WAHL-LARSEN ADVOKATFIRMA

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GLITTERTIND

Borgarting Court of Appeal
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STATEMENT OF CASE
TO
BORGARTING COURT OF APPEAL

Case no.:	18-060499ASD-BORG/03
Appellant:	Föreningen Greenpeace Norden BOX 15164, SE-0465 Stockholm, Stockholm County, Sweden Natur og Ungdom Torggata 34, NO-0183 OSLO, NORWAY
Interveners:	Besteforeldrenes klimaaksjon (Norwegian Grandparents' Climate Campaign) c/o Lund & Co, Akersgt 30, 0158 Oslo, Norway Naturvernforbundet (Friends of the Earth Norway) Mariboes gate 8, NO-0184 Oslo, Norway
Counsel:	Advocate Cathrine Hambro Wahl-Larsen Advokatfirma AS Fridtjof Nansens plass 5, NO-0160 Oslo, Norway Advocate Emanuel Feinberg and Co-counsel Dagny Ås Hovind Advokatfirmaet Glittertind AS PB 1383 Vika, NO-0114 Oslo, Norway
Respondent:	The Government of Norway, represented by the Ministry of Petroleum and Energy. PO Box 8148 Dep. NO-0032 Oslo, Norway
Counsel:	Office of the Attorney General of Norway in the person of Attorney General Fredrik Sejersted and Co-counsels Anders Wilhelmsen and Ane Egeland

1 INTRODUCTION

We refer to the appellants' notice of appeal ("the Notice of Appeal") and the Government of Norway's reply to the notice of appeal ("the Reply") and to the Supreme Court of Norway's decision not to permit a direct appeal to the Supreme Court.

The appellants ("the Environmental Organisations") to this point have not submitted comments on the Reply and wish to hereby submit their comments.

With respect to the Government's general substantive arguments, we primarily perceive these as repetitions of previous arguments, and to this point we have not found grounds to comment further on these. However, we have found grounds to clarify the Environmental Organisations' arguments related to Norway's international obligations and comparative law.

In addition, the Government's arguments related to the proceedings prior to the Royal Decree on awarding of production licences in the 23rd licensing round ("the Decision") do give rise to further comments and clarifications.

Naturvernforbundet (Friends of the Earth Norway) has decided to join the case as an intervener for the appeal. As with Besteforeldrenes klimaaksjon (the Norwegian Grandparents Climate Campaign), the undersigned will also represent Friends of the Earth Norway as counsel.

2 ARTICLE 112 MUST BE INTERPRETED IN LIGHT OF NORWAY'S INTERNATIONAL OBLIGATIONS AND COMPARATIVE LAW

2.1 Main argument

In Section 6.2 of the Notice of Appeal, the Appellants made some brief comments on the relevance of Norway's international obligations and to comparative sources of law. In light of the Government's comments on this (Section 4 of the Reply) and the District Court's deficient treatment of the subject, we have found grounds to elaborate on these arguments prior to the proceedings in the appeal.

As the Environmental Organisations have made clear several times, Norway's international obligations and comparative law are relevant in the interpretation and application of Article 112. International law requirements for the environment and the climate are intended to be protected through the adoption into law of Article 110 b (now Article 112). Because there are few Norwegian sources of law that apply Article 112, international sources of law are essential when Norwegian courts apply the provision. The issues this case raises are undoubtedly of a global nature. The climate challenges are characterised precisely/// by the fact that no single nation can solve the problem alone and each individual country must bear its share of the responsibility. Therefore, there is good reason to look at how courts in other countries have handled issues corresponding to those that come up in this case.

Article 112 of the Norwegian Constitution protects the environment, including the climate. The adoption into law of Article 112 (originally Article 110 b) was intended to safeguard international

law requirements for the environment and the climate. When Article 110 b of the Norwegian Constitution was adopted, one of the purposes was precisely to follow up on the Stockholm Declaration of 16 June 1972, which recognises the right to a "*healthy environment*", expressed in Article 112 as a right to "*an environment that is conducive to health*". This international foundation is particularly important for the climate protection under Article 112 that is global, and this supports the relevance of international law sources in the interpretation of Article 112.

