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NOREGS HØGSTERETT

JUDGMENT

pronounced 22 December 2020 by the Supreme Court of Norway in plenary session with

Chief Justice Toril Marie Øie
Justice Jens Edvin A. Skoghøy
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Kristin Normann Justice
Henrik Bull
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg
Justice Erik Thyness
Judge Kine Steinsvik

HR-2020-2472-P, (case no. 20-051052SIV-HRET)
Appeal from the Borgarting Court of Appeal judgment of 23 January 2020.

Natur og Ungdom Föreningen Greenpeace Norden Naturvernforbundet (Friends of the Earth Norway) (Intervenor) Besteforeldrenes klimaaksjon (Norwegian Grandparents Climate Campaign) (Intervenor)	(Advocate Emanuel Feinberg – for assessment Advocate Cathrine Hambro – for assessment)
versus	
The Government of Norway through the Ministry of Petroleum and Energy	(the office of the Attorney General of Norway in the person of Advocate Fredrik Sejersted) (Co-Counsel Advocate Anders Flaatin Wilhelmsen)

VOTING

(1) Justice **Høgetveit Berg:**

The issues in the case and its background

Subject matter in the case

(2) The case involves the issue of whether a Royal Decree of 10 June 2016 is invalid. The decree – the Decision – involves awarding 10 petroleum production licences for a total of 40 blocks or sub-blocks on the Norwegian continental shelf in the maritime area referred to as Barents Sea South and Barents Sea South-East – the 23rd Licensing Round.

(3) The Decision was made pursuant to Section 3-3 of the Petroleum Act. The case raises in particular questions regarding whether the Decision is contrary to Article 112 of the Norwegian Constitution, and whether the Decision is contrary to Article 93 of the Constitution regarding the right to life or Article 102 regarding the right to a private life and family life, and the corresponding rights in the European Convention on Human Rights – ECHR – Articles 2 and 8, or whether the Decision is otherwise invalid as a result of procedural errors. The gravity of the case is related to the interpretation of Article 112 of the Norwegian Constitution and the question of whether this constitutional provision grants individual rights to citizens, which they may directly assert before the courts.

(4) The parties agree that we are facing major climate challenges, that at least a substantial part of the temperature increase on our planet in the last hundred years has been caused by humans as a result of greenhouse gas emissions, and that the emissions must be reduced in order to stop and hopefully reverse the trend.

(5) The overarching constitutional question is what role the courts should have in the environmental efforts. This is a constitutional question. The legal action concerns the allocation of power principle and the tripartite division of power between the legislative, executive and judicial authorities.

Procedural history before the courts

(6) Natur og Ungdom and Föreningen Greenpeace Norden brought a legal action on 18 October 2016 before Oslo District Court against the Government through the Ministry of Petroleum and Energy regarding the validity of the decision of 10 June 2016 regarding the 10 production licences. It was alleged that the decision is contrary to Article 112 of the Norwegian Constitution and that it is wholly or partially invalid because it is contrary to Section 3-3 of the Petroleum Act, see Section 3-1, as these rules must be read in light of Article 112. Alternatively, it was alleged that the decision is invalid as a result of a series of violations of procedural rules.

(7) The 13 companies that were granted licences in the decision are not parties in the case. The Plaintiffs cited Rt-2015-641 in the Notice of Proceedings. It has been assumed that even though a judgment on the validity of a decision is only directed at the Government and will thus not have legal effects on private parties who have benefitted from the decision, the administration might – if the result is invalidity – have a duty to determine

whether to reconsider the decision. On this basis, it is not disputed at the Plaintiffs had, and have, a legal interest in the lawsuit.

(8) Besteforeldrenes klimaaksjon entered the case as an intervenor before the District Court on behalf of the Plaintiffs. Naturvernforbundet also entered the case as an intervenor before the Court of Appeal. These two organisations are also intervenors before the Supreme Court. The Appellants and the Intervenors will generally be referred to below as "the Environmental Organisations".

(9) Oslo District Court issued the following judgment on 4 January 2018:

> "1. The Government of Norway through the Ministry of Petroleum and Energy is found not liable.
>
> 2. Föreningen Greenpeace Norden, Natur og Ungdom and Besteforeldrenes klimaaksjon are jointly ordered to pay within 2 – two – weeks legal costs of 580,000 – five hundred eighty thousand – Norwegian kroner to the Government of Norway through the Ministry of Petroleum and Energy."

(10) In the opinion of the District Court, Article 112 of the Norwegian Constitution is a "rights provision" granting individual rights that can be reviewed before the courts if the duty to take measures in the third paragraph of Article 112 is not met. In addition, the Court held that Article 112 of the Constitution applies to local environmental harm and greenhouse gas emissions in Norway, but not to emissions from combustion that occurs abroad. The District Court concluded that the decision was not contrary to Article 112 of the Constitution, as the risk of environmental harm and climate deterioration was limited and the remedial measures were adequate. Finally, the District Court was of the opinion that the decision was not invalid owing to procedural errors.

(11) Natur og Ungdom and Föreningen Greenpeace Norden appealed the judgment to Borgarting Court of Appeal. As a new alternative basis for invalidity, it was alleged that the decision is contrary to Article 93 of the Norwegian Constitution and Article 2 of the European Convention on Human Rights regarding the right to life, and Article 102 of the Constitution and Article 8 of the European Convention on Human Rights regarding the right to a private life and a family life. The views related to Section 3-3 of the Norwegian Petroleum Act, see Section 3-1, were not sustained. Otherwise, the Environmental Organisations adhered to the grounds for invalidity before the Court of Appeal.

(12) The Borgarting Court of Appeal issued the following judgment on 23 January 2020:

> "1. The appeal is dismissed.
>
> 2. Legal costs are not awarded, neither for the District Court nor the Court of Appeal."

(13) Like the District Court, the Court of Appeal was of the opinion that Article 112 of the Norwegian Constitution grants individual rights that can be reviewed before the courts. In addition, the Court of Appeal concluded that the provision applies to all the environmental harm alleged in this case, both local environmental harm and emissions of greenhouse gases, the latter through both the petroleum production itself and combustion abroad. The Court of Appeal simultaneously decided that the environmental harm must be assessed against the measures that have been taken. The Court of Appeal was of the opinion that the threshold for declaring the decision to be invalid must be high – and that it had not been exceeded. Nor did the Court of Appeal find the decision to be invalid under Article 2 or

Article 8 of the European convention on Human Rights or the corresponding rules in Articles 93 and 102 of the Constitution. Finally, the decision was not invalid owing to procedural errors.

(14) Natur og Ungdom and Föreningen Greenpeace Norden have appealed the judgment to the Supreme Court of Norway. The appeal is directed at the Court of Appeal's application of the law and assessment of the evidence when discussing Article 112 of the Constitution. The procedural challenge is now limited to the licences that involve Barents Sea South-East. The right was reserved in the appeal to invoke Articles 2 and 8 of the European Convention on Human Rights, see Articles 93 and 102 of the Constitution as particular legal bases, and this was done during the appeal proceedings.

(15) The Supreme Court's Appeal Committee allowed the appeal to proceed on 20 April 2020. That same day, the Chief Justice ruled in HR-2020-846-J that the case would be considered in plenary session, see Section 5, fourth paragraph, and Section 6, second paragraph, of the Courts of Justice Act.

(16) Three justices – Arntzen, Indreberg and Noer – were disqualified from hearing the case in the Supreme Court's order of 28 October 2020, see HR-2020-2079-P. Justice Bergsjø is on a study leave and therefore did not participate during the appeal proceedings either. Justice Matningsdal participated during the appeal proceedings but has subsequently taken sick leave and therefore did not participate in the voting.

(17) The Supreme Court has received six written submissions pursuant to Section 15-8 of the Dispute Act, which are intended to shed light on public interests. These are from The Environmental Law Alliance Worldwide (ELAW), The Allard K. Lowenstein International Human Rights Clinic of Yale Law School, the Center for International Environmental Law (CIEL), the UN Special Rapporteur on Human Rights and the Environment, the Norwegian National Human Rights Institution and Climate Realists. The three aforementioned also submitted statements to the District Court and the Court of Appeal. The statements are included in the basis for decision, see Section 15-8, Subsection 2, third sentence.

(18) One licence in Barents Sea South and two in Barents Sea South-East have been surrendered. In the case of the production licence that now remains in Barents Sea South-East, the operator has applied to surrender 62 per cent of the area. The parties agree that a legal interest still exists, including for the part that involves Barents Sea South-East. I concur in that.

(19) A memorandum dated 8 March 2013 from the Norwegian Petroleum Directorate on valuation of undiscovered petroleum resources in Barents Sea South-East has been submitted to the Supreme Court as a new document. Two depositions have been taken and certain other documents related to the memorandum have been submitted. Otherwise, the case is generally in the same position as before the Court of Appeal.

The parties' views

The Appellants' views

(20) The Appellants – *Natur og Ungdom and Föreningen Greenpeace Norden* – have primarily alleged the following:

(21) The decision on awarding production licences – the 23rd Licensing Round – is invalid

because it is contrary to Article 112 of the Norwegian Constitution.

(22) Article 112 of the Constitution must be understood as guidelines that provide individual rights, which protect against unacceptable environmental encroachments and can be reviewed before the courts. This is evident from the wording and has support in the preparatory works, both for the previous Article 110 b in the Constitution and the current Article 112. Policy considerations of fairness, justice and feasibility and the legal literature support this interpretation.

(23) With respect to the content of the Article 112 of the Constitution, the provision sets both an absolute and a relative threshold. The provision is dynamic and must be adapted to the climate crisis. The assessment is not limited to the harmful effects that result from an individual decision, as this would entail a marginalisation contrary to the purpose of the provision. If each emission is viewed in isolation, the goals will never be reached. The measures by the Government under the third paragraph of Article 112 must be appropriate and sufficient. The third paragraph also includes a duty to refrain from decisions that will violate the right under the first paragraph.

(24) The harmful environmental effects must be assessed collectively. Given the purpose of Article 112, both the risk of traditional environmental harm and harmful effects from emissions of greenhouse gases through the production and subsequent combustion of petroleum, including abroad, must be relevant.

(25) Global warming will have catastrophic consequences if drastic measures are not quickly taken. Norway already emits too much CO_2 and cannot maintain its petroleum production at the current level. In such a situation, permission cannot be granted for further exploration and production in new fields without existing infrastructure if it can lead to petroleum production in 2030 and beyond. In any event, that is the case until the Government has established an appropriate national tolerance limit and a framework that deals with this tolerance limit in an appropriate manner. Any production licences must be capable of being adapted to this.

(26) The fossil fuel resources that can be used globally if the Paris Agreement is to be fulfilled have already been found. The emissions reductions have still not started in Norway. Our national goals are nevertheless too conservative, and the total reported national contributions under the Paris Agreement will be unable to meet the 1.5 degree goal. Norway's responsibility must be assessed on the basis that Norway has been a major petroleum exporter and has the resources to reposition itself. Norway must accept a proportionately larger share of the climate cuts, both because we have produced oil and gas that have resulted in large amounts of emissions and because we have the economic capacity for this. Norway must therefore cut at least 60 per cent of its greenhouse gas emissions by 2030.

(27) Decisive weight cannot be assigned to the Storting's views in general on climate policy and petroleum policy, as Article 112 of the Norwegian Constitution is intended precisely to grant the courts the power of judicial review. If Article 112 is to have any substance, production cannot be defended solely on possible socio-economic benefit. There is no real opportunity to halt the process, for instance in connection with approval of a plan for development and operation (PDO). The production licences have been granted in a particularly vulnerable and valuable area, associated with the polar front and the ice edge, which must also carry weight.

(28) The decision is consequently invalid under both the absolute and the relative thresholds in the first paragraph of Article 112 of the Constitution. The decision is also invalid

under the third paragraph of Article 112 because the duty to take measures has been breached.

(29) Alternatively, it was alleged that the decision is invalid because it is contrary to Article 93 of the Constitution and Article 2 of the ECHR regarding the right to life and Article 102 of the Constitution and Article 8 of the ECHR regarding the right to a private life and a family life The ECHR protects rights such as those asserted in this lawsuit. Among other things, this has been the conclusion of the Supreme Court of the Netherlands in a judgment of 20 December 2019 in the Urgenda case. The climate crisis affects and will affect people in Norway, and there is undoubtedly a "real and imminent threat".

