continental Shelf Convention’s regulation of delimitation has impact both through the LOSC, cf. Statutes of ICJ Article 38, and for the cause of finding a united solution on delimitation in the Barents Sea. The Continental Shelf Conventions Article 6 no. 1 reads:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of the territorial sea of each State is measured.

Still, the primary solution is agreement between the parties, but if it is not achievable, the main rule is a boundary following the median line “unless another boundary is justified by special circumstances”. This leaves us in a situation where the median line principle should apply unless Russia can prove “special circumstances” that can justify the sector line principle that they claim. In this debate the special geography of the Norwegian coast is a valid argument. The Varanger half island pushes the median line far to the east in comparison to the rest of the countries land. Taken into account that international law also contains a requirement for equity, this is Russia’s best chance of proving “special circumstances” to justify another solution than the median line principle. Secondly Russia

claims the decree of 1926 as a special circumstance, but this has little international support. The sector principle has little support in international law as well\(^{46}\).

Even though it is likely that the Continental Shelf Convention and its guidelines on delimitation will have impact on the delimitation question, the rulings of the ICJ demonstrate that the court has been reluctant to apply the Continental Shelf Convention’s regulation directly on the question. The ICJ has rather sought an “equitable solution” as it is the rule in LOSC Art. 74, 2. paragraph\(^{47}\). The approach is nevertheless quite similar for the assessment of an equitable solution. The ICJ’s starting point in the assessment has been the median line with further adjustments in case of inequitable results of the median line, cf. the Qatar-Bahrain case of 2001 and the Cameroon-Nigeria case of 2002. The situation is thus that the legal assessment of delimitation is more or less the same, whether the legal basis is the Continental Shelf Convention or the LOSC Article 74.

Unless Russia will approve the competence of the ICJ in the case of delimitation in the Barents Sea, the conclusion to the dispute is depending on an agreement between Norway and Russia. Most probably it will be complicated for the parties to achieve consensus; so far it has proven to be difficult and with the new knowledge of natural resources in the subsea soil it is reasonable to believe that the Parties will not be lenient against compromises in the disputed area. The status quo of uncertainty increases the need for a temporary solution to deal with pollution matters. This will be discussed in chapter 4.

For the part of the sea border between Norway and Russia closest to their ashore borderline, the parties had an agreement dating back to 15\(^{th}\) of February 1957\(^{48}\). Recently the Parties continued their agreement when they reached consensus and agreed on delimitation within the Varangerfjord-area. The agreement was concluded in 2007 through the “Agreement between Norway and Russia of delimitation in the Varangerfjord-area” of 11\(^{th}\) of July 2007. The agreement could be seen as a step towards a solution of delimitation in the Barents Sea, but in reality it would be to be to read too much into the parties’ conduct. This is because the area where the delimitation applies does not concern areas

\(^{46}\) Elferink, p. 222-223
\(^{47}\) See The Tunisia-Libya case of 1981 and The Gulf of Maine case of 1982
where the States disagree. The line of delimitation is 73 km long and ends at the point where Norway’s claim of the median line and Russia’s estimations diverges\(^49\). Further the Agreement of delimitation expressly states in Article 4 that the agreement of delimitation shall have no other implications to other questions of delimitation.

### 2.6.2 The Grey Zone Agreement between Norway and Russia

Although Norway and the Soviet Union have a disagreement regarding the delimitation in the Barents Sea, the countries early saw the need for cooperation and administration in this area and managed to reach an agreement. The agreement was called “Avtale mellom Norge og Sovjetunion om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet”, which freely translated means a “temporarily, practical agreement for the fisheries in a contiguous zone in the Barents Sea”. The agreement is better known as “the Grey Zone Agreement” and for this reason and for the matter of convenience I will in the following use this term.

The Grey Zone agreement was signed by the Parties on the 11\(^{th}\) of January 1978. Like the original title express, the agreement was meant to be temporarily; a temporarily agreement to organize the practical side of shearing and administrating the resources in the ocean while a dispute of the delimitation lasts. This is underlined throughout the Agreement; in the title, in Article 1 and in the conclusive declaration by Norway. Nevertheless the agreement has been renewed every year since and was this year, 2009, renewed for the 31\(^{st}\) time\(^50\). It is clear that a solution to the dispute and a final result of delimitation is desired, but as long as this is not achieved a temporarily agreement is the best solution. It is certainly better than a complete absent of regulation which inevitably could lead to disputes and uncertainty.


The Parties to the Agreement of 1978 was Norway and the Soviet Union, while it today is Norway and Russia. The Agreement was sustained by the new founded Russian Federation after the fall of the Soviet Union.

The area which the Agreement regulates, commonly called the Grey Zone, is set by seven coordinates with Article 2 of the Agreement as the legal basis. The area is approximately 67 500 km2, where approximately 61.000 km2 is the disputed area, cf. 2.6.1. This means that part of the area is unquestionably within Norwegian waters (area A in the illustration) and similarly, the area farthest to the east is unquestionably Russian waters (area B in the illustration). For illustration see figure II above.

The total area is located within 200 nautical miles from the countries’ shore. Hence the Grey Zone is within the EEZ; no matter how a final delimitation will look like and which country that will obtain jurisdiction in the disputed area. It should be remembered that both Norway and Russia have ratified the LOSC and adopted laws that ensure the countries an EEZ of 200 nautical miles.

The purpose of the Agreement was and is, to administrate the fish stocks. As the letters between the Parties show, attached as a kind of preamble to the Agreement, the Parties express their mutual interest and responsibility for the fish stocks in the Barents Sea, and that the aim of the Agreement was to control and regulate the fisheries in the area.

The Agreement lies down that the Parties shall constrain themselves from any enforcement of Regulation above fisheries that vessels flying the flag of the other party carries out. Further the Agreement regulates how both parties can allow third parties to fish in the Grey Zone and the information the parties shall pass on to each other.

The Agreement solves the question of which jurisdiction the Parties have in the Grey Zone in regard to fisheries. A Party’s access to jurisdiction, in the form of prescribing regulation, control and enforcement, follows by interpretation by negative implication of Article 3 and the legislative idea of the Agreement. Jurisdiction in the form of control of third parties’ vessels is not explicitly regulated by the agreement either. Again, the underlying legislative reasons for the Agreement, which is to protect the fish stocks, suggest that a Party has the ability to control these vessels as well. Article 5 leads in the same direction, which states that the control should take form through cooperation. Hence
both Parties have the admissibility to control third parties’ vessels. For the other Party’s vessels it is clearly stated in Article 3 that a Party shall “restrain themselves from enforcement in any form”.

The prohibition of control of the other Party’s vessels is in regard to “regulation of the fishery”. A Party’s access to give regulation and enforce in matters of other interests to the State is not regulated by the Agreement. As long as it is not prohibited, then the ordinary rules in LOSC will apply. As a starting point the area of the Grey Zone is within the EEZ and the coastal State’s jurisdiction is regulated by international law, i.e. LOSC. However the Grey Zone is in a disputed area and this raise the question; which implications does this have for a coastal State’s prescriptive and enforcement jurisdiction? In specific, which impact does it have on Norway’s access to prevent vessel-source pollution in the disputed area? This will be subject to the discussion of chapter 4.