In the following we will specify and elaborate on why international law and comparative sources are relevant to the case.

The Environmental Organisations argue that Article 112 of the Norwegian Constitution must be interpreted as a rights provision that provides effective protection to the global climate. In addition to the Norwegian sources of law, international law sources provide support for such an interpretation.

The Government argues that Article 112 of the Norwegian Constitution should not be interpreted to include any rights provision or any protection of the global climate; this opinion is the basis for the Decision in the case. On the basis of such a constitutional interpretation, the Environmental Organisations argue that the Decision is contrary to citizens' substantive rights under Articles 2 and 8 of the European Convention on Human Rights.

The District Court agreed with the Environmental Organisations that Article 112 is a rights provision, but the reasoning shows that, in the opinion of the District Court, the provision does not in reality protect citizens' rights in climate matters. Therefore the decision, as the Environmental Organisations see it, is also contrary to Articles 2 and 8 of the European Convention on Human Rights. It also follows from the basis Article 112 has in international sources of law and from the presumption principle that the provision must be understood in accordance with these sources and with Articles 2 and 8 of the European Convention on Human Rights.

The other international sources of law that are particularly relevant in the interpretation of Article 112 are the international law principles of "*no harm*", "the precautionary principle" and *"intergenerational equality – consideration for posterity"*.

Comparative law provides further guidance for particular arguments and issues in the case:

- Norway also has a responsibility for combustion of Norwegian petroleum abroad
- The significance of the petroleum that the decisions set the stage for producing, and the emissions from this petroleum, cannot be relativised away as too "small" with respect to total global emissions.

In addition, we remind the Court of Appeal that the organisations the Center for International Environmental Law ("CIEL"), the Environmental Law Alliance Worldwide ("ELAW") and Yale Law School submitted pleadings in support to the District Court that describe international law and comparative law, see the supplementary factual excerpt before the District Court at pages 719, 768 and 623, respectively. The District Court has not excluded the pleadings in support by an order under Section 15-8, Subdivision 2 of the Norwegian Dispute Act, in the manner the reference in the Reply to Section 15-8, Subdivision 2 can be read to mean. On the contrary, the District Court states

that the pleadings in support are included in the basis for decision before the court, see the District Court judgment, Section 5.2.5 by way of introduction. The Environmental Organisations argue that the sources the pleadings in support describe are important perspectives for the interpretation of Article 112 that were overlooked by the District Court.

2.2 European Human Rights Convention Articles 2 and 8

The Environmental Organisations believe that the factual and scientific basis for the case shows that climate deterioration represents a real and immediate threat to the rights protected by Articles 2 and 8 of the European Convention on Human Rights, see also Articles 93 and 102 of the Norwegian Constitution.

The European Court of Human Rights has read in requirements for environmental protection under Article 2 of the European Convention on Human Rights, the right to life, and Article 8, the right to respect for private and family life, in a number of decisions.[1] Through its positive obligations the state has a duty to implement sufficient safety mechanisms that practically and effectively prevent environmental impairment from threatening individual's rights. This applies to any activity, governmental or not, that may represent a *"real and immediate threat"* to the rights that are protected. Under European Court of Human Rights case law, the scope of the state's duty to act depends on the nature of the threat and the degree to which the risk can be mitigated through measures.

As indicated, the Environmental Organisations argue that when correctly interpreted, Article 112 of the Norwegian Constitution provides more far-reaching environmental protection than Articles 2 and 8 of the European Convention on Human Rights. In the Netherlands, where there is no legal rule resembling Article 112 of the Norwegian Constitution, the Hague Court of Appeal in the *Urgenda case* concluded that the climate threat triggers the state's duty to act under Articles 2 and 8 of the European Convention on Human Rights. The Urgenda case was brought by the Dutch environmental organisation Urgenda against the Dutch state. The reduction in emissions of greenhouse gases in 2017 in the Netherlands was 13 per cent compared with the 1990 level, see the judgment, paragraph 3.7. (In comparison, Norwegian CO_2 emissions in the period 1990-2015 increased by 25.1 per cent, see the supplementary factual excerpt before the District Court at page 6. Projected through 2017, the increase is 24.4 per cent, see www.energiogklima.no/klimavakten/) Urgenda argued that the planned reduction in emissions of 20 per cent leading up to 2020, in accordance with the EU's targets, was too small in relation to the state's duties to the population in the Netherlands, see the judgment, paragraph 28, and requested that the state be ordered to implement measures to ensure emission reductions of at least 25 per cent before the end of 2020,

