

# LEGAL ISSUES RELATED TO THE AGREEMENT ON COOPERATION ON MARINE OIL POLLUTION PREPAREDNESS AND RESPONSE IN THE ARCTIC (MOSPA)

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## SUMMARY REPORT



EMERGENCY PREVENTION,  
PREPAREDNESS AND RESPONSE



ARCTIC COUNCIL

## TITLE

Legal issues related to the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA) - Summary Report



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# Summary Report

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# Summary Report

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## Introduction

This summary report is based on a comprehensive study commissioned by the Norwegian Coastal Administration and was written by Alla Pozdnakova, Henrik Ringbom, and Erik Røsæg of the Scandinavian Institute of Maritime Law at the University of Oslo in the fall of 2018. This report recommends suggestions for actions regarding legal issues on cooperation related to the MOSPA Agreement.

This report discusses the international law (law of the sea) framework as well as MOSPA and some aspects of national law. The main parts of the report are as follows:

- Rights and duties of states to respond to marine pollution
- Costs under MOSPA
- Command center responsibility and liability
- Health and safety matters and safety management of the response operations

The sections of this summary correspond roughly to the main parts of the report mentioned above.

The focus of the study is international law, Norwegian law, United States (US) law, and Russian law. At a later stage, a more thorough investigation of all the Arctic legal systems may be considered.

# Law of the sea framework

## General

The Arctic has been one of few ocean regions without an oil pollution and response arrangement in place. However, MOSPA has changed this, thereby filling a regulatory void that has been particularly problematic in view of the specific challenges that oil spill response in Arctic circumstances entail. A regional oil spill regime caters for closer cooperation between coastal states and clearer rules on the division of rights and duties of the parties involved.

Global agreements	OPRC					
Regional agreements <sup>1</sup>	MOSPA					
		Copenhagen agreement				
					Helsinki Convention	
Bilateral agreements	US-Russia <sup>2</sup>	US-Canada	Canada-Denmark	Norway-Russia	Russia-Finland	
Joint contingency plans (JCP)	US-Russia JCP	Canada US JCP	JCPs on shipping and off-shore activities	Norway-Russia JCP		

Content-wise, MOSPA is quite traditional and builds upon pollution response instruments closely modelled on the global OPRC Convention from 1990. Compared to other such agreements, it is not the most innovative or far-reaching in terms of rights and duties, but it includes all the necessary elements for ensuring smooth response operations in the region and various forms of cooperation between parties, including exercises. The real value of the agreement lies in its establishment of a framework for such cooperation, and its importance and effectiveness is fully dependent on how that framework is implemented between authorities in practice.

Currently, MOSPA only covers oil and could, depending on the profile of cargoes transported in the Arctic, be extended to other hazardous substances in the future.

1. The order of the agreements in this table is not hierarchical.

2. 1989 Agreement Concerning Cooperation in Combating Pollution in the Bering and Chukchi Seas in Emergency Situations.



## Rights and duties of states

All spills in the Arctic are covered by MOSPA, regardless of the source of the spill. It does not specify the rights and duties of parties in any amount of detail and qualifies the key duties with conditions based on the availability of resources and general considerations of appropriateness. It reinforces existing rules on the follow-up actions to be taken by a coastal state that is notified of oil spills, but includes no provisions on the duties of states to require persons operating in the Arctic Ocean to make such notifications. However, such duties exist in other conventions that are more appropriate for the purpose, thanks to their global and/or sectoral scope.

Currently, MOSPA provides clear duties for states to have a national system in place for prompt response, including contingency plans and a minimum of equipment. On this matter, MOSPA tightly follows, and in some respects advances, the duties that follow from other agreements, including the OPRC Convention.

The rights and duties of states to take operational action following oil spills is not regulated in MOSPA but follows from general law of the sea, as laid down in UNCLOS and international customary law. As the table below illustrates, the rights and duties of a state depend on the capacity in which it acts and on the area of response measures.

	Territorial sea		EEZ		High seas	
	Right	Duty	Right	Duty	Right	Duty
Affected coastal state	Yes	Yes, unless limited to that state	Yes, if serious <sup>3</sup>	Yes, unless limited to that state	Yes, if serious	Erga omnes <sup>4</sup> duties? (note EU law)
Third state	No	No	Necessity?	No	Yes, freedom of high seas	Erga omnes?

