NORWEGIAN EMPLOYMENT CONDITIONS FOR FOREIGN-FLAGGED OFF-SHORE SERVICE SHIPS

- INTERNATIONAL AND EU LAW CONSIDERATIONS

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1 Introduction

This is an opinion on the possibilities to impose Norwegian employment conditions, and in particular Norwegian level on wages, on offshore service vessels in the Norwegian sector of the North Sea. It is commissioned by the Norwegian Seafarers' Union and the Norwegian Maritime Officers' Association, as announced in a government report on related issues.[1] There is no formal mandate for the opinion, but the scope has been discussed in meetings and correspondence. A number of adjacent issues have been raised, which we have incorporated.

Professor Ringbom has the main responsibility for section 2 and Professor Røsæg has the main responsibility for section 3.

The law states as of 1 December 2014.

[1] Vurdering av NIS fartsområdebegrensning og innretning av nettolønnsordningen. Innstilling 1. september 2014 til Nærings- og fiskeridepartementet fra Utvalget oppnevnt 3. mars 2014 for vurdering av fartsområdebegrensningene i Norsk Internasjonalt Skipsregister (NIS) og innretningen av nettolønnsordningen (NIS-utvalget) (Oslo 2014; http://www.regjeringen.no/pages/38804652/Rapport_NISutvalget.pdf) p. 30 and 39.

2 International law aspects

2.1 General

The distribution of rights and obligations with respect to the regulation of ships is mainly addressed in the law of the sea, in particular in the 1982 UN Convention on the Law of the Sea (UNCLOS). This convention, which is commonly labelled 'the Constitution of the Oceans', regulates states' jurisdiction over ships in significant detail, for prescriptive as well as enforcement jurisdiction, separately for each maritime zone. The Convention is widely ratified world-wide, by 166 contracting parties, including Norway and the European Union, and is widely considered to represent customary international law.[2]

To the extent questions relating to jurisdictional matters are not addressed in UNCLOS, reference will have to be made to general international law, a circumstance which is also recognized in the last paragraph of the convention's preamble.[3] Many matters of relevance for the present study belong to this category, implying that general international law, mostly uncodified, will therefore play an important role in deciding the jurisdictional limits.

2.1.1 Flag states

The fundamental principle underlying regulation of ships is that it is for the state which has granted a ship the right to sail under its flag, i.e. the flag state, to assume the rights and obligations relating to the operation of ships, including employment matters. While the theoretical foundation of flag state jurisdiction is somewhat unclear,[4] it is a practical arrangements which ensures that ships, which are self-contained mobile units, have a comprehensive legal system applicable to them irrespective of their location and at the same time prevent avoid that they are being subjected to a multiplicity of different legal regimes along their route.

As regards the high seas, UNCLOS Article 92 is clear in stating that ships shall sail under one flag only and "shall be subject to its exclusive jurisdiction on the high seas", "save in exceptional cases expressly provided for in this convention". The Convention includes no such express exceptions in the field of employment matters, which suggests that port and

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2 See www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

3 The paragraph affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

4 Basing flag state jurisdiction on the territorial principle, on the fiction that ships are assimilated to territory, has not had much support in international law since the dictum of the PCIJ in the *Lotus* Case in 1927 (ser. A No 10). On the contrary, this idea has been categorically criticised and resisted and specifically changed in a variety of conventions, including UNCLOS (Article 91(1)) and its predecessor Article 5 of the 1958 Convention on the High Seas, which refer to the 'nationality' of ships. See also Research Report: 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags Aspects of International Law', by Netherlands Institute for the Law of the Sea (NILOS), University of Utrecht (Authors: Dr. E.J. Molenaar; Dr. A.G. Oude Elferink; Ms. D. Prevost) (hereinafter the NILOS Report), p. 20 with further references.

coastal states are prevented from regulating such matters, at least as far as ships on the high seas are concerned.

As to the flag state's more specific obligations, Article 94(1) requires every flag state to "effectively exercise its jurisdiction and control in administrative, technical and social matters", while paragraph 2(b) of the same article requires every state to "assume jurisdiction under its internal law over each ship flying its flag and its master, officer and crew in respect of administrative, technical and social matters concerning the ship."[5] While this article is placed in Part VII of the Convention, entitled 'High Seas', it follows from its nature that the duties which are laid down therein apply irrespective of the ship's location.

A similar focus on the rights and duties of flag states holds true for the main technical conventions for shipping. All main conventions of the principal regulatory body in shipping, the International Maritime Organization (IMO), are focused on flag state administration, with only an ancillary, supportive role for port and coastal states, normally only in the form of control procedures in ports.

The principal convention in the field of employment conditions, the 2006 Maritime Labour Convention (MLC), similarly focuses on flag states. Even if Article V(1) provides more broadly, that each member "shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction", the bulk of the implementing obligation rest on flag states, leaving mainly control functions to the port state and no reference at all to coastal states.[6] This is not least the case in Title 2 which deals with conditions of employment, where all obligations relating to employment agreements, wages, leave, manning etc. that have a specific addressee to them, target the flag state of the ship.[7] Title 5 which deals with compliance and enforcement, specifically separates the responsibilities of flag states from those of port states. As to the former, it provides that "Each Member is responsible for ensuring implementation of its obligations under this Convention on ships that fly its flag",[8] while port state responsibilities are limited to inspections and other mechanisms to ensure that the standards of the convention are complied with.

In conclusion, the principle that the flag state exercises jurisdiction over its ships, irrespective of their location, has a solid foundation in treaty and customary law and faces little opposition in state practice. The flag state's jurisdiction to regulate employment conditions is very strong in the key international conventions that exist in the field and none of the conventions discussed above provides for an explicit right of any other states to implement requirements that go beyond the standards laid down in them for foreign ships.

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[5] Finally, paragraph 3(b) of the same Article requires measures to ensure the safety at sea with regard to "the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments."

[6] See Articles V(2)-(4)

[7] See e.g. Standards A.2.1(1) and A.2.2(1) and Regulations 2.4(1) and 2.7(1).

[8] Regulation 5.1.1(1)

However, this circumstance does not as such exclude that other states may in certain circumstances have a concurrent jurisdiction over the ship. Indeed, UNCLOS includes a great variety of instances where the flag state's jurisdiction is explicitly shared with that of a port or coastal state. Employment conditions on board ships do not belong to this category, but as will be shown below alternative legal bases could also exist. Neither UNCLOS nor general international law provides clear rules for resolving competing claims to jurisdiction.[9]

2.1.2 Coastal state

UNCLOS is generally restrictive on the possibility for coastal states to regulate foreign ships that pass along their coasts (without entering their ports, internal waters or offshore terminals). Ships of all states enjoy the right of innocent passage through the territorial sea of any state (Article 17), even if that sea area falls under the sovereignty of the coastal state (Article 2). This right extends to ships in the territorial sea which are proceeding to or from ports or internal waters (Article 18(1)(b)). The meaning of 'innocent passage' is further defined in Article 19, and it is quite clear that the crew's employment conditions will not as such affect a ship's right of innocent passage. Accordingly, article 21 provides that coastal states are given no specific jurisdiction to issue national requirements on social matters with respect ships in innocent passage, even if such jurisdiction is foreseen for, for example, the safety of navigation or the prevention of infringements of "sanitary laws and regulations" of the coastal state.[10]

To the contrary, it is held that coastal state laws "shall not apply to the design, construction, *manning* or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."[11] To the extent the rules contemplated in this study represent rules on 'manning',[12] this represents a significant limitation. While there are international standards on training and watchkeeping for seafarers which presumably qualify for 'international acceptance' in this respect,[13] the situation is less clear for employment

9 See for example R.R. Churchill & A.V. Lowe, *The Law of the Sea*, Third Edition, Manchester University Press, Manchester, 1999 p. 461, Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Kluwer Law International, The Hague/Boston/London, 1998 p. 87.

10 UNCLOS Article 21(1)(a) and (h). To the extent the employment conditions on board a ship in an individual case would affect such matters, the situation may be different. For example, the relationship between working hours and maritime safety is widely acknowledged, including in MLC Standard A.2.3(4).

11 Article 21(2). The wording clearly suggests that foreign ships may not be bound by the laws and regulations of the coastal state in where no such international rules or standards exist.

12 The term manning is not defined in UNCLOS or in ILO instruments, but has been described as "a broadly accepted term meaning to supply with persons capable of carrying out a particular task and it is thus linked with the working conditions on board and, albeit somewhat more loosely, with the safety of the ship." A. Proelss, 'Legal Opinion: Is it Lawful under Public International Law for a Coastal State to Enact National Labour Legislation Relevant to Foreign Supply Ships Operating on the Continental Shelf?', Kiel, April 2009 (on file with authors), pp. 14-15. But see section 3.6.2 below.

13 See notably the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as further amended, which is currently ratified by 158 states representing 98.6 per cent of the world's tonnage. On the notion of 'general acceptance', see in particular International Law

conditions.[14] Insofar as the existing international standards meet the criteria of general acceptance,[15] they are usually well below the Norwegian standards.

The jurisdiction to prescribe national requirements is obviously even more limited with respect to ships sailing in the EEZ. This restricted and resource-oriented zone does not form part of the coastal state's territory, but certain 'sovereign rights' are granted for coastal states to regulate and enforce shipping-related laws in the EEZ.[16] In exercising its rights and performing its obligations, the coastal state shall have 'due regard' to the rights and duties of other states. Those rights and duties include the freedom of navigation of all states in the EEZ, subject to a corresponding duty to have due regard for the rights and duties of the coastal state (Article 58(1) and (3)). The most express prescriptive jurisdiction of coastal states over foreign ships in the EEZ concerns laws aiming at the protection of the marine environment and even here, coastal states' jurisdiction to prescribe is strictly limited to the adoption of rules that confirm to and give effect to "generally accepted international rules and standards established through the competent international organization" (Article 211(5)).

2.1.3 Port state

In contrast to the strict jurisdictional limitations imposed on coastal states, UNCLOS includes very few limitations on the right of port states to impose conditions on foreign ships. Internal waters form part of the sovereignty of the state (Article 2) and in the absence of specific limitations the jurisdiction over foreign ships in this area must therefore be assumed to be complete. In addition, the absence of a right to access foreign ports and the port state's wide discretion to exercise jurisdiction over foreign ships is acknowledged, albeit rather implicitly, in UNCLOS Articles 25(2), 211(3) and 255. None of those articles place particular restrictions on port state prescriptive and enforcement jurisdiction.

As a starting point, therefore, the port state has a strong jurisdictional claim for regulating foreign ships that voluntarily enter their ports. However, the extent of this jurisdiction varies depending, among other things, on the type of requirement which is at issue and on the methods by which the port state enforces the requirement. The more detailed reach and limitations of port states' right to exercise this jurisdiction is largely governed by general

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Association, London Conference (2000), Committee on Coastal State Jurisdiction Relating to Marine Pollution, *ILA Report,* 2000, pp. 443—500.

14 The MLC entered into force in August 2013 and is already ratified by 65 states. Yet, substance-wise the convention is not very specific on employment conditions. Wages are only regulated by means of certain very generic principles, in Regulation 2.2 and Standard A.2.2, which are complemented by formally non-binding principles. Nothing prevents non-binding guidance as set out in the Guidelines, section B.2.2, to gain the status of 'general acceptance' within the meaning of UNCLOS, but that will depend on how well they are followed in practice. See the ILA report referred to in the previous note, pp. 479-480.

15 See MLC Guideline B.2.2.4. On the basis of this guideline, a Subcommittee of the Joint Maritime Commission (JMC) of the ILO agreed in February 2014 on a Resolution raising the minimum monthly basic wage figure for able seafarers from US$585 to US$592, as of 1 January 2015. See also www.ilo.org/sector/activities/sectoral-meetings/WCMS_234446/lang--en/index.htm

16 UNCLOS Article 56(1)(b)(iii).

international law and potential treaty commitments. These questions are returned to in section 2.2 below.

2.1.4 Host state

A final capacity in which states are sometimes claimed to act in when regulating foreign ships is the 'host state'. This is not a term that is used in the law of the sea, but rather used in international investment law and in relation to headquarters agreements. In EU law, the term is linked to legislation on the freedom to provide services, and is used in this sense in chapter 3 below. Apart from that, it has occasionally been used in a jurisdictional sense in EU shipping regulation, when addressing matters where the interests of the port state are particularly close and the links between the ship and the port state goes beyond a temporary visit within the port state's territory. Typically the 'host state' has been used in relation to safety aspects of regular passenger traffic,[17] but it was also the term used in the European Commission's proposal for a directive regulating manning conditions for regular passenger and ferry services operating between Member States.[18] While it is true, as will be discussed in section 2.2.4 below, that a strong connection between the port state and the subject matter which is being regulated may affect the extent of the prescriptive jurisdiction of the port state, it is clear that a change of terminology alone will have no jurisdictional implications. Merely labelling port state requirements as being imposed by a host state will not affect the jurisdictional rights and obligations in any way. For this reason the remainder of this chapter will refer to the term port state only.

2.2 Port state jurisdiction

2.2.1 General on port state jurisdiction

It is trite that the lawful implementation of a specific rule requires both a jurisdiction to prescribe the rule in question and a jurisdiction to take the enforcement measures concerned. These two types of jurisdiction (prescriptive and enforcement jurisdiction) are closely connected when it comes to the jurisdiction of port states to take measures against foreign ships. While the presence of the ship in the port serves to ensure a close link to the territorial interests of the port state and a basic right to take enforcement measures against the ship, the presence of the ship is not a sufficient jurisdictional basis for imposing *any* type of enforcement measure or *any* type of requirement. Before the specific questions related to the application of Norwegian employment conditions on foreign ships for ships calling at Norwegian ports can be addressed, it is therefore necessary to outline the main aspects of port state jurisdiction more generally.

The first distinction to be made relates to how the port state requirement in question is to be enforced. Enforcement measures which are widely recognised from a point of view of

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17 See in particular Council Directive 1999/35/EC on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high speed passenger craft services. See also H. Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2008 pp. 297-310.

18 Proposal for a Council Directive on manning conditions for regular passenger and ferry services operating between Member States (COM(98)251 final and COM(2000) 437 final).

international law, such as the denial of access to the port,[19] which also implies, *a fortiori*, a right for the port state to make access to its ports conditional on compliance with specific requirements,[20] may be justified even if the prescriptive basis for the requirement is weak, while punitive measures, such as sanctions imposed on ships that have entered the port, may require a firmer prescriptive jurisdictional basis.[21] As a starting point, a port State is hence free to impose its national conditions for access by foreign ships to its ports, at least as long as the effect of non-compliance relate to denial of access to the port, or denial of other services associated with the port stay to which ships have no entitlement.