2.7 The High Seas

The characteristic nature of the High Seas is the freedom it entails. Traditionally it has been free use of the high seas for all States and exclusively flag State jurisdiction\(^5\). What we define as the high sea is in LOSC Article 86 prescribed as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters”. The character of the high seas has not changed much by the third LOSC; still the high seas are “open to all States, whether coastal or land-locked”\(^6\). The freedom comprises navigation, overflight, fishing and scientific research in addition to freedom to lay pipelines and construct artificial islands\(^7\), and Article 89 simply states that no State may validly purport part of the high sea and claim sovereignty. From

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\(^5\) Churchill and Lowe, p. 203  
\(^6\) LOSC Article 87  
\(^7\) Op.cit
this it also follows that no State can prevent ships of other States from using the high seas in a way admissible by LOSC and customary international law\textsuperscript{54}.

2.8 The Continental Shelf

In this section I have chosen to comment on the continental shelf to fully complete the overview of the Norwegian territory and Norwegian rights. It is a fact that the rights in connection to the continental shelf have limited impact on the question of a coastal State’s opportunity of regulating pollution in the EEZ and the disputed areas. On the other hand the lengthy Norwegian continental shelf can at the same time have importance in the question of delimitation between Norway and Russia, which certainly has an impact on Norway’s admission to regulate pollution in the disputed area.

The continental shelf comprises the seabed and subsoil of the areas which constitute the “natural prolongation” of the land mass of the coastal State. It is a complicated methodology established in LOSC Part V that decides where the continental shelf ends\textsuperscript{55}. In short one can say that it is the geological matters that are decisive. A coastal State has to make a declaration which then is subject to a review by the UN Commission on the Limits of the Continental Shelf\textsuperscript{56}.

The continental shelf jurisdiction is limited to exploring and exploiting the natural resources of the sea bed. It does not affect the legal status of the superjacent waters and the area will be part of the high sea for all other purposes than the coastal State’s right to the shelf’s natural resources\textsuperscript{57}.

In the case of Norway, the length of the continental shelf was recently reviewed by the UN Commission on the Limits of the Continental Shelf (CLCS). Since Norway’s prolongation of the land mass continues beyond the 200 nautical miles limit without going

\begin{itemize}
\item \textsuperscript{54} Churchill and Lowe, p. 205
\item \textsuperscript{55} LOSC Article 76
\item \textsuperscript{56} Established under LOSC, see Article 76(8)
\item \textsuperscript{57} LOSC Article 78(1)
\end{itemize}
down to far sea deeps\textsuperscript{58} Norway has submitted the CLCS with materials to prove that the Norwegian continental shelf is far longer than what follows by the standard solution. The CLCS gave a recommendation that was in line with the Norwegian considerations\textsuperscript{59}. One important aspect about the recommendation is that Svalbard is not considered to have a separate continental shelf. The continental shelf around Svalbard is the continuation, and part of, the Norwegian continental shelf. After the Commission’s recommendations the coastal State can then declare the outer limits with final and binding effect\textsuperscript{60}.

\begin{itemize}
\item\textsuperscript{58} LOSC Article 76
\item\textsuperscript{59} http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf
\item\textsuperscript{60} LOSC Article 76(8)
\end{itemize}
3 Fighting Vessel-Source Pollution

3.1 Introduction

With the area of Norwegian jurisdiction at sea sorted out, the next step is to examine what rights and obligations Norway has to prevent, reduce and control vessel-source pollution within this area. This will represent a maximum of Norwegian influence in the area where the Norwegian jurisdiction is not clear, i.e. the disputed area in the Barents Sea. Within Norwegian jurisdiction Norwegian laws apply and this implies a responsibility on the State. Furthermore the State has a responsibility for the obligations taken on through the international conventions it has ratified. The access and the obligation to act against pollution will form an important basis for the discussion of Norway’s access to regulate vessel-source pollution in the disputed area, in chapter 4.

As one can detect from the outline of maritime zones in chapter 2 above; States may generally prescribe their own, national, pollution regulation for their internal waters and territorial sea. Beyond the territorial sea, however, prescriptive jurisdiction must be specifically conferred by international law. For this reason the international legal framework dealing with vessel-source pollution is particularly important in regard to pollution in the Barents Sea which primarily is EEZs and High Sea. The LOSC is still fundamental for the outline of a coastal State’s possibilities in its waters. While MARPOL 73/78 will be held as the basic convention dealing with vessel-source pollution, it is still adjusted in accordance with LOSC. The MARPOL Convention does not deal with jurisdiction issues; in Article 9(3) it is merely stated that the term jurisdiction in the convention shall be construed “in the light of international law”. At the interception of the MARPOL Convention LOSC III was not yet a reality and the debate was at that time tempered in regard to coastal State jurisdiction. The MARPOL Convention left the limits of coastal State jurisdiction for the LOSC to resolve. The result is a close relationship between the two conventions, where the MARPOL convention must be read in conjunction

61 Tan, p. 185
with the LOSC. MARPOL specifies how State jurisdiction should be exercised to ensure compliance with anti-pollution regulation, while the degree to which coastal States may enforce MARPOL regulations in respect of foreign vessels in the EEZ is a subject regulated by LOSC\(^\text{62}\). As we will see below, the relationship is visual through the institute of “GAIRAS”.

The conventions and laws that will be examined in the following are chosen because they all are central in the combat against pollution at sea and they have relevance for the topic. Opening, the preventive regulation will be commented on; the MARPOL Convention will naturally be described in 3.2, afterwards the national legislation where the Pollution Control Act and Ship’s Safety Act are essential in 3.3. In 3.4 and 3.5 the thesis will detect the State’s possibilities of enforcing the regulation by examining the port State control and coastal State control. Following in 3.6 an outline of the legal framework in connection to acute pollution, by comments on regulation of response; the OPRC Convention, a bilateral agreement between Norway and Russia and last the Intervention Convention. These Conventions show part of the coastal State’s opportunity to take action against incidents of pollution. In 3.7 this chapter is summed by an outline of Norway’s possibilities and obligations in the EEZ.

3.2 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)

The International Convention for the Prevention of Pollution from Ships (MARPOL 73) was adopted at a conference in 1973, which purpose was to update MARPOL’s predecessor OILPOL 54. OILPOL 54 was a first initiative by the maritime community to

\(^{62}\) For a comprehensive overview of the relationship between UNCLOS and various IMO instruments (amongst others MARPOL) see: IMO LEG/MISC.5, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization
reduce oil pollution at sea\textsuperscript{63}. The main purpose of these initiatives was to prevent pollution from operational discharges. OILPOL 54 was superseded by MARPOL 73\textsuperscript{64}.

MARPOL 73 consisted of many technical requirements set out in five annexes to the convention. The intent of the conventions regime was to achieve a complete elimination of intentional pollution and also to minimize accidental discharges of oil and other harmful substances. Inevitably an ambitious plan. Unfortunately some of the technical requirements were a bit too rigid for the convention to come into force, but luckily a new conference was held to do the necessary adjustments in 1978. The result was MARPOL 73/78, i.e. the 73 and 78 editions are to be read together as one piece. The 1978 protocol opened up for this solution together with the consequence that new states ratifying the convention in 1978 would be part of the 1973 convention as well\textsuperscript{65}.

Today the convention consist of six annexes, the two first ones are mandatory for contracting States, Annex I and II\textsuperscript{66}, while the four remaining are optional. Annex I contains Regulations for the prevention of pollution by oil and Annex II concerns Regulations for the control of pollution by noxious liquid substances in bulk. The optional annexes are Annex III Regulations for the prevention of pollution by harmful substances carried by sea in packaged form, Annex IV Regulations for the prevention of pollution by sewage from ships, Annex V Regulations for the prevention of pollution by garbage from ships and last Annex VI Regulations for the prevention of air pollution from ships. In this thesis I will focus on the mandatory annexes, Annex I and II, as the focus of the thesis is to detect the possibility of regulating ships pollution in the disputed areas of the Barents Sea, which lie within the EEZ. Like we saw above in 2.1.3, a coastal States prescriptive jurisdiction is limited to adoption of regulation “conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference”\textsuperscript{67} in its EEZ. In short I will refer to this as generally accepted international rules and standards –“GAIRAS”.