(30) Thirdly, it is alleged that the part of the decision that involves Barents Sea South-East is invalid because of procedural errors.

(31) Article 112 of the Norwegian Constitution expands upon the procedural rules in the Norwegian Petroleum Act. This is particularly relevant for the licensing decision, since at this stage there is no requirement for an impact assessment.

(32) The Supreme Court must review as a preliminary matter whether the Storting's opening of Barents Sea South-East for petroleum activities is valid. If that is not the case, the Royal Decree will also be invalid.

(33) The circumstances, which in the view of the Appellants mean that the decision is substantively invalid, should in any event be accounted for and justified in greater detail. Above all else, this applies to global emissions of greenhouse gases. Furthermore, there is a defect in the socio-economic assessments prior to the opening, as the stated revenues for the Government were not discounted. If the correct method is used, the social accounting becomes negative. Finally, there are errors in the assessment of the effects related to employment and CO_2 costs. The Appellants have also alleged that the price of oil fell so dramatically from the opening decision up to the production licences that a new financial assessment should have been made at that time. These errors mean that the decision is based on factual mistakes – which may have affected the substance of the decision. The decision must therefore be declared invalid.

(34) Natur og Ungdom and Föreningen Greenpeace Norden have submitted the following prayer for relief:

> "1. The Royal Decree of 10 June 2016 on awarding production licences on the Norwegian continental shelf, "the 23rd Licensing Round", is to be declared invalid.
>
> 2. Föreningen Greenpeace Norden, Natur og Ungdom, Besteforeldrenes klimaaksjon and Naturvernforbundet are awarded legal costs for the Court of Appeal and the District Court.

The Intervenors' views

(35) The Intervenors – *Besteforeldrenes klimaaksjon and Naturvernforbundet* – have fully concurred on the Appellants' grounds for appeal and have submitted identical prayers for relief.

(36) When I refer in this judgment to "the Environmental Organisations", this also includes the Intervenors.

The Respondent's views

(37) The Respondent – *the Government of Norway, represented by the Ministry of Petroleum and Energy* – has primarily argued:

(38) The Royal Decree is valid. Neither Article 112 of the Norwegian Constitution, Article 2, nor Article 8 of the ECHR, nor Article 93, nor Article 102 of the Constitution render the decision invalid. Nor has any procedural error been made that makes the decision partly invalid.

(39) The first paragraph of Article 112 of the Constitution does not grant substantive rights that private parties can directly enforce before the courts. Even though the provision assigns duties to the authorities under the third paragraph, it does not grant corresponding rights to individuals or organisations. This is all evident in the wording. The preparatory works and the prior history do not provide sufficient grounds for the conclusion that the intent was to grant rights to individuals, nor was the previous provision in Article 110 b of the Constitution understood to be a rights provision. Furthermore, there are not sufficient grounds for the provision having changed its nature with the constitutional revision in 2014. Consideration for division of powers and democracy, for which questions are suitable for determination by the courts and for a legally manageable and predictable rule clearly support the same conclusion.

(40) The third paragraph of Article 112 of the Constitution imposes on the Government a duty to take measures, but this involves only positive measures and cannot entail a duty to refrain from a decision. It follows from the preparatory works that the courts shall not be able to review the Storting's choice of measures. In any event, breaches of the duty to take measures cannot make individual decisions invalid.

(41) If Article 112 of the Constitution grants rights, a number of interpretive questions arise, including whether the provision contains a threshold for intervention through legal actions alleging invalidity. For greenhouse gas emissions, the provision raises a number of other questions as well. The provision is not suited to regulating emissions of greenhouse gases – and irrespective of this, it cannot be read as a limit on Norwegian exports of petroleum. The emissions from combustion of Norwegian petroleum are occurring outside Norway, and both international and national climate policy are based on each state being responsible for its national emissions.

(42) Alternatively, it is argued that the decision is not a violation of Article 112, whether the right under the first paragraph stands on its own or must be seen in connection with the government's duty to take measures in the third paragraph. Emissions of greenhouse gases during the production will not lead to an increase in net emissions since these emissions are included in the EU's emissions trading system. Emissions from the 23rd Licensing Round are nevertheless uncertain – and will be marginal. In addition, a number of measures have been put in place under the third paragraph, and additional measures might be put in place if commercially exploitable discoveries are made. Emissions from combustion after export are also uncertain and will in any event be marginal globally. The effect on the climate in Norway is thus the appropriate subject for assessment. The net effect of having to reduce Norwegian exports of oil and gas is unclear and disputed. Measures have also been put in place under the third paragraph related to global emissions. There is no local environmental harm, and the risk of such harm is minimal.

(43) The Environmental Organisations cannot invoke the ECHR, as they are not "victims" under the Convention. In any event, Articles 2 and 8 of the ECHR have not been

infringed, among other things based on the requirements for a causal relationship. Nor has Article 93 or 102 of the Constitution been infringed.

(44) There are no procedural errors, neither in the opening of Barents Sea South-East nor in the decision on production licences.

(45) The opening was based on a comprehensive process, in which environmental considerations were also assessed. It is not an error that the estimate of the revenue to the Government was not discounted. In any event, future revenues are extremely uncertain at this stage.

(46) At the licensing stage, there is no requirement for an impact assessment, nor is it appropriate, as it is uncertain whether commercially exploitable discoveries will be made. The requirement in Section 4-2 of the Norwegian Petroleum Act for approval of a plan for development and operation provides sufficient opportunity to take into account environmental and socio-economic considerations if commercially exploitable discoveries are made. The climate effect of national emissions is examined at an overarching level, and the effect of combustion of Norwegian petroleum is assessed continually in the political debate.

(47) The Government argues in the alternative that any errors have not affected the decision, in any event. The Storting has upheld the decisions after having considered all objections which to a great extent coincide with those the Appellants now allege.

(48) The Government of Norway through the Ministry of Petroleum and Energy has submitted the following prayer for relief:

> "The appeal is to be dismissed."

My view

The climate challenges

Global warming and the climate

(49) There is broad national and international agreement that the climate is changing as a result of anthropogenic greenhouse gas emissions and that these climate changes may have serious consequences for life on Earth.

(50) The Climate Risk Commission presented in December 2018 the report *Klimarisiko og norsk økonomi ("Climate risk and the Norwegian economy")*, NOU 2018: 17. The Commission details in this report climate-related risk factors and their relevance for the Norwegian economy. The report also includes a depiction of the climate challenges on a worldwide basis and for Norway. The report is primarily a compilation of knowledge from the UN Intergovernmental Panel on Climate Change (IPCC), including the Panel's Fifth Assessment Report from 2014 ("IPCC AR5") and the special report on 1.5 degrees of warming from 2018 ("IPCC 1.5C"). The UN's Climate Change Panel is a scientific body with its most important task being to make regular assessments and compilations of the current state of knowledge regarding the climate and climate changes. The Panel was established in 1988 by the UN Environment Programme (UNEP) and the World Meteorological Organization (WMO). The reports from the UN's Climate Change Panel are considered the most important and best scientific basis for knowledge about climate changes. What I state in the following has been obtained from the Climate Risk

Commission's report, NOU 2018: 17, Chapter 3, pages 31–53:

(51) The global mean temperature has increased by approximately 1°C since pre-industrial times. The effects of this warming are today being observed on all continents and in all oceans. The climate on Earth has natural fluctuations. However, based on current knowledge there is a 95–100 per cent probability that anthropogenic emissions are the dominant reason for the observed warming. The risk represented by the climate changes increases significantly the greater future emissions become, and almost all natural and anthropogenic systems will be affected directly or indirectly. According to the UN's Climate Change Panel, the global warming will reach 1.5 °C around 2040, and will increase to 3–4 °C towards the end of this century if changes are not made to the climate policy currently followed around the world. Achieving a stabilisation of global warming between 1.5 and 2 °C in the second half of this century is considered the best that can be achieved given the current starting point. The effects of global warming will be irreversible for all practical purposes given the current societal perspective, and greenhouse gas emissions that have already occurred will affect the climate for several centuries into the future.

(52) The risk picture on a worldwide basis with a temperature increase of 2 °C includes extreme heat, drought, sea level rise, ocean acidification, floods and extreme weather. The climate changes will alter living conditions for many species and ecosystems. Many hundreds of millions of people will be exposed to serious effects, and certain ecosystems and cultures are particularly vulnerable. The most exposed populations are the poor, indigenous populations and local communities that are dependent on agriculture and small-scale fishing along the coast. For the Arctic, the difference between 1.5 and 2 degrees of global warming will be immense.

(53) With warming greater than 2 °C, there is a real risk that several critical tipping points will be passed. Extreme weather without historic precedent will likely occur, and the climate changes will have major consequences for life in the ocean and for opportunities to produce food.

(54) As in the rest of the world, the climate in Norway has changed substantially in the last century. The annual temperature has increased by about 1 °C since 1900, and in large parts of the country there have been warmer summers, milder winters, more rain, shrinking glaciers and higher sea levels.

(55) In analyses of possible consequences for Norway, the starting point is usually a high-emission scenario, which results in a global temperature increase of 4.3 °C towards the end of the century compared with the reference period of 1971–2000, and an increase in the average temperature in Norway by up to 5.5 °C compared with pre-industrial times. In the Arctic and parts of Finnmark, the warming will be even greater. The risk picture for Norway includes more drought, higher treelines and increased forest fire risk because of more thunderstorms. Snow distributions will change, glaciers will shrink further, and the ocean will become warmer and more acidic. The last-mentioned circumstance will have major consequences for marine species and ecosystems. The sea level will rise, and the consequences from storm surges will be greater. A study that is cited in the report from the Climate Risk Commission concludes that Norway is particularly vulnerable to storm surges. It is expected that the weather pattern will stabilise for longer periods, so that there may be longer high-pressure systems with high temperatures and little rain for weeks, or in the alternative large amounts of precipitation and cold winter periods over a longer time.

(56) The international climate agreement – the Paris Agreement – was adopted during the climate summit on 12 December 2015 and is the most recently adopted protocol to the UN Framework Convention on Climate Change. Norway ratified the Paris Agreement on 20 June 2016, see Proposition to the Storting No. 115 (2015–2016) and Recommendation to the Storting No. 407 (2015–2016). The agreement entered into force on 4 November 2016. The Royal Decree challenged in this case was issued six months after the Paris Agreement was signed, but ten days before Norway ratified the agreement, and about five months before it entered into force.

(57) The purpose of the Agreement is to hold the increase in the global average temperature to well below 2°C compared with the pre-industrial level and to strive to limit the temperature increase to 1.5°C above the same level, see Article 2, no. 1 of the Paris Agreement.

(58) The burden sharing principle in Article 2, no. 2 of the Paris Agreement means that countries rich in resources, such as Norway, have a greater responsibility. Under Article 3, see Article 4, each state is to report nationally-determined contributions, which are to be "ambitious efforts" which together will "represent a progression over time". In other words, this is not a matter of an equal distribution. All countries are to do their best.

(59) Norway reported to the United Nations in 2015 a duty of at least a 40 per cent reduction in the emissions in 2030 compared with 1990, see Report to the Storting No. 13 (2014–2015) and Recommendation to the Storting No. 211 (2014-2015). According to the Climate Risk Commission, the total emission targets that had been reported at the time of the Commission's report were far from enough to achieve the Paris target, see NOU 2018: 17, page 46. Norway reported in February 2020 an enhanced target of 50 per cent, up to 55 per cent, see Report to the Storting No. 2 (2019–2020), page 69.

(60) Norway participated in the European Emissions Trading System through the EEA Agreement. In June 2019, the Storting consented to incorporation in the EEA Agreement of the legislative acts for a common fulfilment with the EU of the emissions target for 2030, see Proposition to the Storting (Bill) No. 94 (2018–2019) and Recommendation to the Storting No. 401 (2018–2019).

Norwegian climate legislation

(61) The Act relating to Norway's climate targets – the Climate Change Act – was adopted in 2017. The Act is intended to promote the implementation of Norway's climate targets as part of its process of transformation to a low-emission society by 2050, see Section 1, first paragraph, of the Act. One of the targets is for the emissions of greenhouse gases in 2030 to be reduced by at least 40 per cent from the reference year 1990, see Section 3. The climate target for 2050 is for Norway to become a low-emissions society, in which the greenhouse gas emissions have been reduced by 80 to 95 per cent from the reference year 1990. When assessing the achievement of goals, the effect of Norway's participation in the European Emissions Trading System is to be taken into account, see Section 4. To promote the transformation, the Government shall submit every fifth year updated, and as far as possible quantitative and measurable, climate targets to the Storting, see Section 5. In addition, the Government shall annually account for how Norway can reach these targets and shall otherwise account for the measures in the applicable climate policy, see Section 6.