Since it is rarely practical or even desirable to implement national requirements by means of denying ships the right to enter ports, states would normally need to justify their national requirements on the basis of the territorial jurisdiction they have through the presence of the ship in their territory. It is well-established that internal waters for jurisdictional purposes may be assimilated to the land territory of the state and that ships, through their voluntary presence in the port or internal waters of another state, therefore subject themselves to the complete territorial jurisdiction of that state.[22] This applies even if there are international rules relating to the subject matter in question, as long as those rules do not specifically rule out the exercise of such jurisdiction by port states.[23] The fact that MLC

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19 *Case concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ Reports 1986, para 213. See also A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law'. 14 *San Diego Law Review* 1977, pp. 597-622 and L. de la Fayette, 'Access to Ports in International Law' *International Journal of Marine and Coastal Law*, 1996, pp. 1-22.

20 Even with respect to ships in distress who request permission to go to a port or other place of refuge, the prevailing view seems to be that such ships do not have an general right of access under customary law, but that each request needs to be assessed separately on its merits. See e.g. A. Chircop, O. Lindén (eds.), *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff Publishers, 2006.

21 See in particular E.J. Molenaar, 'Port State Jurisdiction toward Comprehensive, Mandatory and Global Coverage', 38 *Ocean Development and International Law*, 2007, pp. 225—257.

22 See also UNCLOS Article 2, and, e.g., K. Hakapää, *Marine Pollution in International Law*, *Material Obligations and Jurisdiction with Special Reference to the Third United Nations Conference on the Law of the Sea*, Suomalainen Tiedeakatemia, Helsinki 1981, p. 169; R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, 9th Edition, Volume I, Longman, Harlow, 1992, p. 622; Molenaar, 1998, pp. 105, 187; and Churchill & Lowe, 1999, p. 65.

23 Independent prescriptive jurisdiction for port states is understandably not usually included in conventions which aim to harmonize regulation, though certain more recent instruments have tended to include provisions preserving the 'residual' jurisdiction of port states to take action, notwithstanding the rules of the convention. See e.g. Regulation XI-2/2(4) of SOLAS (on maritime security); Article 1(3) of the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships (London, 5 October 2001; and Article 2(3) of the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments. The furthest-going example in this respect is Article 4(1)(b) of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (www.fao.org/Legal/ treaties/037t-e.pdf), according to which nothing in the agreement shall be construed to affect "the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny access thereto as well as to adopt more stringent port State measures than those provided for in this Agreement."

specifically regulates employment conditions does not therefore in itself exclude that a port state applies more demanding conditions for foreign vessels voluntarily present in its ports.[24]

The wide discretion of port states is not without limits, however. Limitations to this *a priori* unlimited jurisdiction of port states include the restraints that follow from treaty commitments, whether imposed by bilateral or multilateral, maritime, commercial or other treaties or by the set of safeguards which relate to any kind of enforcement action against foreign vessels in UNCLOS Part XII, section 7. While it is not so common for IMO or ILO conventions to explicitly prohibit port states from taking further regulatory action in a given field, there are other types of conventions which may have such effects. For example, bilateral and multilateral treaties on trade and commerce commonly include a requirement of national treatment, limiting the rules that (port) states may apply to ships of other contracting parties to those which are applied for ships flying their own flag.[25] The national treatment principle is also a key principle under the World Trade Organization (WTO) agreements.[26] In order to limit their use of these rights, states have commonly entered into bilateral or multilateral treaties on "friendship, commerce and navigation".[27]

Restraints may also follow from the application of more general principles of general international law, such as the obligation to act in good faith or the prohibition of abuse of rights.[28] Proportionality requirements may also place limitations if the consequences would be completely out of proportion with the aim the requirement seeks to achieve.[29] This type of limitations, which may be grouped together under the general heading of 'reasonableness criteria', are clearly less specific and more dependent on the circumstances of the individual case than the relatively clear-cut, maximum limits imposed on coastal states for regulating ships transiting their maritime zones.

A second fundamental distinction that needs to be made relates to the content of the port state requirements at issue. While this matter has not been addressed in treaties or by international courts, it seems to be widely accepted that the extent of a port state's prescriptive jurisdiction over a foreign ship differs depending on the subject matter of the

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24 See also the NILOS Report, pp. 84-88.

25 For example, Article 2(1) of the 1923 Statute of the International Régime for Maritime Ports, to which, Norway and certain other European states such as Sweden, Denmark, and Germany, are still parties, provides that "every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers."

26 National treatment refers to "treatment no less favourable than [the Member] accords to its own like services or service suppliers" (GATS Article XVII). See also Article III of General Agreement on Tariffs and Trade (GATT) and Article 2(1) of the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

27 See e.g. de la Fayette, 1996, p. 4.

28 See also UNCLOS Article 300.

29 A proportionality requirement exists explicitly in some UNCLOS provisions relating to the enforcement of national rules against foreign ships. See e.g. Articles 221 and 232.

requirements at issue. On the one hand, there are rules relating to 'static' features of ships, such as its design, construction or equipment standards, or manning levels. These features 'follow' the ship wherever it is; either the ship complies or not, irrespective of its geographical location. Since a ship operator cannot easily change this type of features during a voyage, this type of requirements are often considered to be most intrusive ones with respect to ships' navigational rights. Paradoxically, however, static port state requirement are comparatively easy to justify in jurisdictional terms. If a ship fails to comply with a port state's requirement on static features it will be in violation even while present within the port or internal waters of the state, where the prescriptive jurisdiction of states is uncontested.[30]

Port state requirements of a 'non-static' nature, which relate to specific conduct or other operational requirements on foreign ships, raise somewhat different questions. Compliance with such obligations may change during the voyage of a ship which calls for a determination of the scope of the obligation in geographical terms. In case the port state rule regulates conduct that takes place beyond the areas over which it has explicit prescriptive jurisdiction, the requirement entails clear extra-territorial elements, which calls for different jurisdictional considerations.

As is discussed below however, most employment conditions do not easily fit into either of these broad categories. On the one hand, a ship which fails to comply with the required employment standards is clearly in breach also during its stay in the port. Yet, to limit for example wage requirement to the time during which the ship is in the port, or even territorial waters, of the port state would defeat the object and the purpose of the requirement. In reality, the payment of wages is not a requirement which can be easily defined in geographical (or jurisdictional zones) terms at all.

A final distinction which could be of relevance with respect to employment conditions relates to the old discussion in international law as to whether port states have jurisdiction at all over foreign ships in matters which are purely 'internal' to the ship and does not therefore affect the port state itself. This matter is reviewed in section 2.2.2 below.

It may hence be concluded that while states have a broad jurisdiction to regulate foreign ships in their ports in general, a number of elements of the prospective employment requirements affect the assessment as to what extent Norway can actually rely on port state jurisdiction for this particular purpose. Those elements are in particular: the way in which the requirements will be enforced; their focus on a matter which could be argued to be 'internal' to the ship; the extension of the requirement to matters that take place beyond

[30] See also Swedish Case No. M 8471-03, Svea Court of Appeal, Environmental Court of Appeal (Miljööverdomstolen), Judgment of 24 May 2006, where the Court confirmed that the requirement of the port of Helsingborg for ships to be equipped with selective catalytic converters to reduce nitrogen emissions, was consistent with international law, even if no such requirements had been established by IMO.

Norwegian territory; the substantive connection between the requirement and Norwegian interests; other relevant treaty law and 'reasonableness' considerations.

These matters will be discussed further in the remainder of the section. However, it should be pointed out that, due to the shortage of codified law in this area, all these considerations are based on relatively unspecific criteria and that there is considerable discretion for both states and courts to interpret them in their own way. Moreover, the increased use of this jurisdiction by port states in practice in the past few decades, combined with very limited protests by other states, may even have had the effect of altering the legal boundaries in the past years alone. It should accordingly be borne in mind that the international law relating to port state jurisdiction is in a state of flux.

2.2.2 Internal matters

A commonly cited potential exception to this broad jurisdiction of port states relates to matters which are entirely 'internal' to the ship. Matters which do not have any bearing on the interests of the port state should accordingly be left only for the flag state to enforce. In this way a compromise is achieved between the interests of a port state over activities within its jurisdiction and the flag state's interests to keep its regulatory authority intact. However, the applicability of this potential limitation for the application of employment standards is not certain.

While it seems reasonably clear that employment standards, such as wages, would form part of such 'internal matters',[31] and that these matters are usually not regulated by port states in practice, there is disagreement among lawyers as to whether this practice is based on a legal obligation or only considerations of comity. Two schools are usually identified: on the one hand, the French approach under which the port state is considered to be legally prevented from regulating or enforcing matters belonging exclusively to the 'internal economy' of the ship; on the other hand, the Anglo-American approach under which the restraint exercised by port states in this respect is are based on considerations of comity and discretion. Many authors have noted that in practical terms the difference between the two schools is not particularly big, as the countries who favour a broad jurisdiction under the Anglo-American school tend to be reluctant to make use of this jurisdiction in practice, while those adopting the French position tend to adopt an expansive understanding of what disturbs the peace of the port.[32]

[31] This is not the case with requirements on working hours and other standards which have a direct bearing to the safe operations of the ship. See also M.S. McDougal & W.T. Burke, *The Public Order of the Oceans*, Yale University Press, New Haven/London, 1962, p 165, noting that states sometimes have been asserting jurisdiction on the basis quite unclear effects on the port state's public order, such as 'moral disturbance'.

[32] P.C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, G.A.Jennincas &Co, New York, 1927, p. 192; Churchill & Lowe, 1999, p. 66; M. Hayashi, 'Jurisdiction over Foreign Commercial Ships in Ports: A Gap in the Law of the Sea Codification', 18 *Ocean Yearbook*, 2004, pp. 504-505: B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping,* Springer, Dordrecht, 2014, p. 30.

This matter, which has not been regulated in multilateral treaties,[33] has long traditions in case law. The matter has not been addressed by international courts, but at national level the French approach dates back to two opinions given by the Conseil d'Etat in 1806,[34] whereas the US Supreme Court has addressed this balance in numerous cases going back to the late 19th century. While many of the cases have involved criminal or disciplinary proceedings against crewmembers,[35] some have specifically concerned employment conditions on board foreign ships.

In particular, in a series of cases related to US National Labor Relations Act, the US Supreme Court has confirmed the power of Congress to legislate for foreign seafarers, but has concluded that the Congress has not expressly exercised that power.[36] The judgments suggest, firstly, that the Supreme Court accepted that the United States had a jurisdictional right under international law to apply such statutes if that was deemed to be desirable and, secondly, that it prefers not to use that option unless the intention to have such effects is made perfectly clear by Congress.[37]

The absence of examples in state practice of national standards affecting internal matters of ships while in ports, in combination with protests against such plans when they have been contemplated, has led certain authors to conclude that a rule of customary international law has emerged to the effect that port states are prevented to apply local laws on employment conditions.[38] The more widespread approach appears to be, however, that the Anglo-American approach more accurately reflects the current state of customary law in this area, i.e. that the relative absence of state practice in this field originates in practical and policy

33 See, however, the codification projects of the Institut de Droit International in 1898, where it was recommended in a Resolution that port states only exercise its jurisdiction only if conduct endangered the "peace of the port" and the 1930 Harvard Research Draft Convention on Territorial Waters which recognized the full authority over the coastal state under customary international law over all events in port, but acknowledging that "it would be desirable that states should refrain from an exercise of jurisdiction in matters which relate to the internal economy of the vessel." (Quoted in McDougal & Burke, 1962, p. 168). See also Hayashi, 2004, pp. 506-508.

34 The *Sally* and The *Newton* 1806, Conseil d'Etat, reprinted in the article by A.N. Charteris 'The Legal Position of Merchantmen in Foreign Ports and National Waters', *British Yearbook of International Law*, 1920/21, at pp. 45,51.

35 See for example *Mali v. Keeper of the Common Jail* (Wildenhus's Case), 120 US 1, p. 12 (1887)

36 *Lauritzen v. Larsen* 345 US 571(1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 US 10 (1963); *Lopes v. Ocean Daphne*(1964); *Incres Steamship Co. Ltd. v. International Maritime Workers' Union* 372 US 24(1963)

37 See also cases referred to in 2.2.3 below, NILOS Report, p. 103, Churchill & Lowe, 1999, p. 369, A. E. Boyle, 'Proposed EU Directive on Manning Conditions for Regular Ferry Services Between EU Member States', Unpublished Opinion, 1998, p. 3.

38 See for example the opinion by Professor Boyle referred to in the previous note, at p. 4: "It seems clear from this history that there is both a widespread and general practice of abstaining from applying local law to the employment conditions of seafarers on foreign ships and a pattern of protests from European maritime nations when attempts are made to apply local law. Although no international court has held that such regulation is contrary to international law, the evidence considered here prima facie meets the standard for the existence of a rule of customary law."

considerations rather than in a sense of legal obligation.[39] The absence of *opinio juris*[40] would accordingly suggest that a rule of customary law has not developed in this field.[41] In other words, the absence of examples in state practice of port states imposing employment on foreign ships is better explained by the fact that there may be many good policy and practical reasons to refrain from applying such standards than by the existence of a rule prohibiting such standards as a matter of international law.

To this it may be added that, just like the absence of examples in state practice, also the protests by other states against plans for legislation involving 'internal matters' may be motivated by other than purely legal reasons.[42] It may also be noted that one of the few recent enactment of such jurisdiction, the extension in 2009 of the Australian Fair Work Act to ships that visit Australian ports, which does include obligations relating to wages on foreign flagged ships, has not generated very much diplomatic protest,[43] which in itself suggests that a more permissive stance towards port states jurisdiction in this regard may have developed.

Moreover, since the debate on this is a relatively old debate and since the role of port states and, in particular, flag states has changed considerably in the past half century, it is quite thinkable that the case for leaving all 'internal' matters for the flag state to regulate has weakened through the separation of the link between the flag and the operation of the ship. While a traditional flag state with strong links to the ship and its crew may be held to be better placed to regulate the on-board employment conditions, it is less certain if that argument applies to a ship flying the flag of an open register, with limited if any links to the ship's beneficial owner or crewing agency.