\textsuperscript{63} See De La Rue and Anderson, “Shipping and the environment”, p. 822 for details
\textsuperscript{64} MARPOL 73, Article 9
\textsuperscript{65} De La Rue and Anderson, p. 824
\textsuperscript{66} MARPOL 73, Article 14(1)
\textsuperscript{67} LOSC Article 211(5)
Today it is reckoned that Annex I and II of MARPOL is GAIRAS\textsuperscript{68}. Hence, the directive found in MARPOL Annex I and II is among what a coastal State has the opportunity to regulate in the EEZ. There are also voices that hold that GAIRAS refers to the principal instrument on marine pollution, MARPOL 73/78\textsuperscript{69}. Read like this GAIRAS is not limited to the two mandatory Annexes. The author Tan holds that as long as it can be established that a specific rule or standard enjoys sufficiently general state practise in a particular field of regulation, the rule of reference (GAIRAS) ought to extend to that rule\textsuperscript{70}. In a situation like this there has to be proven a sufficient general acceptance for the specific rule, not the general acceptance of the legal instrument where the rule appears. This calls for a case-by-case study, also for the rules and standards found in MARPOL’s annexes. In any event, MARPOL 73/78 has spread wide and as of 1\textsuperscript{st} of January 2009 there were 149 States members to the convention\textsuperscript{71}. The convention is an international success.

**Annex I** is the main source in international law for preventing oil pollution from ships\textsuperscript{72}. The content of Annex I is two-sided; it contains technical requirements to the ships, hence reducing the risk of pollution in case of accidents. A typical example is the requirement of double hulls for oil tankers\textsuperscript{73}. Secondly it contains rules to control initial operational discharges.

**Annex II** applies to all ships carrying noxious liquid substances (NLS) in bulk\textsuperscript{74}. The regulation has common features with Annex I and contains both technical requirements for ships carrying NLS in bulk and it regulates discharge of NLS. Furthermore both Annex I and II calls for record books\textsuperscript{75} and an emergency plan\textsuperscript{76}. There is also a requirement for the government of each party to the convention to ensure reception facilities\textsuperscript{77}. There are three situations that constitute exceptions to the restrictions on discharge. The first situation is in case of force majeure, i.e. the discharge is necessary for

\textsuperscript{68} Churchill and Lowe, p. 346
\textsuperscript{69} Tan, p. 195-196
\textsuperscript{70} Tan, p. 196-197
\textsuperscript{71} De La Rue and Anderson, p. 847
\textsuperscript{72} Op.cit, p. 824
\textsuperscript{73} Regulation 19 and 20
\textsuperscript{74} Regulation 2(1)
\textsuperscript{75} Regulation I/17 and 36 and II/15
\textsuperscript{76} Regulation I/37 and II/17
\textsuperscript{77} Regulation I/38 and II/18
the purpose of securing safety of a ship or salving life. Secondly the discharge requirements
do not apply when discharge is a result from damage to a ship or its equipment. Third it is
accepted when the purpose is combating specific pollution incidents\(^{78}\).

The main Convention MARPOL 73/78 states a member State’s obligations. Article
4 is central in the way it states that violation of the convention shall be prohibited and that
sanctions shall be established. According to the first paragraph this applies to violation by
the fleet flying the flag of the contracting Party, furthermore the obligation to detect and
prosecute violations attach to all incidents within the State’s jurisdiction\(^{79}\). Article 12 states
that the Parties are obliged to conduct an investigation of any casualty occurring within the
applicability of the convention. Furthermore a contracting Party takes on responsibility to
promote technical cooperation\(^{80}\).

Norway has first and foremost complied with its duties through declaring the

### 3.3 Norwegian Law on Vessel-Source Pollution

The main legal tool in the Norwegian legislation to prevent pollution is the Pollution
Control Act of 13\(^{th}\) of March 1981\(^{81}\). The Pollution Control Act is general and covers all
kinds of pollution and discharge. Hence it is also a relevant national act in regard to vessel-
source pollution. One aspect is that it is an act of authorization, which channels the
necessary power to enforce the regulation to the Government. Various directorates are
given authority after the Pollution Control Act\(^{82}\), where the head directorate is the
Norwegian Pollution Control Authority under the Ministry of the Environment’s
supervision. The Act also gives the Government the necessary power to amend further

\(^{78}\) Regulations I/4, II/3  
\(^{79}\) Article 4(2) and Article 6  
\(^{80}\) Article 17  
\(^{81}\) The Pollution Control Act is available in English at government.no,  
\(^{82}\) Pollution Control Act, § 81
regulations concerning matters of pollution and discharge, which is done to a wide extent. A Regulation is given on vessel-sourced Pollution by Regulation of 16th of June 1983. The Regulation is given in accordance with both the Pollution Control Act and the Ships’ Safety Act83 and is commonly called the MARPOL-Regulation. This regulation of vessel-sourced pollution implements the obligations Norway has according to MARPOL 73/78, see above.

The Act is applicable to pollution occurring within the realm, pollution threatening to occur within the realm and lastly it also covers pollution occurring within the EEZ and threatening to occur within the Norwegian EEZ as long as the source of pollution is a Norwegian ship or construction, cf. § 3. There is an opening to increase the applicability due to the sections wording “otherwise to the extent decided by the King”84. The applicability is extended in one concern with ”FOR 1997-09-19 nr 1061: Forskrift om inngrep på åpent hav og i Norges økonomiske sone i tilfelle av havforurensning eller fare for forurensning av olje eller andre stoffer som følge av en sjøulykke.”, freely translated this is the ”Regulation of Intervention at the High Sea and in the Norwegian Exclusive Economical Zone in case of pollution of the sea or threat of pollution by oil or other substances as a consequence of a marine casualty”. The Regulation follows the Intervention Convention closely, see below in 3.6.3. Furthermore the Pollution Control Act is extended to apply to Svalbard and Jan Mayen according to Regulation of 22nd of August 1997.

In regard to vessel-source pollution the Pollution Control Act is first and foremost relevant in matters of acute pollution. Its chapter 6 deals with acute pollution and response to incidents. In regard to discharges besides incidents of acute pollution, the Ships’ Safety Act anno 2007 is the central act. The Ships’ Safety Act contains both regulation on technical standards (ch.3) and discharge regulation (ch.5), which are typical fields of the MARPOL Convention. In Ships’ Safety Act § 31 it is simply stated that discharge and dumping from a vessel is prohibited, unless it is explicitly allowed by regulation. The general rules on construction, contingency plans and reception facilities are also found in

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83 The former Act of 9th of June 1903, followed up in today’s Ships Safety Act in force as of 16th of February 2007
84 Pollution Control Act, § 3(2)(3)
chapter 5 (§§ 32, 34 and 35) as it is known from the MARPOL Convention. The detailed regulation of discharges is found in the MARPOL-Regulation.