(62) The Norwegian Climate Change Act is aimed at the uppermost decision-making level in society, in other words, the Storting and the Government. The Act does not establish rights or duties for citizens that can be enforced through legal actions before the courts, see Proposition to the Storting (Bill) No. 77 (2016–2017), pages 34 and 53. The preparatory works also specify that Norway's established contributions under the Paris

Agreement, see Section 2 of the Norwegian Climate Change Act, "are a target for emissions reductions that encompass the entire economy ('economy wide'). It includes, in this context, all greenhouse gas emissions from the territory of Norway, including Svalbard and Jan Mayen, and from the activities on the Norwegian continental shelf", see page 53 of the proposition.

(63) The Norwegian Act relating to Greenhouse Gas Emission Allowance Trading and the Duty to Surrender Emission Allowances – the Greenhouse Gas Emission Trading Act – was adopted in 2004. The purpose of the Act is to limit the emissions of greenhouse gases in a cost-effective manner through a system with a duty to surrender greenhouse gas emission allowances and freely transferable emission allowances, see Section 1, first paragraph, of the Act.

(64) Norway also has a number of other statutes that are relevant for the climate. I will mention, among others, the Norwegian Environmental Information Act, the Norwegian Nature Diversity Act, the Norwegian Pollution Control Act, the Norwegian Petroleum Act and the Norwegian Act relating to CO_2 Tax in the Petroleum Activity on the Continental Shelf. In addition, there is a long series of regulations for attending to the environment and safety in the petroleum activities. Furthermore, management plans are prepared for the maritime areas. The petroleum activities must occur in line with the plan for the maritime area where the activities will take place. There was formerly a separate management plan for the Barents Sea and the maritime area off the Lofoten Islands. The most recent management plans, from April 2020, are collected in Report to the Storting No. 20 (2019–2020).

Petroleum activities in Norway

Legal regulation up to production of petroleum

(65) The regulation of Norwegian petroleum activities can be roughly divided into three phases: the opening of a field, the exploration phase and the production phase. Prior to each phase, there are reports and assessments in keeping with what the regulations for the phase in question requires. For the opening phase, the main question is whether it is appropriate and desirable to open the area for petroleum activities based on an overarching assessment of advantages and disadvantages. Prior to the granting of licences for exploration and productions, the assessment is primarily related to which blocks should be announced, based on the chance for discoveries. A block is a defined geographic area. There are public consultation rounds, and the Storting is involved at several stages. Prior to extraction and production, the actual impacts of the extraction are assessed in greater detail.

(66) The maritime area must be opened for petroleum activities before a production licence may be granted. The procedure for opening is governed by Section 3-1 of the Norwegian Petroleum Act:

> "Prior to the opening of new areas with a view to granting production licences, an evaluation shall be undertaken of the various interests involved in the relevant area. In this evaluation, an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment and of possible risks of pollution, as well as the economic and social effects that may be a result of the petroleum activities.
>
> The issue of opening new areas shall be submitted to local authorities and key interest organisations, which may be presumed to have particular interest in the matter.

> Furthermore, it shall be made known through public announcement which areas are planned to be opened for petroleum activities, and the nature and extent of the activities in question. Interested parties shall be given a period of no less than 3 months to present their views.
>
> The Ministry decides on the administrative procedure to be followed in each individual case."

(67) The preparatory works state that the legislature has assessed these rules against the then Article 110 b, second paragraph, in the Norwegian Constitution, see Proposal to the Odelsting No. 43 (1995–1996), page 33. Section 6d of the Norwegian Petroleum Regulations requires that opening of a new area under Section 3-1 of the Norwegian Petroleum Act be submitted to the Storting.

(68) During the opening process, the Norwegian Ministry of Petroleum and Energy conducts an impact assessment for the area on the Norwegian continental shelf that is being considered for opening, see the Norwegian Petroleum Regulations, Chapter 2a. Environmental and climate impacts are among the circumstances that must be assessed, see Section 6c, first paragraph, (b) and (e) of the Regulations. The Storting decides whether to open an area for petroleum activities on the basis of the impact assessment.

(69) A production licence grants the licence holder an exclusive right to investigate, search for, and produce petroleum within the geographic area encompassed by the licence, but it does not grant a right to start development and production before additional permission exists. The licence holder becomes the owner of the oil and gas that is produced, see Section 3-3, third paragraph of the Norwegian Petroleum Act. The procedure for announcing and awarding production licences originates in Section 3-5 of the Norwegian Petroleum Act and Chapter 3 of the Norwegian Petroleum Regulations. The regulations set a number of requirements for the application on the part of the applicant, but there is no legally-prescribed requirement for an impact assessment in this phase on the part of the Government.

(70) If a commercially-exploitable discovery is made under a production licence, a process is started towards actual production of the discovery in question. This process is governed by Chapter 4 of the Norwegian Petroleum Act and Chapter 4 of the Norwegian Petroleum Regulations. Among other things, the licence holder must submit and have approved a plan for development and operation (PDO), based on an impact assessment, before development and operation can begin, see Section 4-2 of the Norwegian Petroleum Act and Section 22 to 22c of the Norwegian Petroleum Regulations. I will come back to this.

Factual circumstances – particularly regarding the 23rd Licensing Round

(71) The first licensing round on the Norwegian continental shelf was announced in 1965. Twenty-two production licences were granted at the time for 78 blocks. The first major discovery was Ekofisk in 1969. Production from the field started in 1971. A field comprises production from several blocks. In the subsequent years, a number of major discoveries have been made on the Norwegian continental shelf. A total of 3,196 blocks have been awarded. Today there is activity on 88 fields.

(72) Of these 3,196 blocks, 663 have been awarded in the Barents Sea. Barents Sea South was opened for exploration in 1989. There are currently two fields in production here, Snøhvit and Goliat.

(73) The Barents Sea is a particularly rich maritime area and is an important reproduction area for large populations of fish. At the ice edge, there is a unique ecosystem, with extensive production of plankton in the spring. The polar front, the area where cold

water from the Arctic Ocean meets warmer water from the Atlantic Ocean, also has a unique ecosystem.

(74) Both the ice edge and the polar front are particularly vulnerable to oil spills. The ice edge moves throughout the year and varies from year to year. Climate changes generally cause the ice edge and the polar front to withdraw northwards. In addition to the risk of oil spills, the area is particularly vulnerable to emissions of soot, which increases the ice melt.

(75) After the delimitation line between Norway and Russia entered into force in the summer of 2011, an impact assessment was immediately begun for Barents Sea South-East. The impact assessment was presented to the Storting as an annex to Report to the Storting No. 36 (2012–2013). The report includes a total of 24 technical studies; about a third of these were related to the environment and climate. The Storting decided in the summer of 2013 to open Barents Sea South-East, see Recommendation to the Storting No. 495 (2012–2013).

(76) Seven of the production licences in the 23rd Licensing Round (14 blocks) involve Barents Sea South, while three licences (26 blocks) involve Barents Sea South-East. All the blocks are located north of the mainland of Norway between 71° 30' and 74° 30' North latitude, and from 20° 40' East longitude to the delimitation line facing Russia.

(77) On the blocks from the 23rd Licensing Round, seven exploratory wells have been drilled so far, three in Barents Sea South and four in Barents Sea South-East. One licence from this licensing round in Barents Sea South and two licences in Barents Sea South-East have been surrendered – in all, 20 blocks or parts of blocks. In the only licence that now remains in Barents Sea South-East (seven blocks), the operator has applied to surrender 62 per cent of the area. The reason for the surrenders is that commercially-exploitable discoveries have not been made.

Does Article 112 of the Norwegian Constitution grant individual rights that can be reviewed before the courts?

The issue

(78) It is a fundamental prerequisite for the legal action alleging violations of Article 112 of the Norwegian Constitution to succeed that the provision can be asserted at all before the courts as a substantive limitation on the authorities.

(79) Some constitutional provisions, such as Article 100 of the Norwegian Constitution regarding freedom of expression, clearly grant rights that can be asserted before the courts. The right may be positive and grant a legal claim to something, or negative and grant freedom from interference, for individuals or groups. Such rights will usually correspond to duties for the authorities. Other constitutional provisions are pure "manifestos" involving duties for the authorities, but concrete rights cannot be read from them that can be reviewed before the courts. We also find constitutional provisions which contain intermediate solutions. These express intermediate solutions, where certain rights can be reviewed before the courts, but with more extensive duties for the authorities. The type of constitutional provision that is at issue depends on an interpretation. Here it is essential how the provision is formulated, taking into account the extent to which it is binding and its enforcement.

(80) If a constitutional provision grants rights that can be reviewed before the courts, but are not as extensive as the duties for the authorities, the question becomes how far these rights will extend. The solution may vary depending on whether a legislative decision or

an individual decision is involved, and who has made the decision.

(81) The issue in this case is whether Article 112 of the Norwegian Constitution can be invoked before the courts as the basis for a claim that an individual decision, made under Section 3-3 of the Norwegian Petroleum Act in a Royal Decree and based on consent from the Storting, is invalid. To be sure, the Storting has not consented to the individual decision itself. But this decision is based on opening decisions in 1989 and 2013 to which the Storting has consented, and the opening decisions are precisely what is key in this context. Furthermore, it is a decisive premise for the individual decision that several proposals to stop the awarding of licences in the 23rd Licensing Round were rejected by the Storting with broad political majorities during the period before the decision was made. Therefore, my starting point in the assessment is that there is a decision here that is decisively based on consent from the Storting. The fact that formally the matter simultaneously involves an individual decision made by the Government must therefore be subordinated.

(82) In the opinion of the Environmental Organisations, the first paragraph of Article 112 of the Norwegian Constitution grants an entirely general right coinciding with the duties for the authorities and which can be invoked before the courts, or, in the alternative, such a substantive right results from the first and second paragraphs when read in context with the third paragraph.

(83) The Government does not agree with this and is of the view that the first paragraph of Article 112, whether seen in isolation or in context with the third paragraph, does not grant rights coinciding with the duties for the authorities. Nevertheless, in the opinion of the Government, Article 112 *does have* legal significance (i) as a guideline for the Storting's legislative activities, (ii) as a guideline for administrative discretion, (iii) as an interpretative principle and (iv) as a legal limitation when the Storting has not taken a position on an environmental matter. In addition, the Government believes that (v) the duty to take measures in the third paragraph of Article 112 entails legal duties, but it does not have corresponding rights. As the Government sees it, liability for violations of these duties can only be alleged before the Norwegian Court of Impeachment.

The wording of Article 112 of the Norwegian Constitution

(84) In general, constitutional provisions are to be interpreted in the same manner as other legal rules. However, they distinguish themselves by more often being general and discretionary than provisions in ordinary acts and regulations. The wording in constitutional provisions usually does not provide the full meaning of the nature and scope of the provision. The constitutional style is concise and grandiloquent, and with that it can be quite unlike ordinary statutes and other written standards in form. The legal method is nevertheless the same for the most part. The wording is the starting point.

(85) The provision we today find in Article 112 of the Norwegian Constitution was adopted in 1992 – at that time as Article 110 b. In 1992 the Constitution had five sections. Article 110 b of the Constitution was in Section E regarding "General Provisions". In the constitutional revision in 2014, a number of new provisions were added. The Constitution was given an updated style – in both Nynorsk and Bokmål. Some of the provisions were collected in Section E, which was given the new heading of "Human Rights". In addition, the paragraph numbering was partly changed. The former Article 110 b became the current Article 112 – and is found in Section E, which now involved human rights.

(86) Article 112 of the Constitution is worded as follows:

> "Every person has the right to an environment that is conducive to health and to a natural environment whereby productivity and diversity are maintained. Natural

> resources shall be managed on the basis of comprehensive long-term considerations, which will safeguard this right for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The authorities of the state shall take measures for the implementation of these principles."

(87) This provision imposes explicit duties on the authorities in the first paragraph, second sentence, to manage resources for the long term in a comprehensive manner, and on the Government in the third paragraph to take measures that implement the principles in the constitutional provision. The question is whether the first paragraph, or the third paragraph read in context with the third paragraph, also grants a right that an individual or group of individuals can invoke before the courts, and if so, how far this right extends.