While, therefore, the application of national wage requirements to foreign ships in Norwegian ports is unlikely to violate a rule of customary international law relating to 'internal matters' on ships, it will nevertheless be an unusual step to take in general in Europe and in particular for a country which has traditionally been among the ones

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39 See in particular the NILOS Report, p. 104. See also for example McDougal & Burke, 1962, pp. 164-165; Hakapää, 1981 pp. 169—170; D. P. O'Connell: *The International Law of the Sea*, Volume II, edited by I. A. Shearer, Clarendon Press, Oxford, 1984, pp. 625—626; Jennings & Watts, 1992, pp. 622—623; Churchill & Lowe, 1999, pp. 65—69; Molenaar, 1998, p. 102; BMT Murray Fenton Edon Liddiard Vince Limited, 'Study *on the economic, legal, environmental and practical implications of a European Union System to reduce ship emissions of SO2 and NOx*', No. 3623, Final Report, August 2000, Appendix 4, pp. 36—37, D.R. Rothwell & T. Stevens, *The International Law of the Sea*, Hart Publishing, Oxford/Portland, 2010, p. 56; and Marten, 2014, pp. 28-31. But see J.M. Schupp, 'The Clay Bill: Testing the Limits of Port State Sovereignty, 18 *Maryland Journal of International Law*, 1994 and P. Boisson, *Safety at Sea, Policies, Regulations & International Law*, Edition Bureau Veritas, Paris, 1999, p. 170.

40 See the North Sea Continental Shelf Case, ICJ Reports 1969, para. 74.

41 The NILOS Report, pp. 103-106. Marten, 2014, p. 31 considers that the choice of approach with respect to the 'internal matters' is a matter of domestic law only.

42 Thus Philip Jessup, 1927, p. 192 already noted that "it is noteworthy that the protests of foreign states against the application of American prohibition laws to their ships in American ports are based almost entirely upon appeals to comity rather than to law."

43 Marten, 2014, p. 195

protesting against such moves by other states. It is proposed below that the legal acceptability of the requirement in the end does not depend - at least not exclusively - on the legal status of the 'internal' matter requirement, but rather on the reasonableness of the requirement and its proportionality and justifiability more generally.

2.2.3 Extra-territorial application of port state jurisdiction

A different, though related, question concerns the effect of the port state requirements beyond the port state's own territory. It was already noted above, that in order to be effective the employment conditions need to apply more broadly than merely during the time that the ship is in the port. This raises questions regarding "the limits of jurisdiction which can properly be claimed on the basis of the temporary presence of foreign ships in ports."[44]

Generally speaking, enforcement of a rule is only legitimate if the rule is lawfully adopted in the first place. Therefore the circumstance that the *enforcement* takes place in the port or internal waters, where the jurisdiction of States is very broad, does not do away with the need to find a justification of the rule in terms of *prescriptive* jurisdiction. The mere presence of the ship in the port is not therefore a sufficient jurisdictional basis for requirements that extend beyond the port state's territorial jurisdiction.[45] Since the prospective Norwegian employment conditions, in order to be effective, need to be applied beyond the time in which the ship is present in area where Norway has a clear and explicit territorial jurisdiction, it seems safe to assume that it needs to have another prescriptive legal basis to rely on, apart from the presence of the ship in the port.[46]

Yet, as was already noted above UNCLOS offers no such prescriptive jurisdiction for states over social matters on board foreign ships. On the contrary, UNCLOS Article 92 specifically provides that as far as the high seas are concerned, the flag state jurisdiction is of an exclusive nature, subject only to specific limitations in that convention.

It is conceivable that the required (prescriptive) jurisdictional basis for port state requirement could be found outside the realm of UNCLOS, notably in the principles of extra-territorial jurisdiction under general international law. However, while the existence of

44 Churchill & Lowe, 1999, p. 69.

45 A recent judgment by the European Court of Justice goes unusually far in assuming a regulatory jurisdiction against foreign aircraft on the basis of the temporary presence of the craft at an EU Airport. The Court concluded that the implementation of an emission trading scheme that covered emissions by foreign aircraft, wherever the operated, could be justified on the basis that the voluntarily subjected themselves to the jurisdiction of EU member states by landing at their airports. According to the Court the application of the emissions trading scheme to foreign aircraft operators "does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union." Case ECJ C-366/10, *Air Transport Association of America and Others,* para. 125.

46 Similarly the NILOS Report, p. 101, but see Boyle, 1998, p. 2 who considers that the 'manning directive' would not have represented an exercise of extraterritorial jurisdiction.

certain principles to this effect is widely acknowledged, their respective status, scope of applicability and mutual relationship remains uncertain, due to a notable lack of authoritative judgments at international level, and a multitude of national judgments which point in diverse directions.[47] Four main principles of extraterritorial jurisdiction are usually identified in international law: [48]

- *The personality principle* awards jurisdictions on the basis of the nationality of the subject. However, since the rules in question here are intended to cover foreign ships and operators this principle is not relevant for present purposes. In a less established variant, the 'passive personality principle' covers the nationality or those who are affected by the act.
- *The universality principle* is also likely to be irrelevant, as only very serious crimes, such as genocide, crimes against humanity, war crimes and, in the maritime field, piracy, are normally considered to give rise to universal jurisdiction.
- *The protective or security principle* provides a right for a State to enforce a limited category of offences which threaten the security of the State or the integrity of its government, even if the offence is committed outside its territory. The more detailed scope of this principle – notably with respect to the types of offences which are covered – is subject to debate, but in general the threshold of 'threat' for the State concerned which it seeks to cover is placed quite high.[49]
- *The effects principle* which accepts jurisdiction over extraterritorial acts which have effects within the State concerned is more controversial. Under this principle the effects of the conduct may suffice to provide a basis for jurisdiction, in particular insofar as those effects are significant and foreseeable. The principle is sometimes difficult to distinguish from the less controversial 'objective territorial principle', under which territorial jurisdiction is broadly understood and founded "when any essential constituent element of a crime is consummated on state territory".

In brief, therefore, the international law principles on extra-territorial jurisdiction are unlikely to provide further clarification to the limits of how far port states may regulate the employment matters for foreign ships.

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47 See for example the Final Report of the ILA's Committee on Extraterritorial Jurisdiction, Helsinki 1996, pp. 521—522. The Committee's Chairman concluded that "it was impossible to draw up a draft convention on extraterritorial jurisdiction given the great differences of opinion which existed in this area of international law." (*Id*. at p. 525).

48 See, for example D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources, LIV *British Yearbook of International Law* 1983, pp. 4-14; Restatement (Third) on Foreign Relations Law (1987), §§ 402—403; R. Higgins, *Problems and Process : International Law and How we Use it,* Oxford University Press 1994, p. 89; I. Brownlie, *Principles of Public International Law*, Sixth Edition, Oxford University Press, Oxford, 2003, p. 299-305 and 466-478; A. Aust, *Handbook of International Law*, Cambridge University Press, 2005, pp. 43-48; and V. Lowe, 'Jurisdiction', in M.D. Evans (ed.), *International Law*, Second Edition, Oxford University Press, Oxford, 2006, pp. 337-356.

49 The protective principle is traditionally considered to involve crimes against the security or political stability of the State. Hakapää, 1981, p. 153, for example refers to situations where an act "affects the basic attributes of a State as an independent member of the international community."

The state of flux in this area of international law has led certain legal scholars to settle for a rather more generic single jurisdictional principle of "substantial and genuine connection" between the subject-matter and the state exercising the jurisdiction.[50] Crawford concludes that "if there is one principle emerging, it is one of substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base or reasonable interests of state in question."[51] As regards port state jurisdiction, the territorial presence of the ship in the port provides for a territorial link to the state and also jurisdiction to enforce its national requirements, but that presence alone does not establish whether the connection between the port state and the regulated matter is 'substantial and genuine'.[52]

Case law understandably provides limited guidance with respect to the standards that apply for a test of such a connection in relation to port states employment conditions. While there are no international cases in this field, a few cases on advance payments decided by the US Supreme Court in the 1920's illustrate how the link between the requirement and the ship's presence in port might be drawn.[53] The four US Seamen's Wage Acts of 1875 and 1884, which were "apparently enacted to reduce foreign shipowners' competitive advantage by indirectly forcing them to pay higher wages",[54] were held by the Supreme Court in *Strathearn Steamships Co v. Dillon* to apply to foreign crew on board foreign ships, even if the visit was only of a temporary nature. The Supreme Court considered, however, that it had been Congress's intention to limit the scope of crew's right to advance payments to the ship's presence in US ports.[55] In *Jackson v S.S. Archimedes,* the Supreme Court specifically rejected the idea that advance payments under the US Act could also be claimed in foreign ports, before the ship's departure to the USA.[56] Following the latter case, attempts were made in Congress to extend the scope of the Act to cover payments abroad, but this was

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50 Brownlie, 2003, p. 297. See also ibid. at 305; F. A. Mann, 'The doctrine of jurisdiction in international law'*, Recueil des Cours*, Collected Courses of the Hague Academy of International Law, No. 111, 1964, pp. 43–51; A.F. Lowenfeld, *International Litigation and the Quest for Reasonableness, Essays in Private International Law*, Clarendon Press, Oxford, 1996, pp. 228–232; and Jennings & Watts, 1992, pp. 457–458 and 468 and the US Restatement (Third) of Foreign Relations Law (1987), sub 403(2).

51 J. Crawford, *Ian Brownlie's Principles of Public International Law*, Eight Edition, Oxford University Press, Oxford, 2012, p. 457.

52 See e.g. L.S. Johnson, *Coastal State Regulation of International Shipping*, Oceana Publications, Inc., Dobbs Ferry, 2004, p. 42: "the greater the nexus between the port state's interests and the necessity of regulating ships' activities to protect that interest, the stronger the grounds are for establishing such conditions". See also Molenaar 2007, p. 228., H. Ringbom, 'Global Problem – Regional Solution? – International Law Reflections on an EU CO2 Emissions Trading Schemes for Ships', 28 *International Journal of Marine and Coastal Law*, 2011, and Marten, 2014, pp. 210-220.

53 See also BMT Report, 2000, Appendix 4, p. 39.

54 Note: 'The Effect of United States Labor Legislation on the Flag-of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing' 69 *Yale Law Journal*, 1959-60, at p. p. 507

55 252 U.S. 348 (1920): "taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act.

56 275 U.S. 463 (1928)

resisted, as many states (including Norway) protested.[57] Even here, however, the Supreme Court did not rule out its potential jurisdiction over payments abroad, but merely added that "for us to run interference in such a delicate field of international relations, there must be present the affirmative intention of the Congress clearly expressed."[58]

For a more recent indication of what type of considerations to include in the assessment of the reasonableness of the port state measure, reference may be made to the US Restatement of Foreign Relations Law from 1987, which identifies eight different factors which have to be assessed, under *any* jurisdictional principle, before jurisdiction can be established:[59]

(a) the link of the activity to the territory of the regulating state;
(b) the connections between the regulating State and the person principally responsible for the activity;
(c) the character of the activity, the importance of regulation to the regulating State, the extent to which other States regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another State may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another State.

These criteria clearly emphasize that the interests of the port state are not independent of those of the flag state and/or the international community, and the validity of the port state's claim to jurisdiction will depend on balancing these interests.

2.2.4 Concluding observations

All in all, the position of port states with respect to their jurisdiction to impose requirements on foreign ships is both complex and unclear. On the one hand, port states have a broad right to refuse access of foreign ships which do not meet specific criteria that they impose. This right is not disputed and is limited only by certain general reasonableness requirements, such as proportionality and the prohibition of abuse of rights and by potential treaty obligations, including the safeguards set out in UNCLOS.

[57] The "storm of diplomatic protests" is referred to in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) at p. 146.
[58] Id. at p. 147.
[59] US Restatement (Third) of Foreign Relations Law (1987), sub 403(2)

On the other hand, there seems to be no available jurisdictional foundation to base such requirements on insofar as they create effects beyond the territory of the port state. The international law in this area is imprecise and does not easily accommodate the demands of today's international shipping, where a variety of jurisdictions may be involved in the operation of a single ship and the link between the flag and the ship's operation is often artificial.

The most recent legal studies on employment conditions imposed by port states provide a mixed picture of the legality of such requirements. While two studies prepared for the European and Norwegian Shipowners Associations are critical as to states' powers to impose such requirements, the NILOS study prepared for the European Commission takes a somewhat more positive stance. While acknowledging that such requirements are unusual it concludes that "it is certainly not evident that the exercise of port State jurisdiction by which third States would be required to apply Community employment conditions as discussed in this Report, would be incompatible with general international law."[60]

In essence, the legality of this type of measure depends on a sufficient jurisdictional basis and the type of enforcement measures taken. To summarize the legal situation as outlined above with respect to a prospective Norwegian employment conditions, the following conclusions seem to transpire.

If the employment conditions were to be enforced by exclusively means of denying access to Norwegian ports of ships which fail to meet the required employment standards, its acceptability in jurisdictional terms would be easier. Such a measure could, and probably needed to, be coupled with an accompanying requirement for ships to make a notification with regard to its compliance prior to the entry to the Norwegian port. It is possible to apply this form of enforcement in a prospective way as well, by imposing a prohibition of a non-complying ship in the port to access Norwegian ports for the future, either for a certain time or until compliance can be shown. Similarly, requirements which are only enforced by means of denial of other services to which foreign ships have no international law entitlement can probably be justified even with a weak prescriptive jurisdictional basis.

Yet it should be noted that denial of port access to foreign ships represents a significant intervention in maritime trade, which may be a considerable burden not only for foreign flagged ships but also for maintaining the Norwegian services. As a very minimum the good faith obligation imposes limits on how far this right can be taken, but more concrete obligations will presumably follow from other type of treaty obligations, including international trade law.

With respect to ships that are present in the states' ports or internal waters, enforcement jurisdiction can normally be presumed on the basis of that presence alone. Rules relating to 'internal matters' could be an exception to this, but it is concluded that its status as an independent legal requirement has always been uncertain and has lost even more of its

[60] The NILOS Report, p. 105

relevance in view of general developments in maritime law of the past decades. Rather, for these cases it is the jurisdiction to prescribe the rules which poses the principal legal challenge. The jurisdiction to prescribe, in turn, depends on the nature of the requirement, and more particularly on whether or not they are considered to entail extra-territorial effects. If so, an express legal basis in UNCLOS or elsewhere is required to justify the jurisdiction. Yet, other states than the flag states are granted no explicit jurisdiction to prescribe employment conditions for foreign ships, and not even an implied jurisdiction is provided beyond the territorial sea. This suggests that the employment conditions would be limited to the time that the ship spends in the internal waters and territorial sea of the port state or to ships that exclusively in such waters.

However, discussing employment conditions in terms of territoriality and jurisdictional zones is largely artificial. Most employment conditions cannot easily be defined in such terms. With the exception of requirements on crew's working hours, for which there is some regulatory precedence of 'unilateralism' in Europe,[61] conditions relating to wages or applicable work agreements, are not linked to the location of the ship. Rather, they are administrative requirements placed on the shipowner or crew manager which are unconnected to the location of the operations by the ship or its crew.[62] Nevertheless, it is considered that since the effects of the conditions would extend beyond the time which the ship spends in the port state's national waters (with the exception of ships that *exclusively* operate in such waters), the extraterritorial implications of the prospective employment standards need to be acknowledged. The requirements cannot therefore solely rely on the territorial presence of the ship in the port at the time of enforcement, but need an additional prescriptive basis.