Moreover it follows from § 3, second paragraph, that the Acts’ regulation is applicable to foreign vessels in Norwegian territorial water and the EEZ as well. In both prescribing and enforcing the regulation above foreign vessels, it is a requirement that it is admissible by international law\(^{85}\) (it would anyway be a requirement after international law via LOSC and the requirement of standards to GAIRAS in the EEZ). This opening increases Norway’s opportunity in the combat against vessel-source pollution in the Barents Sea. The opportunity is further extended by the third paragraph of § 3, where it is stated that the King can expand the Act’s applicability to waters beyond the EEZ by prescribing a Regulation, as long as in compliance with international law. It follows from the preparatory works\(^{86}\) that the potential situation is the one described in LOSC Article 218. With this article the LOSC gives admittance to legal proceedings against discharges that have occurred in waters beyond Norwegian EEZ if the vessel later enters a Norwegian Port. This is a matter of port State control, which naturally leads us on to the next subchapter.

### 3.4 Port State Control

While we have both national and international legislation prohibiting vessel-source pollution prescribed, enforcement of them is another side of a State’s jurisdiction. Enforcement represents a State’s opportunity of fulfilling the aims of the regulation. As commented on in the introduction, a State has jurisdiction as a flag State and geographically as a coastal State and a port State. Here I will outline the enforcement powers of a port State.

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\(^{85}\) Ships’ Safety Act § 3, 2. paragraph “med de begrensninger som følger av folkeretten”

\(^{86}\) NOU 2005: 14, p. 82 and Ot.prp.nr.87 (2005-2006) p.106
The implications of port State control in regard to this thesis’ subject, is that Norway has extended possibilities of enforcing its regulation of pollution in the Barents Sea if the vessel suspected of pollution anchors up in a Norwegian port. In LOSC the obvious admittance of port State control is found in Article 220(1). Here the customary international law was confirmed, providing that a State may institute proceedings against vessels voluntarily within port which has violated the pollution laws of the State which is in accordance with international law, while inside waters where the port State has jurisdiction.

By introducing Article 218 however, the LOSC was innovatory. The article states that a port State may even take legal proceedings against vessels alleged to have discharged outside the State’s territorial sea and EEZ. It is a requirement that the case is “violation of applicable international rules and standards established through the competent international organization or general diplomatic conference”. Altogether a port State may now conduct investigations of all vessels in their port in case of suspicion of polluting incidents practically anywhere at sea. If the alleged discharge has occurred within another State’s internal waters, territorial sea or EEZ the port State however, the port State cannot take legal proceedings unless the offended State or the flag State requests it.

According to Article 219 a port State shall take administrative measures to prevent further pollution in case a vessel is “in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment”. The vessel is not allowed to sail until the cause of violation is removed or transported to the closest repair yard. The coastal State control seems to constitute a broad opportunity for a port State to control alleged incidents of vessel-source pollution.

3.5 Coastal State Control

Although port State control seems broad, it is dependent on the vessel suspected of pollution stopping in a port. That is by far not always the case; especially large vessels can

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87 Churchill and Lowe, p. 350
cross huge distances without stopping in ports. Besides, in case of polluting vessels it is not implausible to suspect that a polluting vessel will leave the polluting area and sail by. In case a vessel is merely sailing through the Norwegian Waters and the EEZ the opportunity of coastal State control is essential to leave Norway with a chance of fighting pollution in the Barents Sea. The basis for a coastal State’s enforcement jurisdiction in regard to protection and preservation of the marine environment is found in LOSC Article 220.

In regard to vessels in passage through the territorial waters there has to be clear grounds for believing that the vessel has violated the coastal States pollution regulation, which is in accordance with LOSC. In these incidents the coastal State may physically inspect the vessel, and if the evidence so warrants, it may institute proceedings, including detention of the ship.\(^88\)

In the EEZ the access to enforcement vary in correlation to the suspicion and the graveness of the pollution. The starting point is the same as for incidents in the territorial sea; there has to be clear grounds for believing that a vessel has committed a violation in the State’s EEZ. Furthermore the infringed regulation has to be applicable international rules\(^89\). If the violation is not a substantial discharge causing or threatening to cause significant pollution, the coastal State’s authorities may only require the vessel to provide them with information\(^90\). If however the violation is resulting in a substantial discharge, the coastal State’s powers are broadened to include inspection if the vessel has either refused to give information as requested or the given information is evidentially at variance with the factual situation\(^91\). Lastly the coastal State has an unlimited admission to enforce through inspection when there is clear objective evidence that a vessel has committed a violation that results in discharge causing major damage or the threat of one\(^92\). The proceedings may include detention of the vessel.

Altogether we see that the coastal State is accoutred with the ability to inspect vessels which is suspected to have violated pollution regulation. However it is limited to violation of GAIRAS and in the EEZ the enforcement is further limited to grave pollution

\(^{88}\) LOSC Article 220(2)  
\(^{89}\) LOSC Article 220(3), see 2.5.1 for an outline of the prescriptive jurisdiction in the EEZ  
\(^{90}\) Op.cit  
\(^{91}\) LOSC Article 220(5)  
\(^{92}\) LOSC Article 220(6)
matters. The positive outcome of the restraint of enforcement to concern GAIRAS is that it secures foreseeable and good conditions for international shipping through an easy passage through territorial waters on the same terms in all oceans and the freedom of the high seas in the EEZ, while the protection of the environment is secured through an access for intervention by the coastal State which has the closest interests and best opportunities for a quick and effectual response.

The enforcement in regard to violation of pollution standards does not apply to warships or other ships of another State used in governmental non-commercial service. A similar rule is also found in MARPOL Article 3-3. Therefore, in pollution incidents by war- and state-ships the responsibility fully lies with the flag State.

3.6 Acute Pollution Response

While the regulation concerned so far in chapter 3 is aimed at prohibition of vessel-source pollution, this section will examine regulation concerning response and preparedness to the occurrence of pollution incidents. This will illustrate Norway’s chance to take action in case of pollution incidents in the Barents Sea, which is an important side of preserving the marine environment there. Incidents which calls for a response will in most matters be defined as acute pollution. In the Pollution Control Act acute pollution is defined as “significant pollution that occurs suddenly and that is not permitted in accordance with provisions set out in or pursuant to [the Pollution Control Act]”. As we will see, a situation more or less similar to acute pollution in the meaning of the Pollution Control Act is required for a coastal State to be allowed to take action against polluting vessels.
3.6.1 International Convention on Oil Pollution Preparedness, Response and Co-operation ("OPRC Convention")

The Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) is a result of an acknowledgement that the plans for prevention and response to oil pollution prior to the convention was not good enough to cope with the serious risk an oil pollution at sea represents. The acknowledgement came post several disasters of vessel-sourced oil pollution\(^{93}\). It is certain that it is not enough to have regulation with the aim of prohibiting and reducing pollution as it is, unfortunately, for sure that there will be incidents of pollution even so. As the convention’s title implies, the OPRC Convention attempts to improve both the preparedness for pollution through plans, the response to a possible incident of oil pollution and ensure cooperation across borderlines. The OPRC Convention came into force 13\(^{th}\) of May 1995 and as per 1\(^{st}\) of January 2009 in force in 98 contracting States, including Norway\(^{94}\).

On the subject of preparedness, the OPRC Convention calls for Oil Pollution Emergency Plans\(^{95}\). The emergency plans are to be onboard every ship under the flag of a Party to the convention. The same applies to offshore units\(^{96}\). Further on the ships and units are obliged to report discharge and probable discharge of oil\(^{97}\). As for the response to incidents, the OPRC Convention contains regulation on how the Parties shall act to a report of oil pollution\(^{98}\) and require the States to establish both national and regional systems for preparedness and response\(^{99}\). Lastly, for cooperation the OPRC Convention instructs the parties of the convention to cooperate and provide the service and equipment they can

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\(^{93}\) Like *Exxon Valdes*, an American tanker broken the 24\(^{th}\) of March 1989. For details of the incident see De La Rue and Anderson, p. 48.