(88) Based on everyday language in the first decade of this century, the usage in the first paragraph of Article 112, when viewed in isolation, indicates that rights are involved that can be invoked before the courts. But the statement can also be read as a kind of principle or maxim without a corresponding right to assert the principle or maxim before the courts.

(89) The second paragraph of Article 112 of the Constitution grants citizens the right to knowledge and impact assessments in order to safeguard the right under the first paragraph. The content is more tangible than in the first paragraph. When the second paragraph is also brought into the same interpretation, it indicates in general that the matter has to do with individual rights.

(90) The term "these principles" in the third paragraph of Article 112 refers back to the rights mentioned in the first and second paragraphs. From a purely linguistic perspective, it is natural to understand "principle" as something other than a "right". A maxim is closer to a principle or an axiom – and not something on which a right can be directly based.

(91) Accordingly, the wording is open to several interpretations and does not provide a clear answer regarding whether, and to what extent the provision provides rights that can be invoked before the courts. But the very broad, general wording – and the use of "principles" – clearly indicates, in my view, that a possible right in any event is not as extensive as the duties for the authorities, in such a way that the matter involves an intermediate category.

(92) As mentioned, Article 112 of the Constitution is located in Chapter E on human rights. But this label is of little help in the interpretation. The right to an environment is usually characterised as a third-generation human right, see Erik Møse, Menneskerettigheter ("Human Rights"), 2002, page 90. In contrast to the first- and second-generation rights in the European Convention on Human Rights and the UN's human rights conventions, Article 112 of the Constitution – and the former Article 110 b – is not an example of a binding rule under international law. An individual right to an environment or climate has not been established by any convention. Support thus cannot be found for the interpretation of the wording in such sources.

Background for the former Article 110 b in the Constitution

(93) Prior to Article 110 b of the Constitution, on which Article 112 is based, a number of proposals from Members of the Storting regarding establishing the right to an environment

in the Constitution were presented and rejected. A summary of these proposals was provided in Recommendation to the Storting No. 163 (1991–1992), pages 2–3:

> "Member Helge Seip presented in 1972 a constitutional proposal (Proposal no. 13 in Document no. 13 for 1971–72) as a new first paragraph for Article 110 of the Constitution, which stated that the Government would be obliged to protect the natural environment and natural resources, so that every person was ensured access to clean air, clean water and recreational and open areas, so that the basis for production in the soil, forests and water was preserved for posterity.
>
> The proposal was considered by the Storting in 1976 (Recommendation to the Storting No. 207 for 1975–76) and rejected against a single vote. The Standing Committee on Foreign and Constitutional Affairs stated with respect to the proposal that one should be watchful against the increasing tendency to add to the Constitution declarations of principle without legal significance, even if the principles contained in these declarations are good enough in themselves. The Committee said that it agreed that the Government is obliged to protect the environment in such a way that the access to clean air and water can be ensured, but it did not find the present proposal appropriate.
>
> The Storting considered two proposals in 1984 to establish environmental protection in the Constitution (Proposals nos. 9 and 13 in Document no. 13 for 1979–80). One proposal from Nils Christie, approved for presentation by Anne-Lise Bakken and Ingrid Eidem, was based on a new Article 82 in the Constitution, in which significant encroachments on the natural environment could only be made with a two-thirds, or alternatively three-fourths majority. The proposal would also entitle municipal councils and county councils to appeal a decision on encroachment on the natural environment to the Storting (see Recommendation to the Storting to the Storting No. 163 for 1983–84). The proposal was unanimously rejected by the Storting.
>
> The other proposal put forward by Øyvind Bjorvatn was identical with the proposal Helge Seip presented in 1972. This proposal was also unanimously rejected by the Storting (Recommendation to the Storting No. 163 for 1983–84)."

(94) Nevertheless, the rejection of the latter proposal led the Standing Committee on Foreign and Constitutional Affairs to ask the Ministry to take the initiative for a report that could provide a basis for considering the question of a possible constitutional establishment of natural resource protection, see Recommendation to the Storting No. 164 (1983–1984), page 2. This task was assigned to then Professor Inge Lorange Backer. I will return to this report.

(95) The Standing Committee on Foreign and Constitutional Affairs also recounts in Recommendation to the Storting No. 163 (1991–1992), page 3, that the Storting in 1988 considered a constitutional proposal from Eva Funder Fleischer, presented by Osmund Faremo, on encroachment on the natural environment, see Proposal no. 12 in Document no. 10 (1983–1984):

> "Everyone has a Right to clean Air, clean Soil and clean Water. Any Individual or Combination of Individuals has a Right to have reviewed by the Courts whether a reasonable Purity Level has been infringed."

(96) The proposal was thus formulated as a substantive right to clean air, clean soil and clean water – by expressly stating that all individuals or combinations of individuals should be entitled to a judicial review of whether a reasonable purity level had been infringed. The majority on the Standing Committee on Foreign and Constitutional Affairs stated in the recommendation for this proposal that the legal rights the constitutional proposal granted to the subjects of legal rights was so unclear that it could result in uncertainty and disputes to an unfortunate extent, see Recommendation to the Storting No. 95 (1987–1988), page 4.

(97) The constitutional proposal from Eva Funder Fleischer was also presented by Members Kjellbjørg Lunde and Theo Koritzinsky in the next Storting term and was rejected simultaneously with the adoption of Article 110 b of the Constitution.

(98) Thus when the work started that led to Article 110 b, Storting wanted neither a pure declaration of principle without legal substance nor a pure rights provision with extensive rights that could be tried before the courts. This introduction – which is also highlighted in the subsequent preparatory works – must in my view bear weight when reading the former Article 110 b and the later Article 112.

(99) Professor Backer's report on constitutional establishment of environmental law principles was delivered to the Ministry of the Environment on 20 March 1988. The report was subsequently published in the Department of International and Public Law's monograph series no. 6/1990. Backer initially discusses what can be considered environmental law principles. He also discusses the previous constitutional proposals on environmental protection. Backer refers to the fact that the Norwegian Constitution is *lex superior* and therefore a constitutional provision will take precedence over ordinary law if there is a conflict. Then he refers to the key considerations, including on pages 27–28:

> "From an environmental protection perspective, it will be desirable to have a constitutional provision as binding as possible, in any event so long as a gap is avoided between the constitutional provision and the factual reality that develops. On the other hand, a broad, binding emphasis on environmental considerations could conceivably conflict with other societal objectives. Even though the environment sets boundaries for human activities to ensure continued human existence with a reasonable quality of life, it is not the case that environmental considerations require any environmental burden to be avoided. Often it is the sum of burdens that becomes critical for the environment and not one particular activity. The degree to which environmental considerations come into conflict with other societal objectives often depends on whether environmental improvement must occur with one stroke or over a certain period that provides room for adapting other socially-beneficial activities."

(100) Here Backer points out that considerations for other societal interests and the need for a holistic perspective argue against a constitutional provision that is too binding.

(101) On the following pages, Backer does not support providing individuals with a general substantive right to a particular environmental quality that can be enforced by the individual through legal actions before the courts. He refers to the courts not being as suited to take a position on such matters as popularly-elected bodies, the need to coordinate measures in several areas and to provide a supply of public resources, cumulative effects, consideration for other societal interests, and a holistic perspective.

(102) On the other hand, Backer's proposal included what he refers to as "a constitutional alternative that provides substantive legal protection for the environment, but without it binding to the same degree and giving the courts such a predominant position as mentioned above", see page 30 of the proposal. He also supported an intermediate solution, with something that *can* be reviewed before the courts, but not a right corresponding to the duty for the authorities. Backer recommended an alternative that is very similar to the alternative subsequently adopted by the Storting.

(103) Backer took as a starting point a principle of a right to a certain environmental quality, so that the Storting by statute could decide how the principle was to be implemented. He

assumed that when such a statute is promulgated, these legal rules will be the basis for decision and not the constitutional provision. Then Backer specified how the constitutional provision can also have legal effect where legal rules have been promulgated: as a guideline for the Storting, as an interpretive principle and as a guideline for administrative discretion. In addition, the principle is to be used for environmental problems on which the legislature has not taken a position. Backer emphasises here that the application will be up to the courts. Backer summarised as follows on page 30:

> "It can accordingly be said that this alternative gives popularly-elected bodies an opportunity to play the main role in ensuring satisfactory environmental quality and that it gives the courts a more restrained role without excluding them."

(104) Read in context, I understand this to mean that the intent was for individuals or groups to be able to bring the matter before the courts based directly on the constitutional provision when the legislature has not taken a position on an environmental problem.

The content of the former Article 110 b

(105) Article 110 b of the Constitution was given the following wording:

> "Every Person has the Right to an Environment that is conducive to Health and to a Natural Environment whose Productivity and Diversity are maintained. Natural Resources shall be managed on the basis of comprehensive long-term Considerations which will safeguard this Right for Future Generations as well.
>
> In order to safeguard their Right in Accordance with the foregoing Paragraph, Citizens are entitled to Information on the State of the Natural Environment and on the Effects of any Encroachment on Nature that is planned or carried out.
>
> "The State Authorities shall issue further Provisions for the implementation of these Principles."

(106) Article 110 b was adopted in 1992 after a proposal presented by Storting Members Liv Aasen and Einar Førde, see Document no. 12 (1987-88), Proposal no. 15. This proposal did not expressly refer to Professor Backer's report. However, in Backer's report, four variants of constitutional establishment were set up, which respectively granted clear rights to individuals, only imposed duties on the Government, only provided a manifesto or entailed an intermediate solution. Based on the similarities with the formulations in the proposal from Aasen and Førde that was adopted, there is every reason to believe that this was based on the last-mentioned alternative.

(107) Aasen and Førde justified the proposal on the basis that several proposals for an environmental provision had been rejected "either because they have been pure statements of principle without legal effect, or because they have gone extremely far in providing citizens with rights that can be enforced in the courts pursuant to direct authorisation in the Norwegian Constitution", see Document no. 12 (1987–1988), page 34. The proponents pointed out that they had taken this into consideration in their proposal. It must already be clear from this that the proposal from Aasen and Førde was intended to be something between these two extremes, in other words a provision that did *not* go "far" in granting rights to citizens that could be enforced by the courts, but *neither* was a pure principle provision without legal effect.

(108) It is then stated in Document no. 12 (1987–1988), pages 34–35:

> "The constitutional provision will have legal effect in several ways. The Constitution takes precedence over other legislation if there is a conflict. It will also have great weight in the interpretation of ordinary legislation. A rule concerning environmental protection will also provide guidance for administrative practice.
>
> All three of our alternatives entail a duty for the authorities to provide specific rules that are necessary for implementing the principle of the constitutional statement. The specific content in and the scope of the principles which we are proposing to establish in the Constitution shall be specified through rules laid down by the authorities. The provision entails a duty for the authorities to ensure that the concern for the environment is incorporated in the regulations in all areas of society where it is relevant. The expression 'the State Authorities' is aimed primarily at the Storting as the legislative authority. However, specific rules can also be issued through other Storting decisions that bear on environmental interests, and it may involve regulations issued pursuant to statute by the Government or other administrative bodies. Where rules are provided, it is therefore the Storting's interpretation of the constitutional provision that normally will determine what type of rights citizens have.
>
> In those instances where concern for the environment is not incorporated in the legislation, individuals or organisations with a legal interest under ordinary procedural rules should nevertheless be able to have their rights reviewed in the courts pursuant to direct authorisation in the Constitution…"

(109) This is largely identical to what Professor Backer wrote about the legal consequences of his proposal.

(110) The Standing Committee on Foreign and Constitutional Affairs considered the proposal in Recommendation to the Storting No. 163 (1991–1992). As I have recounted, the Committee referred to the previous constitutional proposals and expressly took as its starting point Backer's assessments and proposal. Among other things, it is recounted here that a constitutional establishment in a legal sense will mean that a constitutional provision will take precedence over ordinary legislation if they conflict with each other", see page 5. The alternative the Storting proposed, and which was adopted, was very similar based on its content to what Backer had recommended. The difference is that Backer's proposal included the sentence about the authorities' duty as the last clause in the first paragraph, and then the provision regarding the right to information.