A key issue in this respect is whether there is not only a right but also a duty, for states to request assistance if they cannot handle a spill themselves. This is not regulated in MOSPA but follows the general duties of affected states in combination with the duty of states to exercise due diligence to ensure their international duties. In contrast, MOSPA clearly provides that a requested state has a duty to provide assistance but that such assistance need not necessarily be in the form of operational support.

The relevance of mutual assistance in MOSPA is also reflected in detailed and relatively stringent provisions on the access to ports and territorial waters of foreign ships and individuals who assist in response operations. The rules of MOSPA fall short of requiring a requesting state to grant such access but clearly encourage states to do so and legitimize any request of access by assisting states. Access is eventually dependent on national rules and practices, and the study of the national laws of three Arctic states illustrates that provisions (at least to some extent) granting access to foreign nationals involved in oil response assistance only exist in the US and that there is still room for further streamlining of national rules and their implementation in this area.

3. The word serious is a convenient (though admittedly somewhat inaccurate) shorthand for the various qualifications included in UNCLOS art 221 and the Intervention convention, e.g., “a casualty, which may reasonably be expected to result in major harmful consequences”.

4. The term Erga omnes duties means duties towards everyone (any state).

# Costs under MOSPA

In respect of the costs of pollution response, the system of the OPRC Convention and MOSPA is that a state party can request assistance from another state and that the assisting state can claim reimbursement of its costs from the requesting state.

This mechanism has been well tested and usually works well. However, issues have been identified that should be discussed and resolved before a conflict involving such issues actually arises. These issues are summarized below.

The procedure for dealing with such issues does not necessarily require a revision of MOSPA. Its text already constitutes a good framework with a comprehensive structure, and there is no need to instigate a formal renegotiation of the treaty. Renegotiation always carries the risk of losing uniformity due to differences in ratification tempo, and this should be avoided.

An alternative procedure would be to agree on these issues in informal discussions among state parties. Chances are that agreement will be easier to reach when the issues are not contentious than when conflict arises. They may not even be controversial when discussed in abstract. Such agreements will be taken into account when MOSPA is interpreted.<sup>5</sup> A suitable record for reference could comprise summaries of the meetings of parties or the EPPR. This procedure could also be formalized in a steering committee with published decisions.

This alternative procedure cannot alter the tenor of MOSPA. The focus here thus lies on developments of the law within the framework of the existing convention.

In the Annex, some points have been identified for review. They relate to policy, claims handling and legal issues. With these issues considered and addressed, the cost reimbursement regime of MOSPA would be robust and comprehensive.

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5. See, for example, The Vienna Convention on the Law of Treaties, Article 31.



# Command center liability and responsibility

A pivotal part of the organization of an oil spill response action is its leadership, referred to here as the command center. It is usually set up by the state where the damage occurs, which will also have the role of the requesting state in respect of cost reimbursements. The command center can be organized in cooperation between several states.

While a thorough analysis of the liability rules that may be applicable after an incident in the Arctic is beyond the scope of the studies undertaken, it is of special interest in this context to see whether the organizing of a response operation by a command center entails liability. The states organizing a command center can be responsible for their acts or omissions in the context of oil pollution response operations where their acts or omission amount to a breach of an international duty. More practical is the possibility that the organizing state or states can be held liable under national law for errors of the command center or become vicariously liable for damage caused by operational personnel.

One type of error is the failure to warn against upcoming dangers, but there is no clear expectation that the command center shall be active in this respect. In any event, command center liability does not typically extend to the independent contractors involved. Furthermore, liability may be limited or subject to responder immunity. In all events, there is most likely no strict liability for the command center. All such national law matters are dependent on the applicable law, which is likely to be the place to which the cases have their closest connection, for example, to the location of the damage or where the damage was caused.

The rules of responsibility and liability of the command center should not cause major concern for organizing states.

# Health and Safety matters and safety management of the response operations

An important part of setting up an oil spill response operation is ensuring that the operation takes due care of health, safety, and the environment (HSE). The state or states organizing operations—typically by setting up the command center—must make sure these considerations receive the necessary attention. Typically, organizing states have jurisdiction and can impose regulations on participating units, and extra HSE measures will rarely be in conflict with existing measures. In MOSPA operational guidelines, the organizing state is granted explicit competence to organize (among other matters) HSE measures.

The organizing state has an overall responsibility for HSE. This is reflected in various systems and routines relating to oil spill actions. However, the primary responsibility rests with ships or other units. Even if not particularly instructed, an assisting vessel must ensure that there is an adequate HSE standard on board in line with the ISM Code. The intervention of the organizing state is an option, perhaps only required when coordination necessary.