\(^{94}\) De La Rue and Anderson, p. 1155. Russia has ratified the OPRC HNS Protocol 2000 per 1\(^{st}\) of January 2009, but not the main OPRC Convention.

\(^{95}\) Article 3(1)

\(^{96}\) Article 3(2)

\(^{97}\) Article 4

\(^{98}\) Article 5

\(^{99}\) Article 6
afford, taking their capabilities into account\textsuperscript{100}. The cooperation also includes financial agreements and cooperation in research and developments\textsuperscript{101}.

Originally the OPRC Convention only dealt with incidents involving oil pollution. Today there is an OPRC-HNS Protocol in addition, in force from 14\textsuperscript{th} of June 2007. The protocol requires similar measures for Hazardous and Noxious Substances (HNS) as those mandated by OPRC.

Norway has complied with the obligations following the OPRC Convention through various regulations. The requirement for ships flying the Norwegian flag to have an emergency plan and report is fulfilled through the Ship’s Safety Act of 16\textsuperscript{th} of February 2007\textsuperscript{102}. The oil reporting procedures is also regulated through Regulation of 9\textsuperscript{th} of July 1992, in case of acute pollution. The Government’s actions in case of pollution reports are regulated in the Pollution Control Act, chapter 6.

The bilateral agreement Norway has with Russia “Agreement concerning the Combatment of Oil Pollution in the Barents Sea” is another way in which Norway has complied with the OPRC Convention, especially the obligation following the Convention’s Article 6(2) and Article 7. The quickest reply to the convention was the agreement concerning Co-operation in Measures to deal with Pollution of the Sea by Oil of 1971 between the Nordic States Denmark, Sweden, Finland and Norway though\textsuperscript{103}. The agreement was followed by the Convention on the Protection of the Environment in 1974\textsuperscript{104}.

\textsuperscript{100} Article 7
\textsuperscript{101} Respectively, Annex "Reimbursements of Coasts of Assistance" to OPRC Convention and Article 8
\textsuperscript{102} Ship’s Safety ActChapter 5, in particular § 34
\textsuperscript{103} Churchill and Lowe, page 337
\textsuperscript{104} Op.cit
3.6.2 Bilateral agreement between Norway and Russia concerning the Combatment of Oil Pollution in the Barents Sea

The agreement between Norway and Russia concerning combatment of oil pollution in the Barents Sea was entered into 28th of April 1994. The agreement was entered into on the background of an awareness of the increased threat of pollution incidents the countries’ activities in the Barents Sea represents, i.e. shipping, fishing and petroleum. According to the agreement the Parties shall inform each other in case of incidents of oil pollution that may influence the other Party. For the matter of acute oil pollution there exist a separate preparedness plan, which lies down how notification shall be given and how a State administrated response’s actions shall be carried out. The preparedness plan exist as of the same date as the Agreement, 28th of April 1994, and is called “Joint Norwegian-Russian Contingency Plan for the Combatment of Oil Pollution in the Barents Sea”. As prescribed by the bilateral agreement, the contingency plan sets out how response operations shall be carried out (chapter 5) and further how there should be joint planning (chapter 4) and also the establishment of joint response centres (chapter 6).

3.6.3 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties

The Intervention Convention is concerned with intervention on the high sea. The objective of the convention is simply to secure the prevention of vessel-source pollution by providing the parties with the opportunity to intervene in cases of grave pollution outside the territorial waters. Article I.1 is the basis for intervention, where it is stated that the parties to the convention can take such measures as may be necessary to prevent grave and imminent danger of pollution that may cause major harmful consequences to the coastline or related interests, following a marine casualty.
Like the OPRC Convention was a response to tragedies of vessel-sourced pollution, in particular the incident of *Exxon Valdes*, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (hereinafter the Intervention Convention) was an effect of the *Torrey Canyon* disaster in 1967\(^{105}\). To prevent further pollution, the British government made radical steps through aerial bombardment. This disaster showed the world how it can be absolutely necessary with State intervention, and after only a couple of years the Intervention Convention saw the light of day, on the 29\(^{th}\) of November 1969.

The requirements for intervention relate to the situation, the interests at stake and the preventing measures. The situation of pollution or threat of pollution has to have its origin in a “maritime casualty”. A maritime casualty is in the meaning of the convention a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or threat of material damage to a ship or cargo\(^{106}\). By the wording “other occurrence” it is clear that the list of situations in Article II.1 is not exhaustive, but that other occurrence should have similarity to the situations listed. There is a clear requirement that the situation of pollution is “grave and imminent”, meaning that the degree of danger is high. This is closely connected to the requirement that the situation must “reasonably be expected to result in major harmful consequences” which serves intervention for situations where the degree of damage is high. Together they form a requirement of danger both in time and expansion.

Intervention is limited to prevention of pollution harming the “coastline or related interests”. “Related interests” are outlined in Article II.4, covering a) maritime coastal, port or estuarine activities, b) tourist attractions and c) the health of the coastal population and the well-being of the area concerned. The list Article II.4 contains it not exhaustive as it follows from the words “such as”. It is not possible to say what can or cannot be included, but together with the purpose of the convention\(^{107}\) and the context in Article II.4 it is clear

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\(^{105}\) For details of the Torrey Canyon disaster see De La Rue and Anderson, p. 10  
\(^{106}\) Intervention Convention Article II.1  
\(^{107}\) The Intervention Convention’s preamble states: “Conscious of the need to protect their peoples against the grave consequences of a maritime casualty resulting in danger of [oil] pollution of sea and coastline”
that the interest affected is protected out of environmental concerns and not economical for instance.

Intervention can only be done by “such measures… that may be necessary”. The constraint on a party’s measures is thus that they have to be proportionate. We find the same principle of proportionality in Article V which regulates the exercise of intervention. It states that measures taken in accordance with Article I “shall be proportionate to the damage actual or threatened to” the State. The measures should not extend what is “reasonably necessary”\textsuperscript{108}. All this constraint a State’s measures, at the same time as it leaves a great deal of discretion to it. Guidelines are given in part 3 of Article V, in considering the measures a State shall take into account the result if measures are not taken, the likelihood of the measures to be effective and what damage will be caused by the measures.

The convention does not deal specifically with intervention in the EEZ. The convention only distinguishes between the territorial sea and the high sea. Knowing that UNCLOS III, where the EEZ was established, was set in 1982, 13 years after the Intervention Convention 1969, it is no wonder that the Intervention Convention does not operate with the concept of the EEZ. As of today it is clear that a coastal State can adopt laws preventing pollution for the EEZ when they conform to generally accepted international rules and standards, see above in 2.5 regarding the LOSC and the EEZ. Further, the coastal State has power to carry out various measures in response to suspected violations of international laws for the prevention, reduction and control of marine pollution\textsuperscript{109}. More than so, the LOSC also grants the coastal States right to intervention on the high sea in the matters covered by the Intervention Convention\textsuperscript{110}. Hence, even though the Intervention Convention talks about the “high sea” it is clear that the Parties right to intervention in matters of serious pollution that threaten the State’s interests also attach to incidents in the EEZ. This can also be derived from the Intervention Convention’s wording itself; since the Convention distinguishes between the territorial sea and the high sea it is a

\textsuperscript{108} Intervention Convention Article V.2
\textsuperscript{109} LOSC Article 220
\textsuperscript{110} LOSC Article 221(1)
safe interpretation to say that the Convention is applicable to the areas outside the territorial sea\textsuperscript{111}.