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[1] For example, Öneryildiz v. Tyrkia No. 48939/99 (November 2004), Budayeva et al. v. Russia, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (March 2008), Fadeyeva v. Russia no. 55723/00 (November 2005), and Kolyadenko et al. v. Russia, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (July 2012)

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see the judgment, paragraph 3.7. The legal basis for the request was Articles 2 and 8 of the European Convention on Human Rights.

The court took as its starting point the Stockholm Declaration and the climate negotiations during the United Nations Framework Convention on Climate Change (UNFCCC) up to and including the entry into force of the Paris Agreement in November 2016, which requires that "*Global warming must remain well below the 2 C limit relative to pre-industrial levels, while aiming for a limit of 1.5 C.*", see the judgment, paragraph 15. The court then reviewed in paragraph 44 various (uncontested facts concerning the climate and concluded in paragraph 45 that it is "*appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and / or disruption of family life.*" The court concluded on that basis that the state is obligated under Articles 2 and 8 of the European Convention on Human Rights to implement measure to protect citizens against a "real threat", see paragraph 45. Based on this, the court affirmed Section 5.1 in the decision from the District Court of the Hague that ordered the state to reduce greenhouse gas emissions in the Netherlands by at least 25 per cent before the end of 2020 compared with the level in 1990. The case has been appealed to the Supreme Court of the Netherlands, and a final judgment is expected early in 2020.

The factual basis for the Urgenda case is to a large extent the same as in this case. Even though the legal action in question was formulated as a request to impose an active duty to act on a state, Articles 2 and 8 of the European Convention on Human Rights must also require a state to *refrain* from taking decisions that are harmful to the climate.

The key point is that the Decision contributes in an unlawful way to extreme environmental harm and thus represents an infringement of each person's right to a healthy environment, as protected by Articles 2 and 8 of the European Convention on Human Rights (possibly Articles 93 and 102 of the Norwegian Constitution). This also supports a finding that Article 112 of the Norwegian Constitution has been violated.

2.3 Key international law obligations are relevant for the interpretation and application of Article 112

There are three international law principles in particular that are relevant for the Court's interpretation and application of Article 112: *The no-harm principle, the precautionary principle and the principle of solidarity with posterity.*

The Environmental Organisations argue that all of these principles are independently embedded as law in Article 112. The principles developed in international law are key to determining how they are to be adopted in Norwegian law pursuant to Article 112.

- The *no-harm-principle* is international customary law and stipulates that a state may not initiate or conduct activity on its territory that harms other states' territory or areas outside national jurisdiction, see for example the preamble of the Convention on Climate Change. The principle has been directly applied in several decisions from the International Court of

Justice (ICJ)[2]. The principle is thus not only a duty to *assess* the harmful effects for other countries, as the Government appears to argue (Section 4 of the Reply)), but also a duty to *refrain* from activity that inflicts environmental harm on other states.

In this case, the principle is important because the addition of greenhouse gases to the atmosphere directly results in global warming. In the current situation, there is little "room" for additional greenhouse gas emissions, and further contributions to this will lead to serious environmental effects abroad and in Norway. The Decision lays the groundwork for new petroleum to be brought up to the surface and into the carbon cycle. In the assessment of which activities Norway must refrain from on its own territory, it is thus relevant to look at what environmental harm this activity creates in other countries. Global warming as a result of greenhouse gas emissions from oil and gas is the direct cause of a high, acute risk of dramatic consequences from climate deterioration in countries that are more exposed than Norway and who do not themselves have the means to avert the danger or reduce the risk. This must be taken into consideration in the assessment of whether the Decision represents a violation of Article 112.