(111) The Storting committee's own comments appear in Recommendation to the Storting No. 163 (1991–1992), pages 5–6. The Committee referred initially to the Storting, through the study from Backer, having been given "a good basis for considering the question of possibly establishing the environmental protection in the Constitution". The Committee then pointed out that a constitutional provision would provide an important signal, both nationally and internationally, that constitutional establishment would function as a policy guideline that could make it easier to promote environmental measures and as a message to the private sector that the Storting assigned importance to environmental protection. In addition, the Committee pointed out that rights in this area that can be reviewed judicially should be legally regulated in order to achieve the requisite level of precision. Finally, the Committee emphasised that the matter involved constitutional establishment of principles that in part were already laid down in Norwegian law, including "the principles regarding a right to certain environmental quality" and the duty to avoid environmental impairment and environmental harm.

(112) The Standing Committee on Foreign and Constitutional Affairs expressed itself in much the same manner as the proponents regarding the legal significance of the proposal, see Recommendation to the Storting No. 163

(1991–1992), page 6.

> "*The Committee* points out that the principles in the first and second paragraph of the constitutional proposal will have legal significance in several ways. It will be a constitutionally-established guideline for the Storting's legislative authority in this area, and it will also be an important factor in the interpretation of the regulations which the Storting itself has adopted or authorised. The principles will also put restraints on the administration by providing guidance when an administrative body exercises discretionary authority. The principles will also be those that are applied with respect to environmental problems, for which the legislators have not taken a position.
>
> The constitutional proposal's third paragraph means that the authorities will adopt specific provisions to implement the principles in the first and second paragraphs. *The Committee* points out that this means that the specific substantive requirements for environmental measures will be determined through the Storting's lawmaking and other rulemaking.
>
> …
>
> *The Committee* wishes to emphasise that where the Storting provides such rules, it will be these that shall be relied on in any cases before the courts."

(113) The Storting committee thus intended, in the same manner as Backer and proponents Aasen and Førde, for the constitutional provision to have a number of legal effects. The provision was to be a constitutionally-established guideline for the legislative work. In addition, the provision was to serve as an element in statutory interpretation and as a mandatory consideration in the exercise of administrative discretion. Finally, the principles were to be used on environmental problems for which the Storting had not taken a position.

(114) The Committee expressly mentioned the right to judicial review. But only *once* – and then while specifying that it is the specifically adopted rules that should be applied during the judicial review when such rules are adopted. In my view, it is natural to view this in line with the proponents – as a right to judicial review directly authorised in the Constitution first and foremost where environmental considerations are *not* incorporated in legislation.

(115) I will mention that nothing further was said in the Storting debate that is relevant to the issue here. The spokesperson emphasised the Committee's statement that the first paragraph of Article 110 b is to be used on environmental problems for which the legislature has not taken a position. It appears that the reason why this was specified was because the special comment by the Norwegian Progress Party, in the opinion of the spokesperson, seemed to assume that the proposal was only a declaration of principle, see to the Storting No. (1991–1992), pages 3736–3737.

(116) I agree with the Government in that based on the preparatory works for Article 110 b of the Constitution, it is clear that the provision did not establish a *general* substantive right such as that which the Environmental Organisations argue for. The same day that Article 110 b was adopted, the Storting rejected the constitutional proposal from Eva Funder Fleischer that Osmund Faremo had presented two Storting terms earlier, and that was again presented by Kjellbjørg Lunde and Theo Koritzinsky in the preceding term, that all persons are entitled to judicial review of whether a reasonable purity level has been infringed.

(117) Based on the background and the preparatory works for the then Article 110 b, as I see it, it must be assumed that the provision in any event could be invoked directly before the

courts, both for the right to information under the second paragraph of Article 110 b and in areas where there were no "specific Provisions" under the third paragraph. Where substantive rules *had* been promulgated, it was these that would be the basis for review. The courts would not be able to review which solutions the legislators chose in order to safeguard environmental considerations.

(118) The question is whether the third paragraph of Article 110 b was also a kind of safety valve against serious violations of the principles in the first paragraph – as a result of the Constitution being *lex superior* and therefore takes precedence if there is a conflict between them.

(119) As mentioned, it was emphasised in several contexts in the preparatory works that constitutional provisions take precedence over ordinary legislation in the event of conflict. What the constitutional drafters specifically included in this is nevertheless uncertain. The ranking principle is not expressly discussed in the Storting committee's own comments on Article 110 b, but as mentioned it is confirmed by the committee in the review of the proposal, see Recommendation to the Storting No. 163 (1991–1992), page 5. The committee was thus aware of the principle.

(120) It was emphasised that Article 110 b was a constitutionally-established guideline for the Storting's legislative power. Even though the starting point was that the Storting should decide which measures are to be taken, it is nevertheless a question whether the Storting would be *entirely free* to promulgate statutes that are clearly in conflict with the core of the protection that was intended in Article 110 b of the Constitution.

(121) In a jurisprudential review of Article 110 b of the Constitution, Ole Kristian Fauchald summarised this question in "Forfatning og miljøvern – en analyse av Grunnloven § 110 b" ("Constitution and environmental protection – an analysis of Article 110 b of the Norwegian Constitution") in Tidsskrift for Rettsvitenskap (2007) on page 35 as follows:

> "Based on this, it must be concluded that setting aside Storting decisions on the basis of Article 110 b will only be imaginable in entirely exceptional cases. This could occur where the Storting's decisions entail a direct and serious weakening or undermining of the environmental standards specified in Article 110 b."

(122) Similar viewpoints were expressed by Inge Lorange Backer, Innføring i naturressurs- og miljørett ("Introduction to natural resources and environmental law") (2012), page 60:

> "It can be said that the constitutional provision leaves it to the Storting to choose the way forwards for protecting the environment. But should it lead the opposite way, to a general deconstruction of environmental safety, it can certainly be justified for the courts to view Article 110 b as a limitation."

(123) In my view, the prior history and preparatory works for the former Article 110 b do not provide any solid basis for such views. But the views do have support – in any event to a large extent – in overarching standards: If the Storting was able to disregard its duties without the courts being able to intervene in any instance, it would violate general rule of law principles. This would be foreign to our democratic rule of law state, and the Storting had no reason to address this when adopting Article 110 b of the Constitution.

(124) On the other hand, I do not find a basis in the referenced sources of law for the courts being able to conduct a more extensive review of compliance with the duties in the

provision for decisions that the Storting had made or consented to, as the Environmental Organisations argue. I refer in particular to the fact that the rights were to be implemented by statute, that there was no desire to leave extensive assessments to the courts, and that there was no desire to grant extensive individual rights that could be reviewed before the courts.

The preparatory works for Article 112 of the Constitution

(125) Prior to the constitutional revision in 2014, the Storting's Presidium appointed a commission to consider the constitutional establishment of human rights. The commission was led by Inge Lønning. The report from the Storting's human rights commission (the Lønning Commission) was submitted to the Storting as Document 16 (2011-2012).

(126) Based on the report from the Lønning Commission, Article 110 b of the Constitution was moved to Article 112. The first and second paragraphs were given more modern language, but no explicit changes were made in reality. On the other hand, the content of the third paragraph was somewhat changed. Instead of "issue" it now read "shall take". The scope of the duty was expanded from "specific Provisions", in other words, legislation, to "measures". This is a wider and more general concept. The question is what effect the changes, and the preparatory works, have for the understanding of the current Article 112.

(127) The adoption of Article 112 of the Constitution was part of a broad reform. The sections of the preparatory works that involve Article 112 are nevertheless brief.

(128) The right to an environment conducive to health is discussed in Chapter 40 of the report by the Lønning Commission. The Commission begins its review of Article 110 b of the Constitution by referring to the fact it has taken a closer look at the provision "with an eye to whether and possibly how environmental rights can be strengthened in the Constitution", see Document 16 (2011–2012), page 243. After a brief introduction, the Commission then describes what it thought was applicable law, in other words, the understanding of the then Article 110 b. Among other things, the Commission stated on page 243:

> "There is little doubt that this provision on the part of the Storting was intended to be a legally binding provision and not merely a manifesto."

(129) The Lønning Commission refers on the same page to Recommendation to the Storting No. 163 (1991–1992), page 5 (which I have referred to), stating that the constitutional provision will take precedence over legislation in the event of conflict. The Commission then refers to what I have cited from the same place page 6, that the principles "will have legal significance in several ways". From references in footnotes, it might seem that the Lønning Commission particularly had in mind here a situation in which the legislature has not taken a position. The Commission concludes that private citizens and organisations could rely directly on Article 110 b of the Constitution in cases before the courts, but it emphasises that it is unclear under what circumstances such direct claims could be made. To that extent, this is nothing new in my view.

(130) In Document 16 (2011–2012), page 244, the Lønning Commission emphasises that the Storting cannot be more or less unrestricted – and refers to the statements in the preparatory works for Article 110 b of the Constitution regarding the provision as *lex superior* and a guideline for the legislature as well. The Commission then concludes that Article 110 b must be seen as a rights provision.

(131) In my view, it is nevertheless unclear what the Commission thought this right was specifically based on, and the extent to which a right could be based directly on Article 110 b of the Constitution, other than "the statutory void" and on that basis set legislation aside in cases before the courts. But the statement that the Storting cannot be more or less unrestricted when legislating indicates that the Commission intended a certain right to judicial review. As mentioned in the review of the sources for Article 110 b, I think there were grounds to claim that certain minimum requirements must be set for the Storting's legislation and measures in the environmental area. Therefore, in my view, neither does this involve anything fundamentally new. But it reinforces a fundamental view that was already in the sources.

(132) After a quick tour of the constitutions in a few other countries came the Commission's own assessments and draft in Document 16 (2011–2012), pages 245–246:

> "For the Commission, the question is whether the right to an environment that is conducive to health should be strengthened in the Constitution, and if so, how this can be done. The reason for this question is that humanity is confronting major environmental challenges in the future, both globally and nationally. Some of these environmental problems are obviously created by humans. For other environmental problems, such as climate changes, there is to some degree disagreement related to how much of these problems is due to human activity. However, it is indisputable that environmental problems can lead to serious problems such as desertification, extreme weather, etc. These are problems which in turn might lead to extinction of species, water and food shortages, migrations, spreading of epidemics, etc.
>
> It is against this background that a question must be raised as to whether the right to a healthy environment is at least as important for the individual's existence and self-realisation as the other human rights that naturally belong in the Constitution, and whether this constitutional protection should not be made more rigorous.
>
> In the Commission's view, Article 110 b, first paragraph, has been worded satisfactorily. It is in accordance with the recommendations of the World Commission on Environment and Development on 'legal principles for environmental protection and sustainable development'. As the Storting sees it, the provision is intended to represent a legal restriction for the authorities, while it has a human rights basis at the same time".
>
> In the Commission's view, the wording of Article 110 b, first paragraph, should therefore be continued.
>
> The provision's second paragraph gave rise to no comments on the part of the Commission.
>
> However, the Commission has considered whether the third paragraph in the provision should be given more appropriate wording, primarily to clarify the duty for the authorities to comply with the principles in the first paragraph with respect to taking appropriate and necessary measures to protect the environment. It is presumed that this is the main justification for the provision, as it is currently worded. However, the provision could have been more precise considering that it is a duty for the authorities of the state to pursue the right to an environment conducive to health. For example, the third paragraph could read:
>
> > 'It is incumbent on the State authorities to take measures which implement these principles.'
>
> Another option would be to repeal the third paragraph without replacing it with any new wording.

> The Commission will recommend that the third paragraph be replaced with wording to indicate that the authorities of the state have a duty to take measures to implement the first and second paragraphs of Article 110 b of the Constitution. This will clarify that the authorities have an active duty to take care of the environment through various forms of measures. There will still be plenty of room for political discretion with respect to which measures are put in place and at which times. However, the preparatory works (Recommendation to the Storting [no. 163 (1991–1992)], page 4) state that one of the main purposes of the current constitutional provision was to link legal effects to the fundamental environmental principles that were earlier formulated by the Brundtland Commission. This premise was also repeated during the Storting's debates. In accordance with this and case law from the European Court of Human Rights, the authorities cannot be passive witnesses to major environmental destruction, but must take measures to assist in ensuring a healthy environment for current and future generations. This should be more clearly expressed in the Norwegian Constitution.
>
> In line with the Commission's proposal for a separate human rights chapter in Section E of the Constitution, it is proposed to move Article 110 b to a new Article 112 in the Constitution."