In the Norwegian Intervention Regulation, implementing the Intervention Convention to national legislation, the Regulation’s applicability is however limited to the high sea and “the Norwegian exclusive economical zone”. The result is a discrepancy where the Norwegian Regulation has an area of applicability which is lesser than what’s admissible by the international convention.

In case of a pollution incident in the Russian EEZ of the Barents Sea, the question of whether Norway can utilize the admissible intervention by the international convention, that is not implemented in the Norwegian Regulation, arises. A legal basis for intervention could be necessity\textsuperscript{112}. In utilizing necessity one would have to apply discretion to the concrete case. In general terms one can say that the actual danger an incident of acute pollution represents is in favour of necessity. The concrete delimitation the Norwegian government has made by the wording “the Norwegian exclusive economical zone” is nevertheless not very likely to be supplemented and this is in disfavour of allowing intervention in other countries EEZ on basis of necessity. Then again, the limitation of the area is done in a regulation, while necessity has the authority of Law\textsuperscript{113}. This implies that the regulation will be superseded by the necessity if the concrete situation entails that necessity is applicable. Furthermore the shipping business on the high sea is of an international character and it is most likely that the operators are familiar with the international framework of law. This adds on to the arguments in favour of allowing intervention on the basis of necessity. Altogether it can be concluded that Norway can intervene in case of acute pollution in another country’s EEZ, in line with the convention’s permission of intervention outside the territorial sea.

With a Protocol of 1973 cases involving pollution or threat of pollution by substances other than oil are also covered by the Intervention Convention.

\textsuperscript{111} Same solution by Nordquist, UNCLOS 1982 A Commentary, p. 306
\textsuperscript{112} Necessity can in short be defined as a right to perform an illegal act in aim to save persons or interests from a threat that without the act of necessity would be unavoidable
\textsuperscript{113} Andenæs, Alminnelig strafferett, p. 180 and the Criminal Act § 47. It has also been asserted that necessity is of constitutional rank, cf. Andenæs, Statsforfatningen i Norge
The Intervention Convention’s Article III and IV states how the measures taken by a coastal State shall be carried out. The regulation in Article III lie down the principle of notification while the latter concerns the principle of proportionality of the measures compared with the damage or threat of damage.

In Norway the Intervention Convention is implemented in the national regulation through the “Regulation of Intervention” of 19th of September 1997\textsuperscript{114}. The Regulation is more or less a copy of the admissible intervention set forth in the Intervention Convention, with the exception of the specification of intervention in the EEZ, as discussed above. The Regulation applies to the Norwegian exclusive economical zone, probably other countries’ EEZs, and at the high sea, included the waters around Svalbard and Jan Mayen\textsuperscript{115}.

3.7 Conclusions on Norway’s possibilities and obligations in the Exclusive Economical Zone

The government (with further delegations) has the responsibility to ensure that the regulation contained in the Pollution Control Act and the Ships’ Safety Act, together with its Governmental Regulations, is carried out. Besides, this obligation is outlined in LOSC as well. Article 216 declares that not only can a coastal State enforce the adopted laws preventing pollution by dumping at sea, but they “shall”. This means that the pollution regulation has to be enforced in the EEZ to prevent dumping, within the limits of the LOSC.

In regard to what is called “operational discharges”, outside the scope of acute pollution, we have seen that the main regulation is the MARPOL conventions Annex I and II. LOSC Article 216 seems to imply that a coastal State “shall” enforce MARPOL regulation in the EEZ in case of violations which is dumping. Similar obligations follows from the MARPOL Convention itself; stating in Article 4(2) that the parties to the

\textsuperscript{114} FOR-1997-09-19-1061: Forskrift om inngrep på åpent hav og i Norges økonomiske sone i tilfelle av havforurensning eller fare for forurensning av olje eller andre stoffer som følge av en sjøulykke
\textsuperscript{115} Regulation of Intervention, Article 1
convention shall prohibit violation within its jurisdiction and violations shall be sanctioned. All of this implies that Norway has an obligation to prohibit and sanction vessel-source pollution which is violating Norwegian pollution regulation. However, operational discharges as dealt with in MARPOL, does not necessarily represent the degree of pollution required for intervention in the EEZ by LOSC\textsuperscript{116}. The most Norway can do in situations of violation of MARPOL-regulation which is not acute pollution, is to require the ship to give information cf. Article 220(3). This leaves a vacuum where Norway has obligations to prohibit pollution, but cannot intervene in case of violations.

The situation is somewhat better for incidents of acute pollution. The Intervention Convention, implemented through the Intervention Regulation, secures Norway the right to take action against acute pollution on the high sea\textsuperscript{117}. As discussed above this includes the EEZ, as intervention is understood as admissible in areas ‘beyond the high sea’\textsuperscript{118}, and intervention by the Intervention Convention is thus not limited to a coastal State’s own EEZ. Following the Norwegian Regulation, Norway can only intervene in the Norwegian EEZ and at the high sea. However in a certain situation of pollution following a marine casualty in another country’s EEZ, necessity could be a basis for Norwegian intervention nonetheless\textsuperscript{119}.

The Intervention Regulation is the only area where Norway has extended the Pollution Control Act to apply to the EEZ. The full Pollution Control Act does not apply either, only as follows from the Intervention Regulation. Like stated above in 3.3 Norway has the opportunity of extending the act’s applicability to the EEZ, cf. § 3.3 of the Pollution Control Act. The Act on the Norwegian Exclusive Economic Zone also contains regulation which gives admission to prescribe regulation concerning environmental protection\textsuperscript{120}, but the access has so far not been utilized. Utilization would be in accordance with international law as long as the adopted regulation would be “conforming to and giving

\textsuperscript{116} Cf. LOSC Article 220(5) and (6) -As outlined in 3.5. Similar, strict criterion for intervention follows from the Intervention Convention and the national Intervention Regulation
\textsuperscript{117} See 3.6.3
\textsuperscript{118} Churchill and Lowe, p. 354 and De La Rue and Anderson, p. 901
\textsuperscript{119} See discussion above in 3.6.3
\textsuperscript{120} Act No. 91 of 1976, § 7 litra a)
effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."\(^{121}\)

To give a satisfactory protection of the Barents Sea and the Norwegian coast and waters it would be advisable for the Norwegian government to adopt regulation for the preservation of the marine environment in accordance with LOSC Article 56 and 211. It could be argued that Article 56 gives a coastal State a wider authority to adopt laws concerning vessel-sourced pollution when it is a threat against the natural resources, than what follows from Article 211. In this regard it is important to keep in mind the sui generis character of the EEZ and that vessels are granted the freedoms of the high sea at the same time as the coastal State is given some rights and jurisdiction in the zone. In addition to this, the purpose behind the requirement of GAIRAS in Article 211 is to ensure conformity for the international shipping. Therefore a coastal State should be restricted in adopting regulation outside the limits of Article 211 and for Norway the focus should be to secure pollution regulation for the EEZ as admissible by the Pollution Control Act, The EEZ Act and the LOSC Article 211.

As we saw in 3.3 the Ships’ Safety Act is applicable to the EEZ and this is an important shelter for the marine environment and Norwegian preservation of the Barents Sea. This fulfils Norway’s duties following the MARPOL Convention and is in line with international law as MARPOL has achieved the standard of GAIRAS.