Other bases for extraterritorial jurisdiction than UNCLOS, based on general international law, do not add much clarity to the question. It has been proposed that there is only one principle of jurisdiction in public international law and that is the one of a substantial and genuine connection between the subject-matter and the reasonable interests of state in question.

Hence, it seems that the legality of such employment conditions eventually depends on a balancing between the interests of the port state and those of the flag states concerned. Taking into account the considerations listed in the US Restatement on Foreign Relations Law, the following observations may be noted with respect to national Norwegian employment conditions.

On the one hand, the interests of ships, flag states and the maritime community are obviously significant when it comes to the 'unilateral' use of port state jurisdiction more

61 In the case of working hours, the EU has applied requirements that extend well beyond the time that ships spend in the territorial jurisdiction of the port state, through Directive 1999/95 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports. This directive implemented ILO Convention No 181, which at the time was in force, but only ratified be a handful of states. On the other hand, the directive had quite weak enforcement provisions. See Ringbom, 2008, p. 357.

62 See Marten, 2014, pp. 197-199.

generally. Requirements which extend beyond the explicit prescriptive jurisdiction for different maritime zones laid down in UNCLOS may be perceived as undermining efforts to achieve global regulation, in relation to jurisdictional as well as substantive matters. It may be contended that the object and purpose of UNCLOS and international maritime law more generally would be undermined if individual states were entitled to impose port state requirements which challenge key features of shipping operation and set hurdles for international navigation. The absence of tradition and state practice in regulating employment conditions would represent a particularly important contention in this regard.[63]

On the other hand, the interests of the port state should not be underestimated. Equal treatment of seafarers' employment conditions is certainly a genuine and legitimate concern to begin with, seeking to eliminate discrimination between ships and to prevent social dumping. The reasonableness of the port state's claim to jurisdiction depends on the proximity of the shipping service in question and the extent of the requirement. While it is probably difficult to justify that a ship which only occasionally calls at a Norwegian port would require foreign ships to apply national conditions over a longer time-frame, the situation may be quite different if the ship in question regularly operates to the port in question.[64]

Covering ships which exclusively, or almost exclusively, operate in Norwegian waters would be much easier to justify, both in terms of prescriptive jurisdiction under the law of the sea, but also with respect to the concern to improve the workers' social situation, which obviously increases with a stronger connection of the crews concerned to Norway.

A similar picture follows from international private law, in relation to determining the choice of applicable law in maritime employment contracts. In brief, the European rules in this area[65] provide that when there is uncertainty relating to applicable law for the employment contract, the choice could be made on the basis of the law of the country in which or from which the employee "habitually carries out his work",[66] or even if "it appears from the circumstances as a whole" that the contract is "more closely connected with" another

63 Lowenfeld, 1996, pp. 23-24, observes that subparagraph f) of the Third Restatement's § 403(2) quoted above (on 'consistency with the traditions of the international system') was included "primarily with reference to maritime law, which by centuries-old custom limits the jurisdiction to prescribe of port states and commits most jurisdiction, including wages and working conditions of the crew, compensation for injuries and safety requirements, either to the flag state or to international treaty." (Footnote omitted).

64 Similarly, see Marten, 2014, pp. 197-198, who also notes that the Australian Fair Work legislation prescribes for weekly pay rates for foreign ships engaged in coastal trade on a short-term basis.

65 Notably Regulation 593/2008 on the law applicable to contractual obligations (Rome I) and its predecessor, the 1980 Rome Convention on the law applicable to contractiual obligations.

66 Article 8(2) In case of international trade, the flag state would usually be the relevant one. See W. Wurmnest, 'Maritime Employment Contracts in the Conflict of Laws', The Hamburg Lectures 2009 & 2010, Springer, 2012, p. 135. For certain examples in German case law, where the coastal state laws, not those of the flag state, have been applied to employment matters, see the NILOS Report, pp. 44 .

country than those arrived at under the other criteria.[67] More importantly, Article 9 provides for a more general possibility to apply 'overriding mandatory provisions' of third countries. The scope of this exception is not established in case law,[68] but its very presence serves to illustrate the limits of the flag state's exclusivity over employment matters.[69] More generally, therefore, international private law in this field, by calling for an evaluation of the circumstances in the individual case, negates the idea that flag states' legislation will always govern issues related to employment conditions of ships.

Finally, the flag state's quest for exclusive jurisdiction over employment matters can also be expected to weaken if the link between that state and the seafarers on board is faint. It is far from self-evident that some far away open register is a better state to regulate employment conditions of seafarers, with which it has no links and who spend all their time in Norway.

In a detailed analysis of one of the few national employment schemes for foreign shipping which is currently in operation, Marten concludes that the substantial connection principle could be applied to justify the Australian Fair Work legislation. He considers the Australian rules, which inter alia, covers offshore service vessels,[70] to represent "a careful selection of those vessels that are already connected closely with its jurisdiction, such as ships operating out of the country's ports, or whose operators use Australia as a base."[71]

2.3 Off-shore installations and the exercise of 'port state jurisdiction'

Ships which provide services to Norwegian off-shore installations without frequent or any calls at Norwegian ports will obviously have a significantly weaker connection to Norway. This prompts the question as to whether the installation itself may exercise 'port state' jurisdiction, for instance with regard to service vessels that provide regular or semi-permanent services for it. The legal status of offshore installations is regulated in detail in UNCLOS

67 Article 8(4). The criteria to be taken into account in that assessment include the language of the contract, the use of legal concepts from a specific legal system, the currency used, the duration of the employment contract, the nationality of the contracting parties, the normal place of residence, the place where the employer supervises his staff and the place where the contract is concluded. W. Van Eeckhoutte, 'The Rome Convention on the law applicable to contractual obligations and labour law', in R. Blanpan (ed.) Freedom of services in the European Union – Labour and Social Security Law: The Bolkestein Initiative, The Hague 2006, pp. 171ff.

68 U. Liukkunen, The Role of Mandatory Rules in International Labour Law *A Comparative Study in the Conflict of Laws*, Talentum, Helsinki, 2004, p. 141.

69 Marten, 2014, pp. 208-209 suggests that the Australian employment laws on wages and working hours qualify as overriding mandatory provisions under the EU rules.

70 33(1)(c) of the 2009 Fair Work Act, extends the Act's provisions to "any ship, in the exclusive economic zone or in the waters above the continental shelf, that: (i) supplies, services or otherwise operates in connection with a fixed platform in the exclusive economic zone or in the waters above the continental shelf; and (ii) operates to and from an Australian port".

71 Marten, 2014, p. 190.

While the waters and sea-bed within the limits of the territorial sea form parts of the area for which the coastal state exercises (territorial) sovereignty,[72] this is not the case beyond that area, where most Norwegian off-shore installations are situated. The territorial sovereignty argument, which is central to the justification for port states' extensive jurisdiction over foreign ships, is hence not available for the installations. Nevertheless, the jurisdictional authority over those installations is quite extensive.

UNCLOS Article 56(1)(a) lays down that the coastal state has "sovereign rights" for the purpose of exploring and exploiting living and non-living natural resources in the EEZ including the sea-bed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone. Subparagraph (b) grants jurisdiction with regard to the establishment of installation and structures in this zone. With respect to the latter, UNCLOS Article 60(1) establishes that coastal states have the exclusive right to construct, authorize and regulate the construction, operation and use of off-shore installations in their EEZs, and through Article 80, on their continental shelf.[73] In addition, they have "exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations" (Article 60(2)). Coastal states may further, where necessary, establish "reasonable safety zones" of maximum 500 metres (unless a wider area is authorized by a competent international organization). In these zones, coastal states "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations or structures" (Article 60(3)).

On the other hand, Article 78 provides that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters (EEZ) and that any exercise of those rights "must not infringe or result in any unjustifiable interference with navigation and other rights or freedoms of other States". Moreover, Article 58(2) provides that the high seas articles, including Article 92 providing for the exclusive jurisdiction of the flag state, apply to the EEZ "in so far as they are not incompatible with this Part".

The quoted parts of Article 60 above suggest that the jurisdiction over the installation relates to the activities on the *installation* itself. As a prolongation of those rights, it seems quite possible that unilateral requirements could be imposed by coastal states for ships serving on their off-shore installations with respect to the matters listed in Article 60(2) and possibly others, such as the security of the installation.[74] By contrast, the only express jurisdiction

72 UNCLOS Article 2(2).

73 In view of the parity of the legal regimes for the EEZ and the continental shelf, it seems that the nature of the installation (floating or fixed) is not of immediate importance for this matter. In addition, the broadly based jurisdiction in UNCLOS for installations and any other structures in the EEZ suggests that the considerations below also apply to other installations established in this area, such as wind farms or aquaculture installations. It may also be noted that these rules regime apply independently of the nationality of the operator of the installation.

74 Cf Marten, 2014, p. 188: "Artificial structures in the EEZ are not equivalent to ports under international law in terms of jurisdiction and in most scenarios the vessels in this maritime zone enjoy the same rights as they would on the high seas". He concludes that "it would appear that the attempt to apply

over *ships* is the one in Article 60(3) which is limited to safety. It therefore seems that even if some degree of 'quasi port state jurisdiction' could be argued to exist for off-shore installations, this would not extend to matters which do not affect the installation as such.[75]

The absence of express or implied jurisdiction in UNCLOS to regulate ships servicing off-shore installations does not rule out that the coastal state may use its sovereign rights to regulate the *access* to such installations or to provide services to them. This could be supported by the extensive and exclusive rights of the coastal states to decide on the operation of such installations combined with the absence of any right of ships to provide such services.[76] Some states have specifically enacted legislation to ensure that foreign vessels visiting such installations expressly consent to the coastal state's jurisdiction.[77] However, even if a right to impose access conditions for serving off-shore installations exists in international law, it was noted above that the corresponding right of port states is subject to a number of general limitations.[78] The same limitations, as a minimum, apply to this scenario. Employment conditions imposed on ships that do not even call at the coastal state's ports (and where the crew on board thus has no relationship to the domestic employment standards) are likely to score very badly in an assessment of the reasonableness of the measure and its connection to the interests of port/coastal state.

In view of such considerations, coastal states probably do not have jurisdiction to impose employment conditions on ships servicing their installations on that basis alone. That does not exclude, of course, that traffic to or from such installations are included in the assessment of the national nature of the trade from the port state perspective under the principles discussed in section 2.2 above.

In conclusion, the coastal state's jurisdiction to place employment conditions on ships serving installations on its continental shelf or EEZ is somewhat weaker, but not radically different, from that of a port state. In the end it is the connection between the requirement and the interests of that state which are decisive for the assessment of their legality. The closer the link between Norway and the regulated services, the stronger will the arguments be of the genuine interests of Norway to regulate this matter.

Whether jurisdictional limitations in this area could be avoided by commercial policies adopted by the operators of the installations to achieve the same result is another issue, which goes beyond the scope of the present analysis, as operators are not as such bound by

the [Australian Fair Work] Act to ships in the EEZ or waters above the continental shelf … contravenes UNCLOS." See also id. at p. 22

75 In this case it seems less relevant whether the ship actually moors by the installation or not. Its provision of services in the vicinity of the installation ought to be sufficient for this purpose.

76 Treating such installation as ports in a functional sense is also supported by the inclusion of traffic between them and the coastal state within the definition of 'cabotage' for example in EU Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

77 See the US Deepwater Port Act 33 USC 1501-1524 (1974) and O'Connell, 1984, pp. 842-846.

78 See 2.2.1 above.

international law.[79] From the point of view of public international law it seems sufficient to note that to the extent the coastal state specifically requires operators to adopt a certain policy as a condition for authorising operations on its continental shelf, those conditions would need to be consistent with the coastal state's obligations under international law.

2.4 International trade law and other relevant treaty limitations

It was already noted that multilateral or bilateral treaties may impose additional limitations to port States' jurisdiction to regulate foreign ships. A potentially important category of multilateral treaties that may have such effects is the international trade law agreements under the umbrella of the World Trade Organization (WTO), in particularly the General Agreement on Trade in Services (GATS). While it is not possible to assess this branch of law in detail here,[80] some general remarks may be still be justified, if only to illustrate that the considerations that apply under international trade law are not necessarily very different from the other limitations on port States' jurisdiction discussed above.

Generally speaking, the relevant international trade agreements do not rule out the adoption of unilateral measures affecting trade, but seek to avoid their abuse by establishing certain principles to govern such measures. The key principles include 'most-favoured nation' ('MFN') treatment,[81] and 'national treatment'.[82] These principles aim at ensuring that trade from all WTO members are treated equally and that members refrain from abusive or discriminatory practices. The beneficiaries are not only ships flying the flag of another member to the WTO, but also "a person which operates and/or uses the vessel in whole or in part but which is of a non-Member".[83]

Of the obligations above, the MFN principle, gives rise to particularly significant implications in shipping, being a sector that traditionally relies on reciprocal concessions. Essentially, the obligation provides that any WTO member providing services in another member has the right to the same treatment as any other country providing such services, hence allowing

79 See also 3.3.5.

80 For a thorough assessment of trade law aspects of unilateral manning conditions by port states, see the NILOS Report, pp. 52-83. See also B. Parameswaran, *The Liberalization of Maritime Transport Services, With Special Reference to the WTO/GATS Framework*, Hamburg Studies on Maritime Affairs No. 1, Springer, Heidelberg, 2004.

81 See for example General Agreement on Trade in Services, Article II(1): "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country". The WTO Appellate Body has held that this phrase covers both de jure and de facto discrimination. See EC-Bananas III, WT/DS27/AB/R, 1997, paras. 233-234. There could be exemptions under para.2 of the Annex on Article II Exemptions.

82 GATS Article XVII(1) provides that "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

83 GATS Article XXVIII(f)(i)In view of the broad membership of GATS, it seems clear that either of these conditions will usually be met.

‘free-riders’ to benefit from such concessions. Eventually, this obligation was – and still is - suspended in the maritime sector, pending the conclusion of separate negotiations for this matter.[84] However, for states that have made specific commitments in various subsectors of maritime transport services, the MFN obligations still applies. [85]

The GATS obligations are not absolute. Article XIV includes a set of ‘general exemptions’, to safeguard the interests of the enacting State.[86] The (exhaustive) exemptions include no reference to employment conditions, but such conditions could possibly fall within any of the subparagraphs quoted in the previous footnote. Apart from fitting in within one of the subparagraphs, the restrictive measures will also need to be proven necessary to achieve the relevant objective. This involves a balancing test, in which the trade restriction of the relevant measure will be weighed against how vital the protected interest is. In this case, too, employment conditions which have a close link to safety, such as rules on on-board working hours, seem easier to exempt.