(133) The Lønning Commission raises here the issue of strengthening the constitutional protection, but does not explicitly reach a conclusion. The Commission brings up the first paragraph as a legal restriction, but does not mention rights for the individual. The Commission proposes to amend the third paragraph in order to "clarify" the duty, but does not say whether this involves a tightening. In addition, the Commission characterises this as a duty to take "appropriate and necessary measures", but does not explain in greater detail what this involves.

(134) Nevertheless, I read this overall to mean that the *duty* for the authorities is the principal justification for the provision as it is now laid down in the third paragraph of Article 112 of the Constitution. The Commission proposed a clarification and expansion of the wording to clarify that the state's authorities have a duty to ensure the right to an environment conducive to health, whether this may occur through legislation or other general provisions, or by use of administrative authority to establish concrete measures. The Commission emphasised that the Storting has an active duty to take care of the environment through various measures. The underscoring of the fact that there would still be plenty of room for discretion regarding which measures should be taken, and when, nonetheless indicates that the Commission believed that the Storting should not be entirely unrestricted.

(135) In Constitutional Proposal 31 (2011–2012), a constitutional proposal was presented on the basis of the report from the Commission. The proposal by the Commission for Article 112 was repeated here without more detailed discussion; it was presented in order to be considered after election of a new Storting, as Article 121, formerly Article 112, prescribes.

(136) After the new Storting was elected, the Standing Committee on Scrutiny and Constitutional Affairs discussed the proposal to a certain extent in Recommendation to the Storting no. 187 (2013–2014), pages 25–26. The draft legislation is referred to here as a continuation of Article 110 b of the Constitution. The Committee also wrote that Article 110 b is to be read as a "legally binding provision" and that the rule takes precedence over ordinary statutes. Then the committee states:

> "*The majority* believes that there is a need to clarify the duty for the authorities to comply with the principles in the first paragraph regarding taking appropriate and necessary measures to protect the environment. The proposal made below must be

read as an active duty for the authorities to take measures to look after the environment. Which measures will be up to each Storting to adopt."

(137) Again, it is the clarification of the duty to take appropriate and necessary measures that is brought up. The duty is active, but it is up to the authorities to choose measures.

Summary and conclusion

(138) the first paragraph of Article 112 of the Constitution is undoubtedly relevant for the interpretation of statutes and for the exercise of administrative discretion. In addition, the first paragraph is a directive for the Storting's legislative power and other measures by the authorities under the third paragraph of Article 112.

(139) The wording does not provide a clear answer as to what legal relevance Article 112 otherwise has for decisions the Storting has made or consented to. However, based on the prior history and the preparatory works, there is a clear basis for letting authorities determine what measures should be taken under the third paragraph. Nevertheless, Article 112 could be directly used before the courts when addressing environmental problems for which legislators have not taken a position. What specifically is present in a possible limitation of instances where legislators *have* taken a position on an issue may nevertheless be unclear, since there are few "statutory voids" in this area. In addition, a distinction between when a position on an issue *has* been taken and when it has *not* can be difficult to deal with in practice.

(140) It is emphasised several places in the preparatory works for Article 112 of the Constitution that there was a desire for the provision to have a legal effect – that it provide guidelines for legislation, be *lex superior* and provide clear duties in the second sentence of the first paragraph and the third paragraph, see the first sentence in the first paragraph. This is among the few matters the Standing Committee on Scrutiny and Constitutional Affairs emphasised in 2014 – and that was in the elucidation of the statement that Article 112 is legally binding. However, the Committee did not say more than this, and it is uncertain how far the statement reaches. In my view, this indicates that the Storting to a certain extent wanted to bind itself, but for the most part did not wish to surrender the political room to act.

(141) On the one hand, consideration for the rule of law obviously indicates that the courts should be able to set limits, including for a political majority, when it comes to protecting constitutionally-established values. On the other hand, decisions in cases regarding fundamental environmental issues often involve political balancing and broader prioritisation. Democratic considerations therefore support such decisions being taken by popularly-elected bodies, and not by the courts.

(142) Based on this, my opinion is that Article 112 of the Constitution must be read, when the Storting has considered a matter, as a safety valve. In order for the courts to set aside a legislative decision by the Storting, the Storting must have grossly disregarded its duties under the third paragraph of Article 112. The same must apply for other Storting decisions and decisions to which the Storting has consented. The threshold is consequently very high.

(143) Based on what has been argued by the parties in the proceedings before the Supreme Court, I will mention that these duties can apply to both positive and negative measures. Much of the purpose for the constitutional provision would be eliminated if it did not also

include a duty to refrain from decisions that violate the third paragraph of Article 112.

(144) Article 112 of the Constitution is thus not a pure manifesto but a provision with a certain legal substance. However, a right can only be directly based on the constitutional provision to a limited degree in a case before the courts.

(145) For administrative decisions where the Storting has *not* been involved, Article 112 of the Constitution will be relevant as an element in the statutory interpretation and as mandatory considerations in the exercise of discretion. Apart from this, the present case does not provide any reason to go into greater detail on how thoroughly such decisions might be reviewed.

Some special interpretation questions

(146) Use of Article 112 of the Constitution on greenhouse gas emissions generally raises some special interpretation questions.

(147) Based on a comment from the Government, I will first mention that there is no basis for climate falling outside the scope of application for Article 112 of the Constitution. On the contrary, the climate is mentioned by the Lønning Commission as an example of what is intended to be covered by the provision, see what I have previously quoted from the report.

(148) For decisions with a climatic aspect, typically decisions that may involve greenhouse gas emissions, there is a question of whether the effect of the decision should be assessed in isolation or together with other emissions. From the second paragraph of Section 6 of the Norwegian Pollution Control Act and Section 10 of the Norwegian Nature Diversity Act, we are aware of the principle that a combined assessment should be carried out. In my view, on the one hand the starting point for validity challenges must be the specific decision. On the other hand, the decision cannot be viewed in isolation, but rather as a part of the whole. However, it cannot be the case that the entire environmental, climate or petroleum policy can be confronted in general through a challenge to an individual encroachment.

(149) One final question is whether it is relevant to look at greenhouse gas emissions and effects outside Norway. Are only emissions and effects on Norwegian territory relevant under Article 112 of the Constitution, or must emissions and effects in other countries also be included in the assessment? Article 112 of the Constitution does not generally protect against acts and effects outside the Kingdom of Norway. But if activities abroad that Norwegian authorities have directly influenced or could take measures against cause harm in Norway, this must be capable of being included through the use of Article 112. One example is combustion abroad of oil or gas produced in Norway, when it leads to harm in Norway as well.

Is the decision invalid?

Factual circumstances

(150) The harmful effects that the Environmental Organisations have brought up as a result of the decision in the 23rd Licensing Round are related in part to greenhouse gas emissions nationally during exploration for and production of petroleum, in part to greenhouse gas emissions nationally and globally during combustion of petroleum, and in part to the risk of local environmental harm as

a result of the petroleum activities.

(151) The Court of Appeal concluded that the emissions from exploration activities were so marginal that they could be disregarded in the assessment under Article 112 of the Constitution. This has not been challenged by the Appellants. The issue is thus related to the emissions from *possible production in the future.*

(152) At the time of the decision, it was uncertain whether oil or gas would be found in such quantities that production would be profitable. Therefore, until commercially exploitable discoveries have been made, possible emissions cannot be quantified but only estimated. Some estimates from the production itself are cited in the judgment of the Court of Appeal in section 3.2:

> "Economics professors Mads Greaker and Knut Einar Rosendahl have calculated the CO2 emissions from such production at respectively 22 million tonnes [high scenario] and 4.5 million tonnes [low scenario], which will be distributed over the production period. In the impact assessment, the COO2 emissions are calculated at 568,000 tonnes in a high scenario and 286,000 tonnes in a low scenario, in the year with the highest emissions, see the impact assessment, page 60. Compared with total annual emissions from the Norwegian Continental Shelf of approximately 15 million tonnes (2015), or total Norwegian emissions of 50-60 million tonnes, this involves a minor contribution. Compared with the global emissions, the emissions are of even less importance."

(153) This estimate was based on the impact assessment for the opening of Barents Sea South-East, i.e. a larger area than the blocks awarded in the 23rd Licensing Round. At the same time, the blocks in Barents Sea South were not included in the estimate.

(154) A review of the decision must be carried out based on the factual situation at the time of the decision. However, subsequent developments may shed light on whether the factual assessment at the time of the decision was proper. Two of the production licences that were awarded were later surrendered. In addition, a surrender has been sought for 62 per cent of the area covered by the remaining licence. This illustrates the uncertainty of the estimates in the licensing rounds. The parties have not submitted updated information that provides a more comprehensive picture.

(155) About 95 per cent of the greenhouse gas emissions from petroleum production generally occur through *combustion abroad after export*. The climate impacts thus particularly come to the fore when emissions from combustion, which mainly occurs abroad, are included. As mentioned, Article 112 of the Constitution only protects the environment here in Norway. Although we have no figures on the extent to which emissions after combustion abroad lead to harmful effects in Norway, there is no doubt that global emissions will also affect Norway.

(156) It has not been alleged that there is *local environmental harm* as a result of the 23rd Licensing Round. On the other hand, calculations have been made of the *risk* of uncontrolled blow-outs that result in environmental harm. For the exploration phase, it has been concluded that if three exploratory wells are drilled annually, one occurrence with serious environmental harm to sea birds can be expected every 15,000 years or moderate environmental harm every 6,000 years. For the ice edge, the figures are respectively one occurrence every 11,000 and 7,000 years. During the development and operational phase, the probability for a blow-out resulting in moderate environmental harm to sea birds is one occurrence every 4,000 years, and for moderate environmental harm to the ice edge one occurrence every 20,000 years. Although the consequences of oil spills can be dramatic, the risk is low.

The specific assessment

(157) When the production licence is a direct consequence of the Storting's concurrence in opening the maritime areas in question, there is little left for the Supreme Court to check. The decision may only be declared invalid under Article 112 of the Constitution in the event of gross disregard of the duty under the third paragraph. I find it clear that this strict condition has not been met and will therefore refer only briefly to some of what has been carried out in the climate and environment area:

(158) A number of general and specific measures have been implemented to reduce *the national emissions of greenhouse gases*. I will note, among other things, a CO_2 tax, a focus on renewable energy, support for carbon capture and storage technology, support for green technology and green conversion otherwise, and, not least, joining the EU Emissions Trading System.

(159) In terms of *greenhouse gas emissions during combustion abroad* after Norwegian export of petroleum, I believe it must be accepted that the Storting and the Government base Norwegian climate policy on the division of responsibilities that results from international agreements. A clear principle applies here that each state is responsible for the combustion that occurs on its own territory.

(160) A number of measures have been carried out to prevent *local environmental harm*. There is a stringent safety regime on the Norwegian continental shelf. For example, special authorisation is required for individual exploratory wells, for which special conditions can be set. If commercially exploitable discoveries are made, a new impact assessment will, as noted, be made in connection with an application for approval of a PDO, where once again conditions can be imposed. In Report to the Storting no. 41 (2012–2013), page 2, it is stated that limits will be set for the drilling period. For instance, exploratory drilling may not be carried out less than 50 kilometres from the ice edge between 15 December and 15 June.

(161) As mentioned, the starting point in validity challenges must be the specific decision. The Appellants are not arguing within such parameters. The argument is, to a large extent, related to the existing petroleum activities. A central point for the Environmental Organisations is that Norway must accept a proportionately larger share of the climate cuts, both because we have produced oil and gas that has resulted in large amounts of emissions, and because we have the economic capacity for this. Norway must therefore, it is claimed, cut greenhouse gas emissions by at least 60 per cent by 2030. The Environmental Organisations also argue that until there is a detailed legal framework and climate account, the authorities cannot initiate production in new areas. It is claimed that the planning must clearly state what the tolerance limit is – and that a system must be put in place to ensure that the tolerance limit is not exceeded.

(162) It is difficult to imagine that the courts would impose such specific requirements on the basis of Article 112 of the Constitution when reviewing individual decisions. The Environmental Organisations' reasoning involves subjecting to review key parts of Norwegian petroleum policy, including production and export. These views will, at the same time, affect subsequent licensing rounds and entail for the most part a controlled phasing out of Norwegian petroleum activities. This is beyond the limits of this case to take a position on.