On the preparedness side Norway has an obligation to notify in case of incidents and the benefit of receiving notification from other countries. Notification obligations and contingency plans are also prescribed in the LOSC, cf. Article 198 and 199. The articles confirm the obligations as in the OPRC Convention and the bilateral agreement with Russia on combatment of pollution in the Barents Sea.

\(^{121}\) LOSC Article 211(5)
4 Norway’s access to regulate and enforce pollution regulation in the disputed area of the Barents Sea

4.1 Introduction

The disputed area in the Barents Sea that this thesis examines is positioned within the EEZ\textsuperscript{122}. As a starting point the ordinary rules of a coastal State’s jurisdiction within the EEZ regulates Norway’s possibilities in its EEZ\textsuperscript{123}. The problem is of course that it is disputed; it is not definite that the area in question is Norway’s EEZ.

As previously mentioned, the western part of the Grey Zone (area A in figure II) is clearly Norwegian, also according to Russia’s claim for delimitation in the Barents Sea. Hence this area is not disputed and here Norway has the same prescriptive and enforcement jurisdiction as in the remaining EEZ. The only limitation being in regard to fisheries and Russian vessel like it follows from the Grey Zone Agreement. Like ways the area east of the median line (area B in figure II) is clearly Russian and outside Norwegian jurisdiction. The area that remains to detect and the object for the following discussion is the area between the sector line claimed by Russia and the median line claimed by Norway, the area which is in fact truly disputed.

In the following I will start by briefly outlining the Norwegian approach to regulate pollution in the area under Norwegian law. Afterwards I will examine the possibility of establishing further jurisdiction in this zone according to international law. Hereunder I will try to substantiate what is the voice of the International Court of Justice (ICJ) and continue to look at legislative reasons for Norway to regulate and enforce in the area concerned.

\textsuperscript{122} See Figure II in 2.6.1 and comment to limitation
\textsuperscript{123} See 2.5
4.2 Norwegian legislation concerning pollution in the EEZ and the applicability to the disputed area

The first Norwegian act that has an impact on the disputed area is the Act of 17th of December 1976, concerning the Exclusive Economical Zone. In § 1(2) it is stated that “the outer limit of the economic zone shall be drawn at the distance of 200 nautical miles from the applicable baselines, but not beyond the median line in relation to other States”. There are no exceptions from this principle and the idea is that Norway has an exclusive economical zone along the whole coast of the country. There are rules within the act that the King can make exception from the exclusiveness through agreements with foreign States\(^\text{124}\), like Norway has done by the Grey Zone Agreement. Agreements like this can however not be understood as giving up the jurisdiction in the area. Now, since there is no exception from the principle the starting point is that the EEZ Act and the rights of Norway as a coastal State applies to the eastern part of the Norwegian territory in the Barents Sea as well.

It follows from § 7 of the Act that the King can give regulation concerning environmental protection in the EEZ within the limits of international law. As the Act in principle applies to the disputed area as well, Norway has access to regulate pollution in this area as it is clearly “environmental protection” cf. § 7, litra a. As previously discussed this opportunity has not been utilized.

The Intervention Regulation impose that Norway has an opportunity of intervention in case of a marine casualty in the EEZ. The access to intervene in other countries’ EEZ\(^\text{125}\) should make the conclusion of allowable intervention in a disputed part of the EEZ dependable. The conclusion is consequently, that intervention in the disputed area in case of acute pollution as described in the Intervention Convention is admissible from a judicial point of view.

\(^\text{124}\) § 6

\(^\text{125}\) See 3.6.3; Allowable according to the international convention and could be based on necessity
It is important to remember the rather constrained access for Intervention. It is delimited to matters pollution caused by maritime casualties that potentially may cause major harmful consequences\textsuperscript{126}.

Furthermore the bilateral agreements with Russia ensure the access to take action against serious pollution in the Barents Sea, irrespective of jurisdiction in the area. The Agreements Article 1 states that the Parties shall assist each other “irrespective of where pollution occurs”\textsuperscript{127}. By interpretation of the section it seems clear that this encloses Norwegian intervention in case of an incident in the disputed area as well\textsuperscript{128}.

In regard to discharges the standards required by the Ships’ Safety Act apply to foreign vessels in the EEZ\textsuperscript{129}. A small notice is done to the fact that the Ships’ Safety Act is in line with international law and the question thus remains whether Norwegian Jurisdiction attach to the disputed area of the EEZ.

4.3 International Law – guidelines from the International Court of Justice interesting to regulation in a disputed area

The International Court of Justice rendered a case interesting to this thesis’ topic in 1974. The case is known as the *Fisheries Jurisdiction Case*\textsuperscript{130}, where the issue for the trial was Iceland’s establishment of a 50 mile exclusive fishery zone in 1972. The establishment of a fishery zone was without basis in international law, at that time, when furthers point in the sea where the coastal State had any kind of authority was the limit for the contiguous zone at 12 nautical miles measured from the baselines\textsuperscript{131}. Although the Court noted that a 12 mile fishery zone had become generally accepted and international custom. This was however not interesting to the case as the Applicant, United Kingdom, did not dispute

\textsuperscript{126} See 3.6.3
\textsuperscript{127} Translated from Norwegian
\textsuperscript{128} However it is not known how Russia will interpret this section
\textsuperscript{129} Cf. Ships’ Safety Act § 3(2) and 3.3 above
\textsuperscript{130} *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.
\textsuperscript{131} *Fisheries Jurisdiction Case* p. 22
Iceland’s exclusive rights within a 12 miles zone. I will now outline how the Court legitimised the Icelandic fishery zone and see how this confirms to the case of Norwegian jurisdiction in pollution matters in the disputed area of the Barents Sea.

First of all I will remark that the Court did not deal explicitly with the Applicants request for the court to adjudge and declare “that there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines hereinbefore referred to; and that its claim is therefore invalid”\(^{132}\). Like the dissenting Judge IGNACIO-PINTO declared, the Court’s decision is “devoted to fixing the conditions for exercise of preferential rights, for conservation of fish species, and historic rights, rather than to responding to the primary claim of the Applicant”\(^{133}\). In other words, the Judgment never accepts Iceland’s establishment of a 50 mile fishery zone explicitly, but as the Judgment discusses how the Icelandic Law cannot be opposable to the Government of the United Kingdom, it implicitly admits Iceland the right of establishing a fishery zone\(^{134}\).

Here follows the reasoning why Iceland could have this right.

First of all the establishment is based on a viewpoint that there is a need for measures of protection. This is based on “the exceptional dependence of the Icelandic nation upon coastal fisheries” and “of the need for the conservation of the fish stocks in the Icelandic area”\(^{135}\). It is clear that Iceland is closest to perform the measures of protection. At the same time as the Court admits Iceland rights in the 50 mile fishery zone, the court underlines, by referring to the *Fisheries Case* against Norway, that the “validity of the delimitation with regard to other States depends upon international law”. Furthermore the Judgment refers to the Geneva Convention on the High Sea of 1958 Article 2 where it is stated “The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty” and that Article 2 goes on to provide that the freedom comprises the freedom of fishing.