There is no case in the WTO Dispute Settlement System directly dealing with employment conditions for ships, but the NILOS Study concludes, on the basis of an analysis of other relevant case law, that at least the objective of preventing social dumping could be encompassed within the scope of public order and public morals under subparagraph (a) and that such conditions could also, subject to certain conditions, be justified under the rules of the chapeau of Article XIV.[87]

Yet, even if there seems to be some margin for states to justify employment conditions for foreign ships under the WTO rules, there is an additional hurdle with respect to new measures affecting trade in the maritime sector. While the 1994 Ministerial Decision and the accompanying Annex on Negotiation on Maritime Transport Services limited the impact of the MFN obligations on maritime transport, notably by suspending the application of the MFN requirement, the failure to conclude the rules on shipping services brought along an additional limitation with respect to new measures in the field. A so-called ‘standstill clause’ was included among the legal obligations that apply to members:[88]

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84 See the Annex on Negotiation of Maritime Transport Services.

85 However, Norway has made no commitments which are of relevance to the present topic. See also https://i-tip.wto.org/services/(S(i4r1myegpfmcur53y10bqgca))/GATS_Detail.aspx/?id=Norway&sector_path=11.A%20Maritime%20Transport%20Services

86 Article XIV provides in the relevant parts that “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: a) necessary to protect public morals or to maintain public order…b) necessary to protect human, animal or plant life or health”…c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to … (iii) safety”..

87 The NILOS Report, pp. 69-72, concluding on p. 81 that ”the form that the relevant measure takes, and the specific objective it aims to achieve, will be crucial in establishing whether it can be justified under Article XIV”.

88 Decision on Maritime Transport Services, 1996 (para. VII).

> “Commencing immediately and continuing until the conclusion of the negotiations referred to in paragraph 1, it is understood that Members shall not apply any measures affecting trade in maritime transport services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage.”

This clause, which was intended as a temporary limitation during the negotiations which were expected to be concluded within a few years, has continued its life following the (repeated) failure to conclude such negotiations. It prevents members from introducing new trade restricting measures, seemingly irrespectively of the policy exceptions that may otherwise apply under GATS.[89] This could represent a significant hurdle for new measures in the field of employment conditions. Alleged violations against this clause cannot be challenged through the WTO dispute settlement, but they could justify countermeasures by other states.

2.5 Cabotage

The legal regime governing port state jurisdiction which has been discussed above applies to international trade, i.e. where the ships in question trade between the port state and another state. In case the ships concerned are engaged in internal trade a rather different legal picture emerges. Despite its obvious significance for the overall regulatory scheme for shipping, however, the international law rights and obligations that apply in domestic transport, or ‘cabotage’, are not very explicit. Since this is often regarded as a trade matter without international implications, UNCLOS and other jurisdictional treaties have not addressed this matter at all. Most international conventions in the maritime field limit themselves to regulating *international* transport, thereby excluding cabotage from their scope.[90] In conventions dealing with international trade and services, cabotage is similarly excluded from their scope, on the understanding that this matter is for the individual states to regulate in line with their domestic priorities.[91]

Cabotage is usually defined as the transport of goods or passengers from one port or place to another in the same country.[92] The term normally refers to a set of restrictions imposed by the state in question to reserve the domestic maritime trade for its own citizens, or to put

[89] The NILOS Report, p. 75, Boyle Opinion, pp. 13-15

[90] See e.g. Regulation I/1(a) of the International Convention on Safety of Life at Sea or Article 1(b) of the 1948 Convention on the International Maritime Organization.

[91] See Article I(2) of GATS. Since cabotage is excluded from the concept of maritime transport services, it is also excluded from the standstill clause discussed in section 2.4 above. See also Article 9 of the 1923 International Ports Statute, providing that “This Statute does not in any way apply to the maritime coasting trade.”

[92] Black’s Law Dictionary, 2004, p. 215.

particular conditions on foreigners engaged in this trade.[93] Such restrictions are widely used in practice, in all parts of the world,[94] typically justified by the need to protect the coastal transport market and the associated jobs from low-cost foreign competition. This practice has long traditions and is not usually objected to on legal grounds.

Whether transport services between the mainland and installations on the continental shelf form part of this concept is a more recent question, but one that has not been subject to much attention in legal literature or otherwise. There appears to be nothing to suggest a restrictive approach to this question. Traffic to and from off-shore installations is specifically included in EU the scope of EU Regulation 92/3577,[95] and the same appears to be assumed for the Norwegian trade.[96]

The legal basis for cabotage restrictions lies in the state's territorial sovereignty and in the consideration that any restrictions applied on domestic voyages only concern its own territory.[97] The maritime zones concerned are not of relevance in this respect.[98] In the absence of specific treaty limitations it is difficult to find limitations of the right to regulate domestic transport in general international law, even for employment conditions or (other) internal matters on board the ship. As Marten puts it, "[g]iven that the port state can legitimately prevent all foreign vessels from engaging its coastal trade, then how can international law limit its ability to allow foreign ships to compete in its domestic market,

93 Nationality requirements on ships and crew members in cabotage trade are quite common and a broad range of states implement such requirements. See e.g. , for example in the United States' 'Jones Act' (46 USC 55102), Brazilian Shipping Act (Law No. 9432/97) and in the Australian Fair Work Act. See also the table in T. Kvinge & A.M. Ødegård, *Protectionism or Legitimate Protection? On Public Regulation of Pay and Working Conditions in Norwegian Maritime Cabotage*, Fafo, 2010, pp. 30-31, where such requirements for 12 (non-EU) countries are summarized based on ITF information and S. Skinnarland and M. Mühlbradt: Det gode liv til sjøs: lønns- og arbeidsvilkår på utenlandske skip: norsk handlingsrom, Fafo Report 2014:19, pp. 51-55.

94 Thus, for example, the Jones Act provides that trade between US ports is limited to ships owned and documented in the United States Similarly Part 4 of the Australian Coastal Trading (Revitalising Australian Shipping) Act limits the right to engage in Australian domestic trade to ships that are specifically licensed for the purpose. Kvinge & Ødegård, 2010, p. 28, hold that "the regulations vary a great deal, and discriminating cabotage regulations are most conspicuous in North, South and Central America and South, East and South-East Asia." For a summary of practices within the EU, see Chapter 6 of 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags', Study carried out for the European Commission by ECORYS, in 2008 and the more recent update in Fafo Report 2014:19, pp. 32-50.

95 See section 3.2.2 below.

96 E.g. Kvinge & Ødegård, 2010, p. 10.

97 See the NILOS Report, p. 104: "This discretion seems based on the specific interests of the port (or host) State and the circumstance that the extra-territorial effects are limited and do not affect the uniformity in the regulation of international maritime transport."

98 Ibid., Marten, 2014, pp. 200-201. See also Case C-323/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-2161 and Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), COM (2014) 232 pp. 6-7.

even under tight restrictions?"[99] This is particularly so in the envisaged case where the question is not about excluding foreign ship operators or foreign nationals from engaging in cabotage services, but only to require them to do so on an equal footing with the domestic operators.

Presumably however, at least the very basic limitations of international law, such as those codified in UNCLOS Article 300 (abuse of a right or failure by the state to exercise good faith) would place some limitations on the kind of restrictions that a port state may lawfully apply. It may be noted, however, that international law acknowledges no general customary rule prohibiting discrimination or preferential treatment between states[100] and it is doubtful if the various UNCLOS articles referring to non-discrimination between flags apply to cabotage.[101]

In practice the most important limitation for states' to impose cabotage restrictions is formed by bilateral or multilateral arrangements to limit restrictive practices in the interest to maintain open maritime markets. A particularly significant instrument to this effect is EU Regulation 92/3577 which is discussed in more detail in chapter 3 below.[102]

2.6 Conclusion

This chapter has illustrated that the international law governing the right of states to impose conditions such as the prospective Norwegian employment condition is a complex one. Many different areas of international law are involved, many of them remain uncodified, and even the ones that are regulated by international treaties, do not necessarily provide a very clear indication of where the legal borders lie. The uncertainty is further emphasized by the absence of state practice and case law in the field.

From the analysis above, it follows that states can regulate conditions relating to employment, including wages, for foreign ships voluntarily entering their ports. However, this right is subject to some significant limitations. In a decreasing order of port state authority, the following observations may be made.

- Transports between the Norwegian mainland and off-shore installations on the Norwegian continental shelf or EEZ are subject to very few international law limitations. This type of transport constitutes 'cabotage' trade for which has long traditions and is continuously applied to some extent in all parts of the world. Even in

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99 Marten, 2014, p. 201

100 See Jennings & Watts, 1992, pp. 376-377: "The freedom of a state to grant preferential treatment to certain states, or to impose disadvantageous arrangements on others, has long been a valued instrument of policy in the conduct of international relations."

101 See e.g. UNCLOS Article 227. See also Articles 24(1)(b), 25(3), 26(2), 42(2), 52(2) and 234.

102 The question as to whether transport within the EU, between its member states, could be considered to represent cabotage within the meaning of international law is discussed in the NILOS Report at pp. 104-105, where it is concluded that this interpretation is plausible, but not supported by state practice or even by the EU itself.

the absence of a specific jurisdictional status of cabotage in international law, most maritime conventions, as well as the international trade law agreements, exclude domestic trade from its scope. The MLC applies to ships in domestic trade, but that convention does not prevent port states from exceeding the minimum standards laid down therein under general international law.

- The application of such conditions for ships in international trade depends on the way it will be enforced. If non-complying ships will be refused access to Norwegian ports or in-port services the need for an express prescriptive basis will be reduced, which provides better opportunities for national requirements.
- If enforcement will be undertaken in ports, and the measures extend beyond merely declining non-complying ships some services, the matter becomes more complex. A number of different legal considerations apply and the limits of legality differ depending on the nature of the employment condition concerned. The critical test is eventually that there needs to be a substantial and genuine connection between the requirement and the Norwegian interests to regulate it.
- It is clearly easiest to justify measures that concerns ship in a near-coastal trade, while the jurisdictional authority decreases with a weaker link between the ship and Norway. Local employment conditions seem particularly justifiable in case the crew in question actually lives in Norway, as this strengthens the legitimacy of the measure in terms of preventing social dumping. A broadly similar picture emerges from the application of international private law on applicable law for maritime employment contract.
- In a substantive sense, it is clear that requirements that can be linked to the safety of the port states will achieve additional weight in favour of the port state under any of the above legal assessments.
- Norway does probably not have jurisdiction to impose employment standards on ships trading between Norwegian off-shore installations and other states. However, limitations on access to the installations, or the right to provide services to them, could be justified on the basis of the ‘regular’ rules on port access if the connection to Norway is sufficiently strong, that is, where the service has strong links to Norway.
- This area of law international law is quite unsettled and in a state of continuous change in the direction away from exclusive flag state jurisdiction.
- There is very little state practice on port state requirements that involve employment conditions on foreign vessels. This means that individual measures by a single state at this stage may have an important impact on the state and bounds of international law in this area.
- In view of the uncertainty of the legal status of this matter, considerable importance will also be attached to how other states react to the measures. In this respect it may be important to note that the only example so far of a national law that extends employment requirements to foreign ships in ports, the Australian Fair Work legislation, which maintains a very close link to the Australian connection to the ships covered, has not met much opposition by other states in this respect.

3 EEA law

3.1 Introduction

The EEA law may limit the use that Norway can make of its jurisdiction under the law of the sea or general international law. There is generally no obligation to make use of such jurisdiction and, as will be shown, the EEA Agreement to a large extent represents an undertaking in not making use of it.

If Norwegian work conditions cannot be enforced against ships/shipowners that can invoke the EEA Agreement,[103] it would not matter whether ships or shipowners with no connection to EEA were subject to Norwegian work conditions. There would still be competitors in the market from the EEA not subject to Norwegian work conditions that could therefore trade on flag state conditions. Thus, the EEA Agreement is crucial when determining whether Norwegian work conditions can be enforced in North Sea support trade.

In addition, as was noted above in section 2.4, international trade law may limit the availability of Norway's jurisdiction to impose different standards for EEA and other ships, even if the obligation to provide the 'most favored nation' treatment does not apply to maritime transport services in Norway.

Moreover, in any case, the practical effect of such a differentiation would be that ships registering in EU/EEA states would be subject to more lenient standards than other ships, which would probably increase pressure for flagging in to European flags. While this type of 'flag of convenience'-like status of the EU would be both unusual and probably politically unbearable for the EU, there would be nothing self-contradictory in such situation.

3.2 Market access

3.2.1 Introduction

In general EU and EEA law, there is free access to markets. This means that EEA ships and shipowners have the right to offer offshore support services in the Norwegian sector (below 3.2.2).[104] It also means that host state[105] (Norwegian) legislation on working conditions could be considered restrictions in violation of the right to offer services (below 3.3.3). Such mechanisms that prevent Norwegian legislators from intervening when, for example, Polish carpenters oust local Norwegian competitors.

103 Issues regarding who can invoke this part of the EEA Agreement do not have to be elaborated for the purposes here. See to this COM (2014) 232 p. 4 et seq. and ECJ in Fonnship (C-83/13).

104 See below in 3.4 on whether these general principles are applicable outside the territorial border.

105 The term host state as used in this context is not identical to the term host states as used in 2.1.4 above.

3.2.2 The right to offer offshore support services

The EEA Agreement[106] includes provisions on the free movement of goods and services, as well as freedom of establishment. The rules mimic those in the EU Law.[107]

The principles have also been confirmed in secondary legislation, which we will discuss first. In line with what has been discussed above in 3.1, the focus is not on who can invoke the rules.

First of all, there is a *Regulation on the right to provide shipping services*:[108]

> "Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

The major part of the Regulation deals with exemptions from the principle that are not relevant here.

The Regulation concerns transport services defined in this way:

> "4. For the purpose of this Regulation, the following shall be considered 'maritime transport services between Member States and between Member States and third countries' where they are normally provided for remuneration:
> (a) intra-Community shipping services:
> the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State;
> (b) third-country traffic:
> the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country."

The ECJ has paraphrased this definition:[109]

> "That interpretation is confirmed, as the Greek Government rightly argues, by the wording of Article 1(4) of Regulation No 4055/86, according to which services are to be considered maritime transport services where they are provided for consideration for the purpose of transporting passengers or goods by sea between any port of a

106 Agreement of the European Economic Area, 1993, as amended 14 October 2014 (http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf).

107 Treaty of the Functioning of the European Union, as amended (http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT), Title IV.

108 Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (EEA Agreement, Annex XIII No. 53), Article 1(1).

109 Commission v Hellenic Republic (ECJ C-205/99), para 30.

> Member State and any ports or off-shore installation of another Member State or a third country."