- *The precautionary principle* stipulates that a lack of knowledge and scientific uncertainty cannot justify the lack of measures or the postponement of measures that are intended to prevent the risk of serious or irreversible harm to the environment. In other words: any doubt shall benefit the environment.

There is no relevant scientific uncertainty concerning the fact that the climate changes are serious and that global warming in excess of the planet's tolerances currently entails an impending risk of irreversible harm. Nevertheless, there is a certain uncertainty concerning *when* climate deterioration will result in irreversible upheavals ("tipping points") of the climate and the environment and *how much* additional emissions the atmosphere will tolerate before such tipping points are reached. The precautionary principle indicates that this uncertainty cannot justify the state continuing as before. The principle calls for the state to act to avoid a risk of arriving at irreversible tipping points. In this case, this means that the Government must refrain from taking the Decision and thus laying the groundwork for bringing the petroleum up to the surface and into the carbon cycle.

The precautionary principle is embedded in the requirement in Article 112 of the Norwegian Constitution for an environment that is "conducive" to health, in the requirement that the diversity and productivity of the natural environment shall be "preserved" and not least in the provision's highlighting of consideration for posterity.[3]

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[2] Trail Smelter (USA v. Canada), Arbitral Award dated 16 April 1938 and 11 March 1941, UN Reports of International Arbitral Awards, Vol. III, pages 1905-1982, Pulp Mills on the River Uruguay (Argentina v. Uruguay), judgment of 20 April 2010, paragraph 101, Gabcikovo-Nagymaros Project (Hungary v. Slovakia), judgment of 25 September 1997, ICJ Reports (1997) 7.

[3] The precautionary principle is also expressed in the 1992 Rio Declaration on the Environment and Development, Principle 15, and in Article 3(3) of the Convention on Climate Change.

For purposes of comparison, the Dutch appellate court emphasised in *Urgenda* (paragraph 63) that the precautionary principle stipulates that the state may not use scientific uncertainty as an argument for postponing the implementation of (more) effective measures.

- The principle of intergenerational equity is at the core of the case because the most serious harmful climate effects will hit future generations. Article 112 explicitly states that *"future generations"* shall be taken into account. The principle means that the Court shall not only consider the harmful effects that will arise for current generations; it must also take into account the effect for later generations.

2.4 Comparative law and particular issues in the case

2.4.1 Main argument

Based on the global and international nature of the climate challenges, courts in other countries have faced several of the same particular issues that arise in this case. While Norwegian courts are not bound by how other nations' courts have resolved these issues, it can nevertheless be of interest to see how these issues have been handled in other countries. The very fact that the challenges are global, and much of the factual basis is the same, makes it appropriate that the problems be resolved in a similar manner. In addition, Norwegian courts should seek to avoid solutions that result in Norway taking less responsibility for the climate crisis than other countries.

Two of the central issues in the case have been discussed in particular by courts in other countries: 1) The relevance of combustion emissions in other countries as a result of resource extraction. 2) The relevance of emissions from a country or individual resources constituting a relatively small part of the total CO_2 emissions in the country and in the world.

2.4.2 Combustion emissions must be taken into account

In Section 6.1. of the Notice of Appeal, the Appellants have explained why the District Court must have made an error when it concluded that emissions from combustion of Norwegian-produced petroleum were not something Norwegian authorities are responsible for under Article 112.

This issue is in no way unique to Norway, and the Environmental Organisations find reason to emphasise how a similar issue has been resolved by an Australian court.

In a legally-enforceable judgment from an administrative court, the Land and Environment Court in New South Wales, Australia, pronounced on 8 February 2019, the court decided precisely that combustion emissions from exported resources must be included in the assessment made under Australian law

Australia is one of the world's largest producers of coal[4]. With respect particularly to carbon-intensive metallurgical coal used in steel production, Australia is the world's largest exporter.[5] The Minister of Planning had denied the mining company Gloucester Resources Limited a licence to develop a new coal mine for extraction of metallurgical coal. The denial was based on the special nature of the geographic area in question and its importance as a recreation area. The mining company brought the issue of the licence denial before the administrative court and argued that metallurgical coal for steel production is difficult to replace with other energy sources, see paragraph 460. The intervener, a local environmental organisation argued that the denial must be sustained out of concern for the global climate threat.