(163) In addition, the Storting has established specific target figures for reduction of the greenhouse gas emissions. They now originate in the Norwegian Climate Change Act. As mentioned, the Storting and the Government have also initiated and planned many measures in order to reach the target figures. At the same time, any possible emissions from Barents Sea South-East will not appear until far into the future. Therefore, this matter does not involve a gross disregard of the duties under the third paragraph of Article 112 of the Constitution.

Is the decision contrary to Article 2 or Article 8 of the ECHR or Article 93 or Article 102 of the Constitution?

(164) The European Convention on Human Rights – the ECHR – has no special rule regarding protection of the environment. However, ECHR Articles 2 and 8 may be used in environmental cases, based on the circumstances. The same applies to the parallel provisions in Articles 93 and 102 of the Constitution.

(165) The ECHR has been incorporated into Norwegian law with precedence over other law, see Section 2 of the Norwegian Human Rights Act, see Section 3. It is clearly within the purpose and scope of application of the Environmental Organisations to attend to environmental and climate considerations. Although the Organisations would not be entitled to appeal to the European Court of Human Rights for violations of Articles 2 and 8, the Organisations can allege violations of the European Convention on Human Rights before Norwegian courts through Section 1-4 of the Norwegian Dispute Act. The same applies to violations of the parallel provisions in Articles 93 and 102 of the Constitution.

(166) Article 2 of the European Convention on Human Rights protects the right to life. The article can impose positive duties on the authorities, including in the case of hazardous industrial activities. But it is required that the risk of loss of life is "real and immediate", see the European Court of Human Rights Grand Chamber judgment of 30 November 2004 *Öneryıldiz v Tyrkia* , paragraphs 100–101. Jon Fridrik Kjølbro, Den Europæiske Menneskerettighedskonvention – for praktikere ("The European Human Rights Convention – for Practitioners"), 5th edition, 2020, page 238, uses here the expression "aktuel og nærliggende risiko for liv" ("actual and imminent risk to life").

(167) The consequences of climate changes in Norway will undoubtedly lead to loss of human life, for example through floods or landslides. The question is nonetheless whether there is a sufficient relationship between the production licences in the 23rd Licensing Round and possible loss of human life, so that the requirement for "actual and imminent risk" is met.

(168) In my view, the answer is no. Firstly, it is uncertain whether or to what degree the decision actually will lead to emissions of greenhouse gases. Secondly, the possible effect for the climate is a good piece into the future. I have stressed several times that the climate threat is serious. But the decision thus does not involve in the sense of the ECHR a "real and immediate" risk of loss of life for inhabitants of Norway Therefore, there is no violation of ECHR Article 2.

(169) ECHR Article 8 protects private life, family life and the home. Case law from the European Court of Human Rights shows that the article entails positive duties for the state. In certain cases, this can lead to the state having a duty to protect the environment. The article has primarily been used for local environmental contamination. The European Court of Human Rights stated the following in a judgment of 2 December 2010 *Ivan*

Atanasov v Bulgaria , paragraph 66:

> "In today's society the protection of the environment is an increasingly important consideration ... However, Article 8 is not engaged every time environmental deterioration occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols ... Indeed, that has been noted twice by the Council of Europe's Parliamentary Assembly, which urged the Committee of Ministers to consider the possibility of supplementing the Convention in that respect (see paragraphs 56 and 57 above). The State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life... Therefore, the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life."

(170) The European Court of Human Rights thus pointed out that Article 8 cannot be used for all environmental impairment and that a right to environmental protection in itself was not included in the rights and freedoms guaranteed by the European Convention Human Rights and its supplementary protocols. The Court also pointed out that the European Commission's Parliamentary Assembly has twice called upon the Committee of Ministers to consider the need to supplement the Convention – without this having been approved. The state's duties are therefore only covered by Article 8 if there is a direct and contemporaneous relationship between the environmental impairment and private life, family life or the home. The Court then lists, in paragraphs 67–73, a number of cases involving local environmental harm. What these have in common is that they involved hazardous activities that were close to home – usually from a few hundred metres to a few kilometres. The environmental threat has also been contemporaneous in these case – "immediate".

(171) To this point, the European Court of Human Rights has not considered appeals related to the climate. It is true that the Court has recently announced an appeal from six young people against Norway and 32 other countries. The case involves failures to cut emissions, and it is particularly linked to forest fires and heat waves in Portugal in 2017 and 2018. Nevertheless, there is no basis in current case law for the subject of assessment in climate cases to be other than what it is for environmental harm in general. Based on the content the European Court of Human Rights has to this point read into the words "direct and immediate", it is clear to me that the possible future emissions as a result of awarding the licences in the 23rd Licensing Round do not fall under Article 8 of the European Convention on Human Rights.

(172) During the appeal proceedings the Urgenda case from the Netherlands has been cited in particular. This was a case brought as a declaratory judgment action by the environmental organisation Urgenda against the Dutch state. The claim was for a judgment that the Dutch state had a duty to reduce greenhouse gas emissions by 2020 by 40 per cent, or at least 25 per cent, compared with 1990. The Dutch supreme court – the Hoge Raad – upheld in a judgment of 20 December 2019 (ECLI:NL:HR:2019:2007, unofficial translation to English) the decisions from the lower courts, which ordered the Dutch state to reduce greenhouse gas emissions by 25 per cent by 2020, compared with 1990. Among other things, the Hoge Raad cited Articles 2 and 8 of the ECHR.

(173) The judgment from the Netherlands has little transfer value for this case. Firstly, the Urgenda case involved questions about whether the Dutch government could reduce the general emissions targets that they had already set. Thus, it did not involve prohibiting a particular measure or possible future emissions. Secondly, it did not involve a validity

challenge to an administrative decision.

(174) Finally, the Environmental Organisations have pointed out that the European Court of Human Rights, when determining the substance of the rights, can rely on international agreements that constitute "common ground" between the Member States, see the European Court of Human Rights Grand Chamber judgment of 12 November 2008 *Demir and Baykara v Tyrkia* , paragraphs 85–86. Such a doctrine can hardly be used in the same manner in the environment area when the ECHR has no separate environmental provision. In any event, it has not been shown that the production licences are contrary to our international obligations.

(175) I will add that most of the pleadings in support that have been received and added to the case pursuant to Section 15-8 of the Norwegian Dispute act are essentially related to international obligations, under both the ECHR and international law otherwise. These do not contain anything that alters my assessments.

(176) Accordingly, the decision is not contrary to Article 2 or 8 of the ECHR.

(177) The Environmental Organisations have also alleged that the decision is contrary to the corresponding provisions in Articles 93 and 102 of the Constitution. In any event, these provisions do not reach any further in the present case than ECHR Articles 2 and 8. This particularly applies since the Constitution, in contrast to the ECHR, has a separate provision on the environment.

(178) The decision is accordingly not contrary to Article 93 or Article 102 of the Constitution.

Is the part of the Royal Decree that applies to Barents Sea South-East invalid because of procedural errors?

Introduction

(179) The procedural errors alleged by the Appellants are related to the decision to open Barents Sea South-East with an aim to awarding production licences, see Section 3-1 of the Norwegian Petroleum Act. It has not been alleged that similar errors affect the licences in Barents Sea South. Firstly, it is alleged that the information submitted to the Storting about the economic potential from opening Barents Sea South-East was wrong. Secondly, it is alleged that there is no assessment of the potential harm to the climate by opening the maritime area for petroleum activities. In addition, it is alleged that the price of oil fell so dramatically from the opening decision up to the awarding of the production licences that a new financial assessment should have been made at that time.

(180) The opening decision is not determinative for rights and duties of private persons, see the Norwegian Public Administration Act, Section 2, first paragraph, (a), and is therefore not a decision within the meaning of the Public Administration Act. However, the opening decision plays a key role in the process that leads to the production licences granted under Section 3-3 of the Petroleum Act. Procedural errors in the opening decision could therefore be taken into account when considering the validity of the subsequent awarding of production licences. The question must be reviewed as a preliminary matter.

(181) The alleged procedural errors are related to the opening process for Barents Sea South-East in 2013. Barents Sea South-East was opened back in 1989, and no procedural errors have been alleged in this opening decision. The procedural errors thus relate only to the most recent production licence that is located in Barents Sea South-East from the 23rd

Licensing Round, since two of the three licences have been surrendered to the Government.

The Constitution's requirements for administrative procedure and judicial review

(182) The body that decides whether to permit an encroachment on the environment is responsible for carrying out the measures and assessments required by the third paragraph of Article 112 of the Constitution, see the first paragraph. As I have explained, the courts must be cautious when reviewing political decisions. However, there is no need to exert the same caution when reviewing administrative procedures. The courts must confirm that the body making decisions on environmental encroachments has considered the requirements for "measures" stated in the third paragraph of Article 112 of the Constitution, see the first paragraph, when making such decisions. A number of procedural rules have been issued to ensure this, which I will come back to.

(183) The second paragraph of Article 112 of the Constitution contains a procedural requirement. The decision-making body must ensure that the right citizens have under the provision is fulfilled. Citizens are entitled to knowledge about the effects a planned environmental encroachment has on the natural environment. The purpose of the knowledge is to ensure that citizens can safeguard their right under the first paragraph of Article 112, see the concluding wording in the second paragraph. For instance, this can be done through consultations during the continued process. The provision sets quality requirements for the administrative proceedings. The greater the impact of a decision, the stricter the requirements that must be set for clarifying the impacts. The judicial review of the administrative proceedings must correspondingly be more thorough the greater the impact of a measure.

(184) For the petroleum activities, the constitutional requirements related to the administrative proceedings have been governed by the Norwegian Petroleum Act and the Norwegian Petroleum Regulations. These rules must be interpreted and applied in light of Article 112 of the Constitution. The petroleum activities have a number of impacts, all of which have a major influence on society. The administrative proceedings, when opening new areas, must thoroughly clarify the advantages and disadvantages of the opening.

The requirements for administrative proceedings in the petroleum legislation

(185) As mentioned, the procedural rules for opening new maritime areas for petroleum activities stem from the Norwegian Petroleum Act and the Norwegian Petroleum Regulations. The procedural requirements may also be supplemented by the principle of a reporting duty in Section 17 of the Norwegian Public Administration Act, even though the act does not directly apply to the Storting, see Section 4, fourth paragraph. In addition, the EU Planning Directive, Directive 2001/42/EC, imposes requirements for impact assessment for the opening decision. The Directive has been implemented in Norwegian law, in part through Sections 6a to 6c of the Norwegian Petroleum Regulations.

(186) The first paragraph of Section 3-1 of the Norwegian Petroleum Act, which I cited earlier, requires a broad assessment and weighing of various interests and effects the petroleum activities may have: industrial effects, environmental effects, risk of contamination and economic and social effects. The assessment must encompass all stages of the petroleum activities, see Section 1-6 (c), from exploration to development, production, transport, utilisation and decommissioning. The operating phase is thus covered, although it is primarily the effects in the exploration phase that are to be assessed under Section 3-1, see

Proposition to the Odelsting No. 43 (1995–1996), pages 33–34. The provision does not regulate which interests are to have the greatest weight, but is intended to ensure a good factual basis in the assessment of whether a new area should be opened for petroleum activities.

(187) Under the fourth paragraph of Section 3-1 of the Norwegian Petroleum Act, it is the Ministry that determines the administrative procedure in an individual case. Although the Ministry has great freedom with respect to which investigations and assessments are to be carried out, it must be taken into account that the purpose of the assessment is for the Ministry to ensure that the Government and the Storting are given a solid basis for decision. In connection with this, it must be emphasised that petroleum production has major consequences for all of society, that there may be a conflict of various interests, and that there are different views among political parties and the population. This means that the assessment may often be more extensive than is the case with other decisions.

(188) Chapter 2a of the Norwegian Petroleum Regulations states that an impact assessment shall be carried out before new areas are opened for petroleum activities. Among other things, "relevant environmental goals", "important environmental issues", "the effects of opening" for the environment and any remedial measures must be accounted for to the necessary degree, see the Norwegian Petroleum Regulations, Section 6c, first paragraph, (b), (d), (e) and (j). The impact assessment is to be sent out for broad consultation, see Section 6c, third paragraph.