Some services offered by offshore service ships are not transport-related, but, for example, standby services. To the extent some services are considered not to be transport-related, the freedom to provide services under flag state conditions would nevertheless follow from the general rules of the EEA Agreement (see below in this section).

The Regulation applies to interstate transport. Internal transport in Norway is governed by a special *Regulation on cabotage* (domestic, coastal trade).[110] These provisions, too, reaffirms the general rule of free international competition within the EEA:[111]

> "... freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State ..."

As was noted above, cabotage explicitly includes offshore support services:[112]

> "For the purposes of this Regulation:
> 1- 'maritime transport services within a Member State (maritime cabotage)' shall mean services normally provided for remuneration and shall in particular include: ...
> (b) off-shore supply services : the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State ;"

The notion of cabotage also includes 'transport' starting and ending in the same port.[113] And, like in the case of the international shipping services, if the service falls beyond the definition of transport-related activities, the freedom to provide services under flag state conditions follows from the general rules of the EEA Agreement (see below in this section).

For ships in "mainland cabotage" and "island cabotage", there are certain exemptions from the principle of free international competition within the EEA.[114] Such exemptions are not made for offshore services. The general principle, therefore, clearly applies.[115]

In addition to the secondary legislation, there are also Treaty provisions relating to market access. These are the rules concerning the right to establishment and free movement of

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110 Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide sevices to maritime transport within Member States (maritime cabotage) (EEA Agrement, Annex XIII No. 53a).

111 Council Regulation (EEC) No 3577/92, Article 1(1).

112 Council Regulation (EEC) No 3577/92, Article 2(1)(b).

113 Alpina River Cruises and another v Ministero delle infrastrutture e dei trasporti (ECJ C-17/13), which concerned a passenger cruise.

114 Council Regulation (EEC) No 3577/92, Article 3, cf. Article 2(1)(a) and (c) and below in 3.6.

115 To the contrary Fafo Report 2014:19, p. 27.

persons, goods, capital and services. For the purposes here, the rules on free movement of goods and capital are not important.

The right of establishment is set out in Article 31(1) of the EEA Agreement:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4."

The freedom of establishment also extends to the choice of flag in the sense that

> "the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Article 52 et seq. of the Treaty." [116]

Seemingly the freedom of establishment is only a right of organizing the enterprise. In Viking Line, however, the ECJ protected a shipowner moving its business to another Member State (arguably to a "flag of convenience") from trade union actions against social dumping, maintaining that the right to establishment would be illusory if such protection were not granted:[117]

> "72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU [the trade union] has the effect of making less attractive, or even pointless, as the national court has pointed out, Vikings exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.
>
> 73 Secondly, collective action taken in order to implement ITF's [the trade union's] policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Vikings exercise of its right of freedom of establishment."

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[116] Factortame II (ECJ C-221/89), para 23.

[117] International Transport Workers' Federation and another v Viking Line ABP (ECJ C-438/05).

In this case there were no hindrances to the reestablishment. What was considered a restriction was that the reestablishment would not be as profitable as expected. The right of establishment, then, becomes something more than an organizational matter; it is a right not to sustain at least some kinds of adverse effects of the way the enterprise has chosen to organize itself.

The freedom to provide services is set out in Article 36(1) of the EEA Agreement:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

Offshore support services are clearly services in this sense.

Article 38 of the EEA Agreement excludes the freedom to provide services included in the special rules for transport. It refers to Part III Chapter 6, which does not apply to sea transport — and in any event, it does not provide for a right to provide services. However, the secondary legislation referred to above makes it clear that the principles now also apply to sea transport.[118] The general principles of EU law also otherwise apply in the maritime transport sector.[119]

In *Commission v Hellenic Republic*, the ECJ suggests that there may be some transport services that are excepted from the general freedom to provide services as well as from the secondary legislation on the same matter, leaving these services in the hands of the individual states:[120]

> "On the other hand, it follows from Article 51(1) EC, read in conjunction with Article 80(2) EC, that services falling within the sea transport sector, but not within the scope of Regulation No 3577/92 or other rules adopted on the basis of Article 80(2)EC, remain governed by the legislation of Member States, in compliance with Article 54 EC and other general provisions of the Treaty (see, to that effect Case 167/73 Commission v France [1974] ECR 359, paragraph 32)."

For procedural reasons, this was not part of the rationale of the case.[121] The case only decided that towing is not governed by the Regulation on the right to provide shipping services.[122]

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118 This legislation is incorporated i the EEA Agreement by its Article 47(2).
119 Commission v France (ECJ C-167/73), para 32; Power, *EC shipping law* (1998) p. 228.; H. Bull, EØS-avtalen at http://www. rettsdata.no, comment 97.
120 Commission v Hellenic Republic (ECJ C-205/99), para 26.
121 Ibid., para 27.
122 Council Regulation (EEC) No 4055/86.

It is submitted that there is no significant unregulated area relevant for our study that falls within the exception from the general freedom to provide services applicable to "services in the field of transport"[123] and at the same time does not fall within the definition of "maritime transport services"[124] in the secondary legislation. Neither the wording nor policy reasons warrant such reading.

The freedom to provide services has been understood not only as a freedom to carry out activity in another member state but also to bring the workforce along. The ECJ speaks of a

> "right of a person providing services in the building and public works sector to move with his own labour force ... for the duration of the work undertaken." [125]

There can be no doubt that this also applies in the shipping sector.

The 'Services Directive' has been adopted to supplement the Treaty provisions on the provision of services in the internal market.[126] However, as this directive does not apply to labor law, it will not be further considered here.[127]

Because the freedom to provide services encompasses moving the workforce, the *principle of free movement of persons* is not important in our context. The principle is, however set out in Article 36(1) of the EEA agreement:

> "Freedom of movement for workers shall be secured among EC Member States and EFTA States."

There is also a Regulation regarding the free movement of workers,[128] but this does not include provisions important to the present discussion.

In conclusion, there is a right for EEA ships and shipowners to offer offshore support services in the Norwegian sector. This is well in line with existing practice, and is, thus, old news.

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123 EEA Agreement Article 38.

124 Council Regulation (EEC) No 4055/86, Article 1 (with definition in Article 1(4)) and Council Regulation (EEC) No 3577/92, Article 1 (with definition in Article 2).

125 Rush Portuguesa v Office national d'immigration (ECJ C-113/89), para 17.

126 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

127 Directive 2006/123/EC, Article 1(6), providing in full:

> "This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States."

128 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

However, the right carries with it a freedom from restrictions, which is more controversial. This will be discussed in the next section.

3.2.3 Undue restrictions

The ECJ has taken a strict line with respect to restrictions that might limit the freedom to provide services etc. as described above in section 3.2.2. Obviously, not allowing foreigners to participate in the market on the same conditions as nationals would violate the freedoms. However, the court has gone further.[129] Even conditions that are exactly the same for foreigners and nationals and have the same effect may be considered to be undue restrictions. Moreover, not only hindrance is considered but also mere inconvenience. In the same vein, it is irrelevant whether the intention of the legislator was to restrict market access.

For present purposes, a general survey of what are considered to represent undue restrictions under the freedoms is unnecessary. Our focus is whether requiring the Norwegian working conditions — in particular wages — for foreign workers would amount to an undue restriction.

Any measure that would effectively prevent or hinder services from being offered under non-Norwegian employment conditions (to render possible prospective Norwegian employment requirements) would necessarily be a restriction. The question is whether such restrictions can be justified.

The general rules for such situations are found in the Posting of Workers Directive.[130] While this directive does not apply to[131]

> "merchant navy undertakings as regards seagoing personnel" [132]

and therefore not apply to the North Sea support vessel services, its provisions may nevertheless be relevant as an indication of where the prospective borderlines are drawn.

The Posting of Workers Directive limits the host state legislation on work conditions to the following matters:[133]

> "(a) maximum work periods and minimum rest periods;
> (b) minimum paid annual holidays;

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129 See to this and the following Barnard, *The substantive law of the EU: the four freedoms* (2013) p. 18-21.

130 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (EEA AGreement, Annex XVIII No. 30).

131 Directive 96/71/EC, Article 1(1).

132 Directive 96/71/EC, Article 1(1).

133 Directive 96/71/EC, Article 3(1).

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
(e) health, safety and hygiene at work;
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination."

The list has been interpreted exhaustively.[134] Outside the list, public policy provisions are allowed.[135]

The host state can use legislation directly or indirectly by making collective agreement universally applicable.[136] Yet, as will be shown below, case law has restricted the use of host states' legislative powers.

In matters outside this list, the law of the work contract applies. In the EU, this is determined by the Rome I Regulation.[137] According to this Regulation, workers posted in Norway would often be subject to the more lenient labor laws of their home countries outside the scope of host state legislation on the points listed above, including home state wages. (This Regulation is, however, not applicable in the EEA outside the EU.)

It is submitted that this Directive is a good indicator on how the ECJ might interpret the freedom to provide services, etc. The host state regulation of employment conditions are therefore likely to be seen as undue restrictions if they go beyond the standards of the Directive. However, there is reason to believe that the Court could be somewhat more flexible outside the scope of the Directive, as in the North Sea offshore support trade.[138]

Although the Posting of Workers Directive and cases interpreting it completely dominate the field of employment conditions relating to the freedom to provide services, similar principles have been established directly on the basis of the Treaty provisions. The general principles regarding the restrictions of the freedoms are, of course, also relevant in this field.

The starting point is that the host state can make its legislation applicable on foreign workers:

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134 Laval v Svenska Byggnadsarbetareförbundet (Case ECJ C-341/05), para 71; Commission v Luxembourg (ECJ C-319/06), para 26; Barnard, *l.c.* p. 381.
135 Directive 96/71/EC, Article 3(10).
136 Directive 96/71/EC, Article 3(1).
137 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 8.
138 Barnard, *l.c.* p. 381.

> “Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means ...” [139]

However, the exercise of such legislative powers must not unduly restrict market access. A leading case which is *not* based on the Posting of Workers Directive is the Viking Line case. Here, it was made clear that restrictions on the right of establishment would in most cases *not* be justifiable:[140]

> “It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it.”

Only when an “overriding public interest” so requires, restrictions can be justified.

A similar test is used also, for example, in respect to the free movement of persons:

> “Consequently, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest ...” [141]

The wording may vary, but the substance remains:

> “It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it ...” [142]

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139 Rush Portuguesa v Office national d'immigration (ECJ C-113/89), para 17.
140 Viking Line (ECJ C-438/05), para 75.
141 Kraus v Baden-Württemberg (ECJ C-19/92), para 32.
142 Gebhard (ECJ C-55/94), para 37.

These tests seem to be applicable regardless of which basis for market access is used. They apply even within the scope of the Position of Workers Directive. They must also apply within the scope of the secondary legislation on freedom to provide shipping services discussed above. This is true despite the condition in the Cabotage Regulation that market access requires that "these ships comply with all conditions for carrying out cabotage in that Member State".[143]

The question then arises as to any Norwegian legislation aimed at making work conditions similar in Norwegian and foreign companies supplying offshore services can be said to pursue "imperative requirements in the general interest." We presuppose that they are non-discriminatory, suitable and do not go beyond what is necessary.

However, the cases clearly indicate that Norwegian legislation aimed at making work conditions similar in Norwegian and foreign companies supplying offshore services cannot be said to pursue "imperative requirements in the general interest." In *Seco*, restrictions in the shape of social security premiums could not be justified as a measure for leveling the playing field between the high-cost host state and the low-cost home state of workers:

> "Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed." [144]

Similarly, in *Finalarte*:

> "According to settled case-law, measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of national businesses (see, to that effect, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 34, and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23)." [145]

In conclusion, it seems clear that harmonizing the work conditions for Norwegian and foreign workers cannot in itself justify restrictions on the market access to the North Sea offshore support trade.

3.2.4 A remark on the Cabotage Regulation

The Cabotage Regulation provides:[146]

> "Article 62 of the Treaty shall apply to the matters covered by this Regulation."

143 Council Regulation (EEC) No 3577/92, Article 1(1).
144 Seco (ECJ C-62/81 and C-63/81), para 15.
145 Finalarte Sociedade de Construção Civil (ECJ C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98), para 39.
146 Council Regulation (EEC) No 3577/92, Article 7.

This is a reference to the now abolished standstill clause in the EC Treaty:[147]

> "Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty."

If this applies, the free market access is even wider than discussed above in 3.2.3. However, it is questionable whether Article 7 of the Cabotage Regulation still is in force, as it only reflects a repealed provision.

In the EEA version of the Regulation, the Article is rephrased:[148]

> "Save as otherwise provided in this Agreement, the Contracting Parties shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the decision by the EEA Joint Committee to include this Regulation in the Agreement."

At the time of adoption, the EEA Joint Committee must have felt that the provision was in force. However, this was in 1997, when the destiny of the Amsterdam treaty and the Repeal of Article 62 of the EC Treaty were still undecided.[149]

Later on, the Member States have introduced new restrictions in this area with the approval of the Commission.[150] Also the Norwegian government disregards the wording of the Regulation.[151]

It is submitted that the failure to delete Article 7 of the Cabotage Regulation is due to an oversight, and that no standstill clause applies.[152] There is hardly any reason to uphold the standstill clause in this area more than on other areas; this was a measure used when the rules on free market access were developed. However, if the standstill clause still applies, it

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147 Treaty Establishing the European Economic Community (Single European Act 1987; http://europa.eu/eu-law/decision-making/treaties/pdf/treaties_establishing_the_european_communities_single_european_act/treaties_establishing_the_european_communities_single_european_act_en.pdf), Article 62.

148 Decision of the EEA Joint CommitteE No 70/97 of 4 October 1997 amending Annex XIII (Transport) to the EEA Agreement (http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=uriserv:OJ.L_.1998.030.01.0042.01.ENG=), Article 1.

149 For an overview of the decisions in respect of the Amsterdam Treaty, see http://no.m.wikipedia.org/wiki/Amsterdam-traktaten.

150 Reassessing the regulatory social framework for more and better seafaring jobs in the EU, COM 2007 (591) p. 7.

151 Norwegian proposal to the Parliament 'Om lov om endringar i yrkestransportlova og jernbaneloven (tilsette sine rettar ved bruk av konkurranse i kollektivtransporten o.a.)', Ot.prp. nr. 60 (2008–2009) (http://www.regjeringen.no/pages/2171982/PDFS/OTP200820090060000DDDPDFS.pdf) p. 13-14.

152 In the Opinion of Advocate General Wahl in Wagenborg Passagiersdiensten (ECJ C-207/13), para 89, it is, however, assumed that the standstill clause still applies.

would prevent new market restrictions even to a greater extent than the general principles discussed above.