The court clearly states that combustion emissions in other countries must also be assessed, see paragraph 487, and it cited the fact that many courts in other places in the world have stated the same, see paragraph 499 et seq. In paragraph 514 et seq., the court states that *all* CO_2 emissions the resource in question gives rise to are relevant and that combustion emissions from exported coal must also be included in the assessments. In comparison, the District Court in this case has concluded that combustion emissions shall be disregarded *because* the petroleum is exported. As pointed out in Section 6.1.3 of the Notice of Appeal, this point of view is difficult to understand.

In the Gloucester Resources case, the court concluded that a new coal mine in the area in question "*would be in the wrong place at the wrong time." … wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to agreed climate targets, is a rapid and deep decrease in GHG emissions.*" The reference to "agreed climate targets" is a reference to the requirements of the Paris Agreement.

The Gloucester Resources judgment illustrates that the District Court's exclusion of combustion emissions from Norwegian-produced petroleum from what is relevant to assess in the application of the law under Article 112 yields meaningless results. Even though Norwegian courts naturally enough are not bound by how an Australian court has dealt with the same issue, it is unfortunate if Norwegian courts conclude that Norwegian authorities have a more limited climate responsibility than other countries.

2.4.3 The emissions cannot be relativised away

In Section 3 of the Notice of Appeal, the Environmental Organisations explain why it is not correct as the District Court concludes that the right to a habitable environment is not infringed because the negative climate effect from the Decision is small in relation to the total greenhouse gas emissions in Norway and the world. The Government for its part emphasises in the Reply that future activities on the blocks covered by the Decision, irrespective of the size of the discoveries, will only constitute a minor share of the total Norwegian petroleum activities (Section 2) and that any

[4] http://minerals.org.au/sites/default/files/181012%20Commodity%20Insights%20Met%20Coal%20Report.pdf

[5] Op. cit. page 10.

combustion emissions abroad "will nevertheless constitute such an uncertain and modest contribution that it is presumably immeasurable" (Section 5 in conclusion).

The Environmental Organisations believe that such a fragmented and isolated approach to the consequences of the production licences is a restrictive interpretation of Article 112 for which there is no basis. As it has been thoroughly explained in the Notice of Appeal, the District Court's approach in reality is that it is lawful to ruin the environment and the climate so long as it occurs little by little.

Similar matters came up and were answered by the court in the Gloucester judgment from Australia. The court found that it is irrelevant that the emissions from coal produced in that project will constitute a small part of the total CO_2 emissions on the planet, see paragraph 515. On this point, the court cited *Urgenda*. In *Urgenda*, the court acknowledged that the climate problem is global and that the Netherlands cannot solve this alone, but the court stressed that this cannot relieve the state of implementing more measures within its territory, see paragraph 62. Both the court of first instance and the court of second instance in *Urgenda* rejected quite categorically the government's arguments that the Netherlands was responsible for a small part of the world's CO_2 emissions, see the judgment of the Court of Appeal, paragraphs 61-62.

The Environmental Organisations believe that the argument that the Decision (and Norway) are responsible for a small part of the world's CO_2 emissions must be rejected, in light of the targets defined through the Paris Agreement, because the Paris Agreement requires that industrialised countries bear a larger share of the burden in reaching the targets and because the Decision, in the same way as for the Australian coal mine, has been made at the *wrong place* and at the *wrong time*, if one accepts the established factual basis (the climate crisis) that exists in the case and is uncontested between the parties.

It is also interesting to note that the Australian court refers to *Urgenda* and cases from several other jurisdictions. Such an approach is in line with the Environmental Organisations' view on how the courts should look to solutions for similar issues from courts in other countries in order to achieve a uniform approach to a global problem.