\(^{132}\) I.C.J. Reports 1973, p. 5, para. 8 (a)
\(^{133}\) Page 35 in the Judgment
\(^{134}\) The common way of how to understand the Judgment, see amongst Fleicher, Folkerett 8. utgave, p. 127, where he states that the demand for judgment of an breach of international law by the establishment of the fishery zone was not followed
\(^{135}\) Page 20-21 in the Judgment
At the time the *Fisheries Jurisdiction Case* was brought before the ICJ, there was a tendency in favour of admitting the coastal State additional sovereign rights in the adjacent waters. This was clear through the conferences held in connection to development of the Law of the Sea Convention and especially by the discussions and various proposals of preferential rights. Even so, the Court naturally held that it could not render a judgment *‘sub specie legis ferendae’*, or anticipate the law before the legislator has laid it down.

In spite all of this, the establishment of an Icelandic 50 mile fishery zone was not found void in itself. The Icelandic rights within the zone were based on the need for conservation of fish species and historic rights and the exceptional situation for Iceland and the vital interests of its population. Consequently it seems like it was equity and the heavy impact of the reasons stated that convinced the International Court of Justice to uphold the Icelandic preferential rights in the fishery zone.

For the cause of extending a coastal State’s rights in adjacent waters we can derive from the *Fisheries Jurisdiction Case* that traditions and a pressing need for conservation are positive factors. Applied to the situation of the disputed area in the Barents Sea we find that the situation actually is quite similar. Norway has long traditions in the Barents Sea and is highly concerned about the environment in the High North. Concerning the environment it is clear that an administration and regulation are necessary in an area as vulnerable as the arctic sea. Nevertheless, the similarity with the *Fisheries Jurisdiction Case* can clearly not legitimise Norwegian jurisdiction in regard to pollution in the disputed area. What is useful is to show that the reasoning why Norway *should* be progressive to fight pollution in the disputed area has support by the ICJ’s rulings. In addition it should be remembered that Norway would not be claiming jurisdiction in a new area or purporting the high sea; the disputed area is from a Norwegian viewpoint part of the Norwegian EEZ.

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136 Preparatory works, St.meld. nr. 8 (2005-2006)
4.4 The need for pollution regulation in the disputed area of the Barents Sea.
Legislative reasoning

When Norway established its EEZ in 1976 this was before the concept of EEZ was known through international conventions. The third version of the UNCLOS was under development through international conferences, where the hot potato was the EEZ. In the cause of detecting whether Norway has an opportunity to regulate pollution in a disputed area it can be interesting to see how the government argued and legitimised the establishment of an EEZ which implied an expansion of territorial jurisdiction.

The EEZ was first and foremost established to secure the fish stocks. In the reasoning given in the preparatory works, Ot.prp.nr.4 (1967-1977), the threat against the fish stocks is in particular outlined. Furthermore the situation as of 1976 was held as an argument; other countries were expanding their fishery zones and Norway did not want to lose track with the development. The situation was also used to underline the threat against the fish stocks; when it became impossible to fish in other countries’ 200 mile zones, even more third countries would go to the Norwegian waters to exploit the resources there. The reasoning was that a legal regime of EEZ would make it possible to prescribe effective measures and establish the necessary protection of the resources.

In the pending United Nations meetings to found the new version of the LOSC Norway took a position where it said that it was an absolutely necessity that the new regulation for economical zones had to be outlined in a way that was satisfactory for all the involved Norwegian interests. This shows that although fisheries was the main reason for establishing an EEZ, there were other interests involved as well. Preservation of the coast and the marine environment are natural interests to protect.

The preparatory works describe how the tendency in State practise is and how the concept of an EEZ has broad support internationally. At the same time the preparatory works note that albeit the broad support, there is also another group in massive opposition to the EEZ. At that time, 1976, it was not clear what would be the final result in regard to maritime zones in the third LOSC. Even so, the EEZ was established in Norway.

137 Ot.prp.nr. 4 (1976-1977) p. 2
establishment was legitimised by the tendency in State practise and the reasoning of preservation of the fish stocks and the environment.

As we can see, the main reason for establishing the Norwegian EEZ in 1976 was exploitation and to preserve and protect the resources in the sea. This is clearly an important intend and a valid argument. The exact same argument attach to the importance of establishing pollution regulation in the disputed area. To be fully able to protect both the resources and the environment pollution regulation should not be absent in a huge area of the Barents Sea such as the disputed area. The practical need for preservation is thus a valid argument in favour of Norwegian vessel-source pollution regulation in the disputed area, like it was for establishing the EEZ in 1976.

The international tendency in regard to pollution regulation is moreover positive. A coastal State’s enforcement jurisdiction in the EEZ is most extensive in pollution matters. The large amount of conventions dealing with pollution reflects the awareness, the willingness to fight against pollution problems and admits the coastal States extended opportunities to fight pollution. This tendency, together with the practical need for regulation fighting pollution in the Barents Sea is strong arguments to why Norway should be able to regulate pollution in the disputed area to the same extent as in the EEZ otherwise.

\[138\] LOSC Art. 220 and 221 and see 3.5 above
5   Conclusions: Status Quo and Futuristic Perspective

Regulating vessel-source pollution in the disputed area, in the way admissible in the remaining EEZ, would be in line with the claim Norway has filed. Norway claims that the area west of the median line is Norwegian EEZ and could put into effect jurisdiction in the area on this basis. To be able to utilize the rights of a coastal State according to the LOSC Articles 211 and 220 in the disputed area, it is absolutely necessary for Norway to assert a claim of and perform jurisdiction according to the median line.

The fact that the Norwegian claim is disputed cannot alone be an obstacle for prescribing and enforcing pollution regulation in the area. The Norwegian claim has broad support in international law and this strengthens the viewpoint that it would be admissible for the Norwegian government to regulate pollution in the disputed area. It seems like Norway will not be running a risk of breaching international law. The legal position is thus that Norway has about the same access to pollution regulation as in the EEZ otherwise. This would include applicability of the Ships’ Safety Act above foreign vessels in the disputed area.

However the chance of visualizing Norwegian jurisdiction in the disputed area will first be present when Norway makes full use of the admission to regulate pollution in the remaining EEZ. Today the Ships’ Safety Act applies to foreign vessels in the EEZ, but the chance of extending the Pollution Control Act’s applicability has not been utilized. A legitimate argument for introducing pollution regulation in the disputed area is how the access already is controlled and limited by the LOSC. As a coastal State’s adoption of laws are narrowed down to GAIRAS and the enforcement of them limited by Article 220 it makes it less daring of Norway to introduce pollution regulation in the disputed area of the EEZ.

In addition, it can be derived from the ICJ judgment Fisheries Jurisdiction Case and the Norwegian preparatory works for the EEZ Act -which both legitimised an extension of the coastal State’s jurisdiction in the adjacent waters- that factors like the need for preservation, traditions and international tendency are important for the access. We

139 See 2.6.1
have seen that all of these factors are present in regard to vessel-source pollution regulation in the disputed area of the Barents Sea. There is a positive tendency concerning environmental protection and the need for it in the Barents Sea cannot be disputed.

Whether or not the Norwegian government should utilize the opportunity to regulate vessel-source pollution in the disputed area will be a decision of high political character, but from a legal jurisdictional point of view it seems to have support in international law. Another opportunity is for the Norwegian government to seek the protection of the marine environment through extended bilateral agreements with Russia. We have seen that bilateral agreements on pollution response exist and that the Grey Zone Agreement for preservation of fish stocks have proven to be successful. In light of this, cooperation on the subject of vessel-source pollution could be a reasonable suggestion for environmental protection in the Barents Sea and a way in which for Norway to regulate vessel-source pollution in the disputed area.

From an environmental point of view it would be highly advisable to both prescribe and enforce regulation with the aim of preventing vessel-source pollution in the disputed area of the Barents Sea.
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