3.3 Relationship to other rules, etc.

3.3.1 Social security

The provisions discussed above apply to employment conditions. The distinction between employment conditions and social security provisions is not clear.[153] However, the flag state principle applies to social security provisions, even when provided by the employer.[154]

3.3.2 Non-government acts

The rules on free market access would not be effective if restrictions could be introduced by non-government bodies. If Statoil required that all contractors applied Norwegian employment conditions, the freedom to provide services using other employment conditions would to a large extent be illusory.[155]

The question whether non-government acts can be restrictions relevant to the rules pertaining to free market access must not be confused with the question pertaining to who can be made responsible for a violation of the rules. If acts of private bodies are considered undue restrictions, this might be relevant in an action between private parties[156] or the government might be liable for having allowed the restrictions.[157]

Despite the possibility that non-governmental requirements may undermine the rules, the starting point is that private parties (non-government bodies) are free to disregard the rules on free market access when making contracts:[158]

> "... that ... obligation arises out of a private contract between the parties to the main proceedings. Such a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty since it was not imposed by a Member State but agreed between individuals ..."

There are exceptions to this starting point.

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153 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Article 3(2).

154 Regulation (EC) No 883/2004, Article 11(1), (3)(a) and (4). If the person liable to pay for the social security provisions is the shipowner, special rules apply, see Regulation (EC) No 883/2004, Article 3(4). Some seafarers are still subject to Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended, see Regulation (EC) No 883/2004, Article 90(1)(a). We will, however, not go into details in this respect.

155 The situation where Statoil or other licensees are required to use Norwegian employment conditions is dealt with below in 3.3.7.

156 See below in 3.3.3.

157 See, for example, Commission v French Republic (ECJ C-265/95).

158 Sapod Audic (ECJ C-159/00), para 74; Barnard, *l.c.*, p. 77. In earlier practice, the ECJ was perhaps more inclined to consider non-government acts as restrictions. See, for example, Angonese (ECJ C-281/98).

First, the point of view above obviously does not apply if the government is responsible for the restrictive acts as an employer[159] or, perhaps, an active owner (as may be the case if, for example, Statoil suddenly changes contracting policy).

Second, it is submitted that if a non-government body dominates the market in such a way that its decisions have the same effect as legislation, then its acts may be considered as restrictions in relation to the rules on free market access.[160] The rules here work in parallel with the rules pertaining to abuse of dominant market position in competition law.[161] If Statoil would require that all contractors should apply Norwegian employment conditions, such views would be most relevant.

Non-government acts cannot do what legislation cannot do in order to impose Norwegian employment conditions. If a non-government act works as effective as legislation, then it is likely to be considered a measure subject to the rules of free market access.

3.3.3 Industrial action

A special application of the rules outlined above in 3.3.2 concerns industrial action. Even otherwise legal boycotts can be undue restrictions under the rules of free market access.[162]

Still, the EU law recognizes, in principle, the right to industrial action:

> "As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge* v *Belgium,* of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others* v *United Kingdom* of 2 July 2002, 2002-V, § 44)." [163]

The right is rather limited, in the sense that the results achieved must fit the EU rules on market access:[164]

> "In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that

159 See, for example, A.G.M.-COS.MET (ECJ C-470/03).
160 Barnard, *l.c.*, p. 77-78 and below in 3.3.3.
161 See, for example, Bosman (ECJ C-415/92).
162 Viking Line (ECJ C-438/05).
163 Ibid., para 86.
164 Ibid., para 90.

agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article."

In this respect, the law can be summarized by noting that the rules regarding the right of industrial action yield to the rules pertaining to market access.

3.3.4 Public procurement

A borderline case occurs when the government insists on Norwegian working conditions in their own contracts. There is a requirement that Norwegian conditions of work are used in Norwegian public procurements:

> "§ 5. Krav til kontraktsklausul om lønns- og arbeidsvilkår
> Oppdragsgiver skal i sine kontrakter stille krav om at ansatte hos leverandører og eventuelle underleverandører som direkte medvirker til å oppfylle kontrakten, har lønns- og arbeidsvilkår i samsvar med denne bestemmelse.
>
> På områder dekket av forskrift om allmenngjort tariffavtale skal oppdragsgiver stille krav om lønns- og arbeidsvilkår er i samsvar med gjeldende forskrifter.
>
> På områder som ikke er dekket av forskrift om allmenngjort tariffavtale, skal oppdragsgiver stille krav om lønns- og arbeidsvilkår i henhold til gjeldende landsomfattende tariffavtale for den aktuelle bransje. Med lønns- og arbeidsvilkår menes i denne sammenheng bestemmelser om minste arbeidstid, lønn, herunder overtidstillegg, skift- og turnustillegg og ulempetillegg, og dekning av utgifter til reise, kost og losji, i den grad slike bestemmelser følger av tariffavtalen." [165]

Such conditions cannot be adopted unless the conditions for restrictions under the rules of free market access are fulfilled: [166]

> "Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, precludes an authority of a Member State, in a situation such as that at issue in the main proceedings, from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed."

The Norwegian Regulation has, surprisingly, been approved by the EFTA Surveillance Authority (ESA). The reasoning, though, is rather pragmatic:[167]

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165 Forskrift om lønns- og arbeidsvilkår i offentlige kontrakter No. 112/2008.
166 Rüffert (ECJ C-346-08), conclusion.

> "Taking into consideration the development of this case since its opening in June 2008, in particular the amendments adopted to Regulation No. 112/2008 together with the increase in the number of universally applicable agreements, the scope of the infringement has significantly been reduced. The Authority considers it therefore appropriate, at the present stage, not to proceed further with this case.
>
> This decision is, however, without prejudice to any future decision by the Authority to open a new case on this issue or on a related issue. Such a decision could be taken, for example, in the light of new information concerning the implementation, interpretation or application of the national measures under consideration, receipt of a new complaint, or developments in EEA or EU law."

In the North Sea support trade, there are relatively few government contracts. Both for this reason and because the rules on free market access apply, requiring Norwegian employment conditions in public procurement contracts does not seem to be a possible way of imposing such conditions on support vessels.

3.3.5 Choice of law

The Rome I Regulation empowers a host state to apply at least provisions of an international mandatory character on workers there, [168] including workers on board ships.[169] Rome I does not form part of the EEA Agreement, but Norway has corresponding rules of international private law.[170] The question thus arises as to whether a legitimate choice of law rule pointing to Norwegian law would allow the Norwegian government to enact provisions that would otherwise have been considered illegal restrictions under the rules on free market access.

We have not found sources to clarify this issue. However, it seems fairly clear that the choice of law rules, whether derived from EU law or not, only address conflicts with other relevant national legislation and not conflicts with the law on free market access. National legislation that includes illegal restrictions on free market access is disallowed regardless of whether the choice of law rules points to that legislation.

In our context, this means that the choice of law rules would not provide an opportunity for the Norwegian government to require Norwegian employment conditions.

3.3.6 Recognition of judgments

Between Norway and EU there is a system for recognition of judgments. This takes precedence over the rules of market access in that even judgments wrongfully accepting

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167 Closure of a case concerning labour clauses in public procurement against Norway. Letter form ESA to the Norwegian Minisrty of Labour 27 December 2012 (Case No: 64849)

168 Rome I Regulation, Articles 8 and 9.

169 Giuliano/ Lagarde: Report on the Convention on the law applicable to contractual obligations (1980 Official Journal of the European Communities No C 282/1) p. 26; Voogsgeerd v Navimer SA (C‑384/10).

170 For the present purposes it is not necessary to discuss the details of these rules.

market restrictions must be recognized.[171] However, this can hardly form a basis for a Norwegian policy in respect of Norwegian working conditions.

3.3.7 Conditions for licensing

If the petroleum licensees were bound in their licenses to hire only support vessels with Norwegian working conditions,[172] this would be a violation of the principle of free market access. As was noted above in section 3.2.2, it is the effect of the rules, not the form, is what matters.

3.4 Does the EEA Agreement apply outside the territorial border?

3.4.1 The problem

A condition for the application of the principles above is that the EEA Agreement applies. The scope of the relevant provisions of the Agreement is limited to the "territory." In international law the territory only extends to the 12 nm-territorial border, and not to the entire continental shelf. In EU law, however, the territory includes sea areas to the extent the states have jurisdiction over them. Which of these readings applies in the EEA Agreement is not yet settled.

The choice of definition is crucial. If the EEA Agreement does not apply on the continental shelf outside the Norwegian territorial border, Norwegian working conditions could be imposed there. If so, they would be enforceable if the vessel calls at a Norwegian port — despite the port being within the EEA — or the use of Norwegian employment conditions could be made a condition of the licenses for petroleum activities.

3.4.2 The wording

The scope of the EEA Agreement is stated in this way:[173]

> "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway."

Other provisions also refer to the territory, notably Article 36 on the freedom to provide services:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties."

The term territory is not defined in the Agreement.

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171 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007, Article 36.

172 See to this above in 2.3.

173 EEA Agreement, Article 126(1).

The Norwegian government maintains that the wording in the EEA Agreement differs significantly from the wording of the EC Treaty.[174] However, the EC Treaty in force at the time of the EEA negotiations[175] repeatedly confines the scope of its provisions to be "within the Community", for example, in Article 57 on the freedom to provide services:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

The expression "within the Community" cannot easily be understood to be outside its territory. Indeed, in other parts of the Treaty[176] as well as in case law the term "territory" is frequently used.[177] The contrast in wording between the EC Treaty and the EEA Agreement is thus not very significant.

3.4.3 The ECJ practice

While the definition of the territorial border is clear from UNCLOS and the Norwegian implementation legislation, the geographical delimitation of EU law may require further attention.

The ECJ has recently confirmed that the rules on market access also apply on the continental shelf:[178]

> "A Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations."

Indeed, it has long been established that rules on market access apply outside the territories of the EU States if a violation of the rules would have an effect there:[179]

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174 Reasoned Opinion delivered in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice regarding the Act referred to in point 1 of Annex VI to the EEA Agreement (24 September 1999, ESA doc. no 99–6990-D) p. 3. The view of the Norwegian government is summarized in Norwegian Report to the Parliament 'EØS-avtalen og Norges øvrige avtaler med EU', Meld. St. 5 (2012-2013) p. 41.

175 EC Treaty, 1987.

176 TFEU, for example Articles 20-22, 45 and 49.

177 See, for example, Prodest (ECJ C-327/83).

178 Salemink (ECJ C-347/10), para 36.

179 Walrave and another v Association Union Cycliste Internationale and another (ECJ C-36/74), conclusion item 4.

> "The rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community."

Later on, this is further generalized:[180]

> "In situations such as that of the plaintiff in the main proceedings, Community law and thus the prohibition of discrimination based on nationality contained in the abovementioned Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State."

This also applies on-board ships:[181]

> "That connection criterion must also apply in the case of a worker/national of a Member State who is permanently employed on board a ship flying the flag of another Member State."

The ECJ practice would mean that the treaty rules on market access would apply to the exercise of the flag state jurisdiction of EU Member States over their ships on the Norwegian continental shelf. If the EEA agreement did not apply there, the Norwegian continental shelf jurisdiction over the same ship (or the Norwegian flag state jurisdiction over Norwegian ships in the same location) would not be subject to the rules regarding market access — a very strange situation indeed.

3.4.4 The negotiation history

The ECJ practice was well established at the time of negotiations of the EEA Agreement.[182] Despite this, there is nothing to indicate that the intention was to depart from this practice; indeed, there are no published documents indicating that this wording was discussed in the negotiations at all. This is remarkable, as the general rule is that

> "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."[183]

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180 Boukhalfa (ECJ C-214/94), para 17.

181 Lopes (ECJ C-9/88), para 16.

182 See above 3.4.3.

183 EEA Agreement, Article 6.

3.4.5 The loyalty commitment

Regardless of the stated scope of the EEA Agreement, there is an obligation of loyalty:[184]

> "They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement."

An example is the national tax policies. The EEA Agreement does not include tax policy, but the states must still make sure that their tax policies are consistent with the goals of the Agreement.[185] Arguably, not applying the four freedoms on the Norwegian continental shelf would be inconsistent with Article 2 of the EEA Agreement.

3.4.6 Norwegian case law

In two cases, Norwegian Courts of Appeal have considered criminal cases turning on whether Norwegian fishery legislation requiring a Norwegian crew based in Norway in the EEZ was valid or violated the EEA Agreement. This further turned on whether the EEA applied outside the territorial border. In the first case, the legislation was found valid, as the EEA Agreement did not apply in the EEZ.[186] In the second, the court arrived at the opposite conclusion; because the other view would be "too formalistic":[187]

> "Selv om EØS-avtalens artikkel 126 første ledd omtaler anvendelse av avtalen på de aktuelle lands territorier, er lagmannsretten kommet til at det vil være en for formalistisk fortolkning å legge til grunn at EØS-avtalen ikke får virkning utenfor territorialgrensen."

Court of Appeal decisions are not considered precedents in Norwegian law. There is even less reason to consider them as precedents in EEA law.

3.4.7 Treaty practice

There are many examples of the pragmatic Norwegian application of EEA legislation outside the territorial border, and likewise some examples on treaties and legislation are inconsistent with the application of the EEA agreement in this area. It is difficult to see how this could shed light on the scope of the EEA agreement.

3.4.8 The discussion

The issue of the application of EEA law outside the territorial border has been discussed between Norwegian authorities and the ESA in relation to the application of the Norwegian social security system offshore[188] and the privileges for Norwegian fishermen discussed

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184 EEA Agreement, Article 2.

185 ESA v Iceland (E-1/03), para 26.

186 Agder Court of Appeal 10 December, 2001 (LA-2001-1152). Agder Court of Appeal 10 December, 2001 (LA-2001-1152).

187 Frostating Court of Appeal 21 September, 2006 (LF-2006-24118).

188 Reasoned Opinion delivered in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice regarding the Act referred to in point 1 of Annex VI to the EEA Agreement (24 September 1999, ESA doc. no 99–6990-D).

above in 3.4.6. In both cases, the ESA remained firm that the EEA could apply outside the territorial border, while the Norwegian government maintained the opposite view.[189] In both cases, pragmatic solutions were found.[190]

Remarkably, the matter has been discussed by several authors without firm conclusions.[191] One author points out that the case for an application of the EEA Agreement is stronger in respect to market access than other aspects of EEA law.[192] The issues discussed here, of course, are issues of market access.

3.4.9 Conclusion

For our part, we are of the opinion that the EEA Agreement limits Norwegian jurisdiction on the continental shelf. It seems justified to construe the wording in line with the EU case law and tradition as it concerns EU matters. And, there are no other examples of a significant economic sector of a state being exempted from the principles of free international competition without a special justification and debate. Not only is the support market in the Norwegian sector significant, but so also are similar markets at the continental shelves on the EU markets under the EEA Agreement.