3 THE GOVERNMENT'S PROCEDURAL ARGUMENTS

3.1 Main argument

The alternative claim that the Decision is invalid as a result of procedural errors is key to the case. In summary, the Environmental Organisations have argued that the Decision lacks sufficient *investigation* and *justification.*

As a general objection to the procedural argument, the Government has argued that the errors alleged are related to *the opening process* (Section 3-1 of the Norwegian Petroleum Act) and not *the licensing process* (Sections 3-3/3-5 of the Norwegian Petroleum Act) and that these errors are irrelevant if the Environmental Organisations are not challenging the opening itself.

Even though the District Court has presumably concurred with the Environmental Organisation's point of view on precisely this point – that the errors are relevant for the validity of the Decision –

the Government's argument appears to be new before the Court of Appeal, and it necessitates some clarifications on the part of the Appellants, see Section 2.2 below.

3.2 The Government's argument regarding which case preparation is relevant

The Government (at page 13 of the Reply) states that the economic assessments included in the Storting's consideration of the Barents Sea South-East opening are irrelevant for the Decision if the Environmental Organisations are not challenging the Storting's decision on opening. Based on this, the Government states that the Environmental Organisations must choose between alleging that "the Storting's decision on opening BSE in the spring of 2013 was invalid" or "abandon the allegations that the economic estimates from 2012 are deficient". The Environmental Organisations disagree with this dichotomy, and we will explain the Environmental Organisations' point of view in the following.

For the sake of continuity, we will first replicate the overall division into three parts in the licensing process, which is essential for the understanding of the Government's procedural obligation prior to the Decision. Licensing of petroleum production primarily occurs in three phases:

- An *opening phase* where entirely new areas are assessed for petroleum activities and where the question of whether such activities should be conducted at all in the area is investigated.

- A *licensing phase* where the particular production licences are granted to oil companies.

- An *approval phase* where the oil companies' plans for development and operation of proven commercially exploitable discoveries are considered for approval.

This case involves the validity of a decision in the *licensing phase*, where several of the licences granted were granted in an entirely new area (Barents Sea South-East) and therefore almost immediately followed the *opening phase*.

When the Government now argues that the investigation in the opening phase is irrelevant for the assessment of the validity of the licensing decisions, the following is important: In the opening phase, no formal decision is taken that can be challenged before the courts. Section 3-1 of the Norwegian Petroleum Act, supplemented by Chapter 2 a of the Norwegian Petroleum Regulations, requires a thorough investigation at the opening, and it is required that any "[opening] of a new area for petroleum activities … be submitted to the Storting". Accordingly, the opening was submitted to the Storting through Report to the Storting 36 (2012-2013), and as is usual when considering reports to the Storting, the Storting did not decide anything other than that the report was to be "included in the minutes".

Both the Environmental Organisations and the Government have referred to the Storting's consideration of the impact assessment as an opening *decision*, but in a formal sense this is not entirely accurate. Even though the Storting's consideration and guidelines naturally have great importance and are necessary in order to open a new area to petroleum activities, in a formal sense it is the King in Council who *opens* the area to petroleum activities through the decision on

production licences in the area. It is also possible to view this so that the opening phase and the licensing phase overlap.

This thematic structure is addressed as follows in Universitetsforlaget's comments on Section 3-1 of the Norwegian Petroleum Act:

> *The provision in Section 3-1 of the Act seems to presume that a separate decision is made on opening of new areas. In the preparatory works , there is a discussion of whether it should be laid down that it is the Storting that will decide on opening of areas. It is concluded there that in reality it has been the Storting that has decided to open new areas, even though in a purely formal sense it has appeared as a Government decision in the form of granting production licences, and it is presumed that this practice will apply in the future without finding reason to specify this in an enactment.*
>
> *It has been regular practice from the time before the entry into force of the Petroleum Act that the Storting, with assistance from reports to the Storting, is informed about the Government's plans concerning the future petroleum activities in the short, medium and possibly the long term, including when opening new areas. By considering the report, the Storting expresses its view on the submitted plans, but the Storting does not make a formal decision.*
>
> *It is now laid down in Section 6d of the Petroleum Regulations that opening of a new area to petroleum activities shall be submitted to the Storting. (…)* (Ulf Hammer, Trond Stang, Sverre B. Bjelland, Yngve Bustnesli and Amund Bjøranger Tørum, Section 3-1. Åpning av nye områder. Petroleumsloven: Kommentarutgave ("Opening of new areas. The Norwegian Petroleum Act: Commentary Edition"), Juridika (copied on 5 August 2019)