Rules on workers' compensation form an integral part of HSE regulations. If HSE measures fail, and workers are injured, the employer may be liable. All three jurisdictions studied have systems for workers' compensation.

HSE matters seem well taken care of in MOSPA, but identifying national best practices in this area would be helpful for the states parties.







## Annex— points for consideration

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## A. Policy

1. Pursuant to MOSPA, the assisting state can only require the reimbursement of costs if the assistance is made on explicit request. This raises the question of whether one should clarify that the request is explicit even if it is unspecified or misunderstood, or when an assisting state has acted according to its own judgement in cases where it has not been feasible to obtain instructions that are more specific.<sup>6</sup>
2. In respect of claims, MOSPA primarily addresses reimbursement for requested services. However, this does not preclude claims on other bases, such as liability for wrongful acts or omissions. Should this be clarified?<sup>7</sup>
3. Should it be clarified that the requirement to calculate reimbursable costs fairly applies to the reasonableness of the measures taken as well as to the technical calculation?<sup>8</sup>
4. Should the principle that administrative costs are admissible be agreed?<sup>9</sup>
5. Should a solidarity fund or other mechanisms securing payment to an assisting state be set up?<sup>10</sup>
6. Should additional rules be agreed in respect of extraordinary costs?<sup>11</sup>

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6. See section 3.2.2 of the accompanying report.

7. See section 3.2.3 of the accompanying report.

8. See section 3.2.8 of the accompanying report.

9. See section 3.2.8 of the accompanying report.

10. See section 3.2.12 of the accompanying report.

11. See section 3.2.14 of the accompanying report.

## B. Claims handling

In considering the points below, particular attention should be given to solutions already implemented in at least some Arctic states, for example via the International Oil Pollution Compensation Funds.

1. While MOSPA deals with the actions and liabilities of states, it does not mention subcontractors. Should MOSPA be developed to show that the rules apply between states even if assisting or requesting states have involved a subcontractor, meaning that a state and its subcontractors are regarded as a unit?<sup>12</sup>
2. Should a routine for the use of expert reports in evaluating claims under MOSPA be recommended?<sup>13</sup>
3. Should a routine for the early informing and invoicing of costs be implemented?<sup>14</sup>
4. Should the types of items to be specified in the invoice be listed?<sup>15</sup>
5. Should there be an indication of the maximum admissible percentage of administrative costs?<sup>16</sup>
6. Should standard reference prices be set up for the use of equipment and so on?<sup>17</sup>

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12. See section 3.2.4 of the accompanying report.

13. See section 3.2.8 of the accompanying report.

14. See section 3.2.8 of the accompanying report.

15. See section 3.2.8 of the accompanying report.

16. See section 3.2.8 of the accompanying report.

17. See section 3.2.10 of the accompanying report.



## C. Legal

1. An oil response action could be initiated after an incident for which an assisting state is liable in torts. Should it be clarified that any claims under MOSPA can be set off against torts claims and vice versa?<sup>18</sup>
2. In MOSPA, there are several rules on alternative agreements. Should it be clarified that in sum, the reimbursement rules of MOSPA only apply to the extent that involved states have not agreed otherwise?<sup>19</sup>
3. In some cases, states can seek reimbursement from the International Oil Pollution Compensation Funds on the basis of subrogation but only if allowed by the applicable national law. Should state parties clarify that MOSPA allows such subrogation and urges states to implement the rule in their national laws if an international convention does not form part of national law without further formalities?<sup>20</sup>
4. Should there be a principle that vessels and equipment can only be charged for in the periods when they can actually perform the services required?<sup>21</sup>
5. Should a mechanism assisting dispute resolution be set up?<sup>22</sup>
6. Should a recommendation be set up for excepting recourse claims of a requesting state from the limitation of ship owners' liability (in respect of payments pursuant to MOSPA to an assisting state), utilizing the right of reservation under limitation conventions when applicable?<sup>23</sup>

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18. See section 3.2.5 of the accompanying report.

19. See section 3.2.6 of the accompanying report.

20. See section 3.2.7 of the accompanying report.

21. See section 3.2.9 of the accompanying report.

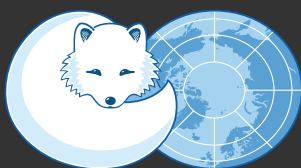
22. See section 3.2.11 of the accompanying report.

23. See section 3.2.13 of the accompanying report.



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