Above, the EEA Agreement has been discussed on the presumption that it also applies at the continental shelves. The conclusions of this report must therefore be read with the proviso that this view proves correct.

3.5 Possible measures

3.5.1 Minimum wage

While it is not possible to require that the differences between Norwegian and foreign working conditions are completely eliminated, it may be possible for the Norwegian government to take some action. One possibility is to introduce minimum wages or similar measures.

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189 The correspondence in the fishery case is annexed to Norwegian proposal to the Parliament 'Om lov om endring i lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann (endring av nasjonalitets- og bostedskravet)', Ot.prp. nr. 99 (2005–2006) (http://www.regjeringen.no/Rpub/OTP/20052006/099/PDFS/OTP200520060099000DDDPDFS.pdf).

190 In Utenfor og innenfor: Norges avtaler med EU, NOU 2012:2 p. 674 it is submitted that the Norwegian government in the end accepted that the EEA agreement is applicable on fisheries in the EEZ.

191 Quite positive to an application outside the territorial border Martin Hennig: Kan norske myndigheter motsette seg å implementere EUs offshore-direktiv? Seminar at the Centre for European Law, University of Oslo 29 October 2014 (my knowledge is based on the speaker's manuscript). More open Finn Arnesen: The EEA Agreement and activities off-shore, 400 MarIus 19-26 (20111; Fredriksen, *EU/EØS-rett i norske domstoler* (2011) p. 64-68; Lars Fause: Domssamling i fiskerisaker (RA-2011-10 Tromsø 2011; also at http://www.riksadvokaten.no/filestore/Dokumenter/2011/Domssamling.pdf) L13 and L34; Fafo Report 2014:19 p. 28; NOU 2012:2, p. 557.

192 Henning, *l.c.*

There is no tradition of minimum wage legislation in Norway. However, other, similar measures could also be considered. While it was noted in section 3.2.3 above that the list of possible measures under the Posting of Workers Directive (which specifically mention minimum wage provisions) is exhaustive, this is not so when the Directive does not apply. A range of similar measures could therefore be considered for the North Sea support trade. Here, the focus will be on minimum wages, as the practice of ECJ deals with this measure.

The right of the host state to impose minimum wage legislation has long been recognized:[193]

> "Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply."

The justification must be the protection of workers:[194]

> "31. The freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (see *Arblade*, cited above, paragraph 34, and *Mazzoleni and ISA*, paragraph 25).
>
> 32. The application of the national rules of a Member State to providers of services established in other Member States must be appropriate for securing the attainment of the objective which those rules pursue, and must not go beyond what is necessary in order to attain it (*Arblade*, paragraph 35, and *Mazzoleni and ISA*, paragraph 26).
>
> 33. Overriding reasons relating to the public interest already recognised by the Court include the protection of workers (see, in particular, *Arblade*, paragraph 36, and *Mazzoleni and ISA*, paragraph 27)."

The minimum wage must apply both to national and foreign employers:[195]

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193 Jean-Claude Arblade and an orther v Bernard Leloup and another (ECJ C-369/96 and C-376/96), para 80.

194 Finalarte (ECJ C-49/98).

195 Portugala Construções (ECJ C-164/99), para 36.

> “The reply to be given to the second question must therefore be that the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.”

The minimum wage provisions must include all elements of remuneration, whether called wages or otherwise:[196]

> “On those grounds, the Court (First Chamber) hereby:
>
> 1. Declares that, by failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services;”

Much of the difference between Norwegian and foreign employment conditions could be eliminated by such minimum wage rules. However, it is unlikely that a minimum wage provision aimed at securing a decent standard of living in a high-cost country like Norway would be accepted for workers actually not living there.

If the motive of the legislator is justifiable, such as social protection, and unjustifiable, such as evening out payment levels, the restrictions are still justifiable. In *Wolf*, the ECJ held, in a case regarding the Positioning of Workers Directive, that minimum wages may have such dual motives — but they were still justifiable:[197]

> “Article 5 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, does not preclude [description of the minimum wage system], if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.”

The problem then is not to ask for too much; that is more than what is necessary for the protection of workers.[198]

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196 Commission v Germany (ECJ C-341/02).

197 Wolff & Müller v Félix (ECJ C-60/03), conclusion .

198 Björkholm, *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv: en analys av sjömannens och redarens grundläggande friheter* (2010), p. 446.

3.5.2 Collective agreements

Alternative measures for the protection of workers could also be considered. One possibility is to impose collective wage agreements with tenor to be negotiated on the parties, as in §6 of the Act on the Norwegian International Ship Registry:[199]

> "Terms of pay and employment and other working conditions on ships in this register shall be fixed in a collective wage agreement which expressly states that it applies to such service. A collective wage agreement which does not so state does not apply to service on ship in this register.
>
> Norwegian trade unions have a right to take part in all negotiations for a collective wage agreement.
>
> Collective wage agreements may be concluded with Norwegian or foreign trade unions.
>
> The collective wage agreement mentioned in the first paragraph shall expressly state that the agreement is subject to Norwegian laws and Norwegian court of law. The parties to the agreement may nevertheless deviate from the provisions in subsections 2 and 3 of Section 6 and Chapter 2-5 of Act no. 1 of 5 May 1927 relating to labour disputes, if the agreement instead of referring to Norwegian courts explicitly provides that disputes concerning the agreement shall be subject to the courts and procedural rules, including rules governing arbitration, in another country.
>
> Individual contracts of engagement for service on ships in this register shall expressly state that the contract is subject to Norwegian laws and Norwegian courts, but that cases concerning the employee's service on the ship may be brought against the owner before a Norwegian court or before a court in the employee's country of residence. A contract of engagement as referred to in the first sentence is not a hindrance to a case being brought before a court in another country when such action is permitted under the Lugano Convention 2007."

In Rt-2013-248, the Norwegian Supreme Court, in the context of national employment conditions at a shipyard, considered this negotiation system as being so fundamental for Norway that it constituted a matter of public policy in relation to the Posting of Workers Directive, close to rules for the protection of workers:

> "(170) På bakgrunn av hva departementet generelt uttaler i Ot.prp.nr.88 (2008-2009) om det destabiliserende potensial sosial dumping har for arbeidslivsmodellen, og på bakgrunn av de samfunnsøkonomiske analyser fremlagt i saken, finner jeg det tilstrekkelig dokumentert at allmenngjøring av Verkstedsoverenskomstens regler om

[199] Lov om norsk internasjonalt skipsregister No. 48/1987 (in English; http://www.sjofartsdir.no/PageFiles/3267/48%20of%2012%20June%201987%20Act%20relating%20to%20a%20Norwegian%20International%20Ship%20Register%20(NIS).pdf).

dekning av utgifter til reise, kost og losji er av betydning for stabiliteten i den norske arbeidslivsog frontfagsmodellen. Det følger av mitt generelle utgangspunkt at vi da har å gjøre med bestemmelser om «offentlig orden» etter artikkel 3 nr. 10. Ved vurderingen legger jeg atskillig vekt på den dominoeffekt en underkjenning av forskriften § 7 vil ha for andre allmenngjorte tariffavtaler som har likelydende ordninger. Et bortfall av refusjonsordningen vil altså ha konsekvenser for et betydelig større antall utsendte arbeidstakere enn bare dem som er virksomme i skips- og verftsnæringen.

(171) Under de forutsetninger spørsmålet om offentlig orden diskuteres - nemlig at dekning av utgifter til reise, kost og losji ikke er lønn - legger jeg ved en totalbedømmelse også vekt på at bestemmelsene vi står overfor etter sitt innhold er ment å sikre den sosiale beskyttelse av utsendte arbeidstakere. Vi ligger under enhver omstendighet altså svært nær lønnsbegrepet og svært tett opp til de hensyn direktivet skal fremme."

If the same views applied in the North Sea support trade, imposing of collective agreements could be justifiable. But we do not know for certain whether this view would be accepted by the EFTA Court and the ECJ. In any event the reasoning is not sustainable with respect to offshore support services, where there is a long tradition of allowing ships in without requiring a bona fide collective agreement. The fact that most ships apparently have collective agreements and many ships have a collective agreement on Norwegian wage levels does not alter this. Experience shows that the possible lack of collective agreements in some cases here is not a threat to the system and to public order. At least in this trade, therefore, it is hardly arguable, as the Supreme Court did above, that a Norwegian style collective agreement is required for the protection of workers or that a lack of such agreements would destabilize the situation.

3.5.3 The role of national courts

The distinction between allowed and disallowed measures is not always entirely clear. In such cases before the national courts it is for them to evaluate the facts and determine whether a measure falls on one side of the dividing line or the other:[200]

"In regard to the national court's observation that the priority purpose pursued by the national legislature on adoption of Paragraph 1(a) of the AEntG is to protect the national job market rather than remuneration of the worker, it should be pointed out that it is for that court to verify whether, on an objective view, the legislation at issue in the main proceedings secures the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged

[200] Wolff & Müller v Félix (ECJ C-60/03), para 38.

> benefits conferred on workers by the measures which it has adopted (Portugala Construções, paragraphs 28 and 29 and case law cited)."[201]

The liberal attitude of the Norwegian Supreme Court in Rt-2013-248 (above) indicate that one cannot expect a very strict attitude in this respect when it comes to legislation concerning North Sea offshore trade.

3.6 Some remarks on other trades

3.6.1 Introduction

The discussion above has focused on the North Sea support trade. The conclusions are generally applicable on other shipping trades as well. Here, some special rules will be highlighted.

3.6.2 Mainland cabotage

The Cabotage Regulation makes an exception for coastal trade along the mainland, defined in this way:[202]

> "(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands; ..."

In this trade Norway may impose legislation on "all matters relating to manning" for very small ships (less than 650 gt):[203]

> "1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state), except for ships smaller than 650 gt, where host State conditions may be applied."

Manning includes "minimum wage rules in force in the country."[204] This means that Norwegian employment conditions can be imposed on these ships.

3.6.3 Island cabotage

Also, with respect to island cabotage there are exceptions to the rules. Island cabotage is defined in this way:[205]

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201 Wolff & Müller v Félix (ECJ C-60/03), para38.
202 Council Regulation (EEC) No 3577/92, Article 2(1).
203 Council Regulation (EEC) No 3577/92, Article 3.
204 COM (2014) 232 p. 9.
205 Council Regulation (EEC) No 3577/92, Article 2(1).

“(c) island cabotage: the carriage of passengers or goods by sea between:
— ports situated on the mainland and on one or more of the islands of one and the same Member State,
— ports situated on the islands of one and the same Member State; ...”

The same rule now applies to island cabotage and mainland cabotage:[206]

“2. For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State).

3. However, from 1 January 1999, for cargo vessels over 650 gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).”

The term “manning” is commented above in 3.6.2.

It is provided that for very small ships in island cabotage, Norwegian employment conditions can be imposed. For larger ships, Norwegian employment conditions can be applied unless they do not call on foreign ports.[207]

206 Council Regulation (EEC) No 3577/92, Article 3.

207 See to this Agip Petroli v Capitaneria di porto di Siracusa (ECJ C-456/04).

4 Conclusions

Norwegian employment conditions can only be imposed on foreign flagged offshore service ships in the North Sea support trade if there is jurisdiction to do so under international law and if EEA law or other legal commitments do not rule out the exercise of such jurisdiction.

This study has sought to indicate the legal framework and limits involved in this matter. In brief, it is concluded that there is some jurisdiction to implement this type of employment conditions under international law, but the right of establishment and other freedoms under EEA law significantly limit the exercise of that jurisdiction with respect to operators from other EU member states. Neither body of law completely rules out the introduction of such employment conditions.

Chapter 2, which discusses the international law aspects of the matter, concludes that the flag state does not have an absolute monopoly on regulating employment related matters on board ships. The extent of the port/coastal state's jurisdiction depends on several factors, which center on the substantial connection between the regulating state and the ships in question. Thus, the proximity of the ships in question to Norway in terms of port calls or participating in offshore activities under Norwegian jurisdiction will be crucial for establishing whether such jurisdiction exists.

The jurisdiction of states to impose conditions on services to its port or offshore installations also depends on the kind of enforcement measures to be employed. If the consequence of non-compliance with the conditions is that the ship in question will not have access to services in port, or even access to ports of the state, the need for an express jurisdictional basis for the requirements as such is reduced, which provides better opportunities for national requirements.

A state's right to impose restrictions relating to maritime services within its own borders (including traffic between a port and an offshore installation located on the continental shelf of the same state) is not subject to many limitations under international law. Restrictions on market access for such 'cabotage' trades are commonly practiced in different parts of the world.

It should finally be noted that the international rights and obligations in the field of employment conditions on foreign ships are neither explicit nor precise. In this situation, practice by individual states, and the reactions against such practice, is likely to be important elements in the establishment of the overall jurisdictional scheme under international law.

However, as is discussed in chapter 3, the right of establishment and other freedoms under EEA law place important limitations on the exercise of that jurisdiction. Since the starting point under EU/EEA law is one of free market access for operators established in another member state, host states' discretion to impose its own national employment conditions is considerably curtailed. This follows from certain specific directives and regulations, but also from the general provisions in the Treaty and the EEA Agreement.

It is concluded in chapter 3 that the imposition of Norwegian employment conditions on offshore support services would be considered under EEA law as a restriction on market access that has to be justified. Protecting the Norwegian workers or Norwegian shipping from competition would not as such be considered to be a valid justification. However, minimum wages or other measures to protect the foreign workers from unfair conditions would be justifiable measures. The more detailed limits of what minimum wages might be permissible in this respect or what 'other measures' might be available is not clear. The particularities of the shipping industry, for example in terms of the widespread use of non-EU seafarers on board EU-flagged ships, have not been addressed in case law so far, which leaves some additional uncertainty as to the legal limits.

There is an exception in the Cabotage Regulation for vessels in island trade and vessels below 650 gt in coastal trade (above in section 3.6). For these cases, it seems clear that Norway can decide that Norwegian employment conditions shall apply.

Current standstill clauses may restrict the imposing of Norwegian working conditions (above in sections 2.4 and 3.2.4).

The above conclusions are based on the assumption (justified in section 3.4 above) that the EEA Agreement applies to the continental shelf beyond the territorial border.

Table of abbreviations

AEntG	German Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen
ECJ	European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
ESA	EFTA Surveillance Authority
FSU	Finnish Seamen's Union
GATS	General Agreement on Trade in Services
ILO	International Labour Organization
IMO	International Maritime Organization
ITF	International Transport Workers' Federation
MFN	Most-favoured nation
MLC	Maritime Labour Convention
NILOS	Netherlands Institute for the Law of the Sea
NIS	Norsk Internasjonalt Skipsregister
NOU	Norges offentlige utredninger
PCIJ	Permanent Court of International Justice
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
USC	United States Code
WTO	World Trade Organization