The Environmental Organisations' argument is that the Government, through the King in Council, was obliged to grant the production licences on a proper basis and based on a proper investigation. It is not the case that any errors in connection with the submission of the matter to the Storting are irrelevant or remedied *because* the report has been considered by the Storting.

Based on the aforementioned, the proceedings prior to the Storting's consideration are obviously relevant for the validity of the licensing decision: When a court is to assess whether the production licences granted in Barents Sea South-East have been the subject of satisfactory proceedings, the court must include in the assessment the fact that these licences represent the opening of an entirely new area (the first in more than 20 years) and assess whether the proceedings prior to this decision were satisfactory.

We remind the Court here that Section 3-1 of the Norwegian Petroleum Act expressly stipulates that "*an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment (…) as well as the economic (…) effects that may be a result of the petroleum activities*". This duty rests with the administration as a whole, not just the Storting, and particularly

the King in Council who formally granted rights in the area and thereby opened the area. From the perspective of the Environmental Organisations, it is reasonably obvious that the proceedings have not been proper when the opening is based on calculations that mistakenly overestimate the revenue potential by hundreds of *billions*, and where the corrected calculations would have shown that the activities will result in a socio-economic loss.

Irrespective of this, a Storting decision cannot nullify the requirements for investigation of individual decisions that follow from Section 17 of the Norwegian Public Administration Act, read in light of Article 112 of the Norwegian Constitution. It is the administration's proceedings that led to the decision on granting licences through the 23rd licensing round that are challenged on the basis of procedural errors. The assertion that a political decision based on this erroneous and deficient basis “cleanses” the entire investigation process appears hollow. This would have resulted in reality in gross procedural errors being made unchallengeable.

It is otherwise correct that it follows logically from the Appellants’ arguments that the Storting's decision on opening is also based on deficient investigation and factual errors. The same errors necessarily also apply here. Because the submission to the Storting is a special procedural step laid down by regulation, there is a basis to regard the errors in the Storting's consideration as an independent procedural error that can also lead to invalidity. However, because these errors nevertheless lead to the Decision being invalid as a result of a violation of the general duty to investigate, it is not necessary for the Court to assess the validity of the Storting's decision.

For the sake of clarity, it is also specified that the aforementioned only applies to the licences granted in BSE, as the opening relates to these. The arguments on procedural errors apply equally to <u>all of the licences:</u>

For all of the licences, the Environmental Organisations allege (and did before the District Court) that the administration is obliged to carry out a thorough proceeding before the licensing, including investigating and assessing whether the licences should be granted on the basis of a balancing of the licence’s socio-economic benefit against the licence’s inherent harmful environmental effects. the Government has made it clear that the administration *did not make any such assessment at the time of the licensing.*

To the extent it is correct that the administration never undertakes such assessments in connection with the licensing decision, it is also correct that the argument is more than “*an attack on the proceedings in this specific case*” (Reply, page 13). However, it is wrong when the Government simultaneously states that the argument is an attack on “*the Act's entire system*». The regulatory structure, including Section 17 of the Norwegian Public Administration Act and Article 112 of the Norwegian Constitution, means that the administration is obliged to make such assessments. The argument is therefore not an attack on *the Act’s system*, but an attack on the administration’s *unlawful practices and inadequate compliance with the Act’s system*.

In order to avoid misunderstanding here, we **ask** the Government to clarify whether we have understood the Government correctly when we assume that the administration makes no economic assessments whatsoever in connection with *granting production licences*.

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This statement of the case is being uploaded in Aktørportalen.

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