(189) As mentioned, these rules are part of implementing the EU Planning Directive in Norwegian law. The purpose of the Directive is to ensure strong protection of the environment by setting requirements for environmental assessment early in the decision process, before the frameworks for individual decisions have been made, see the published comments of the Ministry of Petroleum and Energy on the Regulations relating to Changes in the Petroleum regulations of 20 January 2006, Section 3 (I). Article 7 of the Planning Directive states that if a plan in a Member State "is likely to have significant effects on the environment in another Member State", the other Member State shall be notified. The Planning Directive is thus not based on a purely national perspective on the environmental effects of a measure. Article 7 has been implemented in Chapter 4, Section 22c of the Norwegian Petroleum Regulations regarding production. However, this provision applies to the extent suited for the opening phase, see Section 6a, third paragraph, first sentence.

(190) There are no requirements for an impact assessment when awarding production licences. The usual requirement in Section 17, first paragraph, of the Norwegian Public Administration Act, that the matter must be "clarified as thoroughly as possible" before a decision is made on awarding a licence, applies here. Viewed in context, the consequence of Section 17 of the Norwegian Public Administration Act is that the impact assessment prior to the opening decision must also take into account the natural consequence of the opening decision – that a production licence will be awarded.

(191) If a discovery is made that is considered for development, the licence holder must prepare a plan for development and operation of the petroleum deposit – a PDO – see Section 4-2 of the Norwegian Petroleum Act. The plan must be approved by the Ministry. The applicant must conduct an impact assessment that describes the effects the development and operation of the deposit will have on the environment, see the Norwegian Petroleum Regulations, Section 22a, first paragraph, (a).

(192) It is most natural for environmental questions related to development and operation of the specific discoveries to be investigated and assessed in connection with the impact assessment for a PDO, see also Proposition to the Odelsting No. 43 (1995–1996), pages 33–

34. The presumption must nevertheless be that this does not involve issues that affect the overall assessments that must be made for the opening decision.

Were the economic effects of possible future petroleum activities inadequately investigated in the opening of Barents Sea South-East?

(193) Section 3-1 of the Norwegian Petroleum Act stipulates that before new areas are opened, the economic effects that the petroleum activities may have must be assessed. Petroleum activities are defined in Section 1-6 (c) as all activities associated with subsea petroleum deposits, including utilisation of the deposit. This indicates that the economic aspect of the operating phase must also be investigated and weighed. At the same time, it is not known at the opening stage what discoveries will be made, and all estimates of economic effects will be particularly uncertain. The requirement in Section 3-1 of the Norwegian Petroleum Act must therefore be, to the extent possible, that a realistic picture must be provided of the limits for what the economic aspects in the operating phase *may* be.

(194) The report to the Storting on the opening of Barents Sea South-East, Report to the Storting No. 36 (2012–2013), page 13, mentions that the resource estimate for Barents Sea South-East "shows substantial estimated recoverable resources and a large upside potential". The estimated recoverable resources were quantified on page 24.

> "Estimated recoverable resources for Barents Sea South-East are calculated at 300 million Sm^3 o.e., with a downside of 55 mill. Sm^3 o.e., [standard cubic metres of oil equivalents] (P95) and an upside of 565 million Sm3 o.e. (P05). The estimated recoverable resources are distributed at respectively 50 million Sm^3 liquid and 250 billion Sm^3 gas."

(195) The estimates were based on seismic shots in 2011 and 2012 and discoveries made in adjacent areas. At the same time, it is emphasised in a number of places that the resource estimates are uncertain and that exploratory wells should be drilled to establish petroleum deposits. The extent of estimated recoverable resources is probably the most relevant factor for providing a picture of the possible socio-economic impacts. The prices for oil and gas in the future are so uncertain that it is especially difficult to make an estimate of likely profitability.

(196) Section 6.1 of the opening report presented the main results from the impact assessment. On pages 25–26, the expectations for the economy from opening Barents Sea South-East are noted:

> "If commercially exploitable discoveries are made, petroleum activities in Barents Sea South-East may yield considerable profitable production. Oil and gas resources in the scenarios were estimated to have a net value of respectively NOK 280 billion in the high scenario and NOK 50 billion in the low scenario. The extent will be closely related to the quantity of recoverable resources established in the area. The resource inputs for recovering these resources will form a basis for ripple effects. Ripple effects will be created in all phases of the activities.
>
> At the national level, it has been calculated that the activity will yield an annual value creation effect of up to NOK 10 billion and an annual net employment effect of 1200 persons. For the low scenario, the corresponding figures are about NOK 3 billion and 500 persons. These ripple effects are in addition to the revenues from the sale of oil and gas."

(197) This information was used as a basis for decision by the Storting, see Recommendation to the

Storting No. 495 (2012–2013), page 9.

(198) The Environmental Organisations allege that there are several errors in what was stated in the opening report. Firstly, it was not stated that the estimate of net value in the two scenarios was summed figures for the entire lifespan and not a calculated present value based on discounting. Furthermore, there were errors in the assessment of ripple effects. Finally, it is an error to fail to take the price of CO_2 into account.

(199) The information regarding profitability of any discoveries was obtained from the Norwegian Oil Directorate. At the end of February 2012, the Ministry of Petroleum and Energy asked the Norwegian Oil Directorate for estimates of "gross production value, undiscounted and discounted profitability, exploration costs, operating costs and investment costs". On 8 March of the same year, the Directorate had made calculations showing that "the profitability expressed in net present value (NPV) at a high level of activity is about NOK 35 billion, whereas NPV is around NOK 0 billion at the low level of activity", assuming a discount with a real interest rate of 4 per cent. Net undiscounted cash flow was respectively NOK 135 billion and NOK 15 billion. These figures were sent to the Ministry on 12 March 2012.

(200) There was disagreement between the Ministry of Petroleum and Energy and the Norwegian Oil Directorate on whether or not the revenues should be presented with discounted figures. The Appellants have argued in particular that it may seem from an internal e-mail message at the Directorate on 13 March 2012 as though the Ministry perceived the figures as too negative. It is further argued that the documentation also shows that the Ministry wished to portray opening Barents Sea South-East as attractive. Among other things, an updated basis for figures that the Directorate had ready in February 2013 was not used.

(201) I do not take a position on whether or not the figures that were presented in the opening report as a starting point should have been discounted, since this is greatly based on what seems mostly pedagogical. Figures that were not discounted say little about profitability, but when – as here – they are stated in current value, it could be asserted that they provide a better picture of probable total gross production value over the lifetime of the area than discounted figures. Presentation of discounted figures can mean that profitability seems more precise, and with that more certain for some readers, than there is a real basis for, since the calculations rely on loose estimates. Why the figures were presented this way is unclear, but there is no reason for me to address this in further detail.

(202) What was undoubtedly unfortunate was that the opening report did not clearly state that the figures were expressed in current value, but not discounted. It would have been simple to avoid the risk of misunderstanding by providing information about the calculation method.

(203) The Environmental Organisations have alleged that there are also other weaknesses in the economic analysis, including the calculation of the ripple effects. The government has acknowledged that the additional value creation is too high and that the correct figures here are about a third of the stated figures. The error is that the same revenues were partially included several times. The Environmental Organisations argue that the error is significant. Although it involves several billion Norwegian kroner, which in itself is a great deal, in my view it is not much in relation to the total figures.

(204) It is finally alleged as an error that the CO_2 price has not been taken into account, neither for the production nor the combustion. CO_2 pricing is part of the international work on reducing greenhouse gas emissions. It is uncertain how the CO_2 price will develop in the

future. Professor Knut Einar Rosendahl has pointed out in his written evidence before the Supreme Court that it is uncertain, and can be debated, what the CO_2 price should be used for. It is therefore difficult to see how this should have been taken into account in the impact assessment in any other way than to point out the issue. But that could have been done to advantage.

(205) A reader with economic insight would likely have noticed that the figures were not discounted – or at least would have questioned this more closely. When this was not done by any of the consultation bodies or the Storting, it indicates that such economic views did not occupy a central position. Nor is there any indication that the Ministry believed the production would be unprofitable if a decision was based on discounted figures. The Government chose to have direct ownership through the State's Direct Financial Interest (SDFI) in the three production licences in Barents Sea South-East, managed by Petoro AS.

(206) Considerations other than profitability, such as keeping the exploration activity on the Norwegian continental shelf at a certain level, community development considerations and safety policy considerations also appear to have contributed, see Recommendation to the Storting No. 495 (2012–2013).

(207) Overall, I cannot see that a failure to discount or a failure to specify that the figures were not discounted, and the other imprecisions in the information, can have had anything to say for the decision on the opening of Barents Sea South-East. Nor can this lead to the decision regarding the production licences in the 23rd Licensing Round being invalid, see the principle in Section 41 of the Norwegian Public Administration Act.

Were the climate effects of possible future petroleum activities inadequately investigated in the opening of Barents Sea South-East?

(208) The national greenhouse gas emissions resulting from the petroleum activities were assessed in the impact assessment for the opening of Barents Sea South-East. On the other hand, the assessment itself did not directly comment on emissions resulting from combustion of exported Norwegian oil and gas.

(209) The Environmental Organisations argue that the impact assessment should at least have pointed out and assessed the combustion effect abroad. The issue is thus whether there should have been an impact assessment of possible combustion emissions that would arise if a production licence were granted and assent was then given to a PDO, and whether in such case this is an error that renders invalid the subsequent decision on a production licence.

(210) Section 6c, first paragraph, (e) of the Norwegian Petroleum Regulations stipulates that an impact assessment in connection with opening a new area shall also describe the effects on the climate. Section 6c, first paragraph, (b) requires the impact assessment to account for the relationship to relevant environmental goals. The same requirements result from EU Planning Directive Article 5, no. 1, see Annex I (f). In a footnote it is stated that the information on environmental impacts "should include secondary, cumulative, synergistic, short-,medium- and long-term, permanent and temporary, positive and negative effects". A corresponding duty is incorporated in Section 21, second paragraph, of the Norwegian Regulations relating to Environmental Impact Assessments. The European Court of Justice stated the following in the judgment of 10 September 2015 in case C-473/14 *Dimos Kropias Attikis* , paragraph 50:

> "Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must

> be interpreted broadly (judgment in Inter-Environnement Bruxelles and Others, C-567/10, EU:C:2012:159, paragraph 37). Any exceptions to or limitations of those provisions must, consequently, be interpreted strictly."

(211) The European Court of Justice's position here indicates that the provisions in the Directive will be interpreted on the basis of the purpose and that there is no basis for interpreting the wording narrowly. As the case stands otherwise, I nevertheless do not find it necessary to take a position on whether this means that the impacts from emissions of greenhouse gases after combustion of exported oil and gas, in EU/EEA countries or other countries, also come under the duty in the Planning Directive.

(212) The preparatory work for the Norwegian Petroleum Act must be interpreted such that the assessments of any global greenhouse gas emissions must primarily be made when approving a plan for development and operation (PDO), see Proposition to the Odelsting No. 43 (1995–1996), pages 33–34.

(213) The scope of the investigation and the time when individual circumstances should be investigated are also dependent under the Directive on an assessment of what is reasonable and appropriate, see EU Planning Directive Article 5, no. 2:

> "The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

(214) I will first look at *the point in time* for when the climate effects must or should be assessed. The issue in this case is when the assessment of global climate effects should be made in an ongoing process. It is closely related to the issue of when the authorities have the knowledge basis that is otherwise necessary in order for the assessment to fulfil its purpose – and be included as a natural part of a basis for decision.

(215) The parties agree that possible production of petroleum pursuant to the licences from the 23rd Licensing Round will probably not occur until 2030. In that case, it would be 17 years after the opening decision and 14 years after the decision on production licences.

(216) At the time of the opening decision in 2013, the climate impacts from production in Barents Sea South-East were very uncertain – because it was not known whether oil or gas would be found. The uncertainty was related to *whether* petroleum would be found, and whether it would be found to such an extent that it would be commercially exploitable. This uncertainty continues to reign. So far, no commercially exploitable discoveries have been made, and I would point out that two of three licences have been surrendered, and that surrender of 62 per cent of the area in the third and last licence has been sought. This sheds light, as I have discussed, on the situation when Barents Sea South-East was opened. Based on this, the time of the eventual approval, if any, of the PDO must clearly be the most suitable and appropriate time for assessing the specific global climate effects of the production on which a position is to be taken.

(217) In my view, it is also absolutely essential that global environmental impacts do not result to any significant degree from the opening or the exploration. Impacts will not come until there are commercially exploitable discoveries, and a licence will then be sought – and granted – for development and operation.

(218) I place great weight on the fact that a production licence, despite the usage, does not grant an unconditional right to production even if commercially exploitable discoveries are made. Production requires an approved PDO – under Section 4-2 of the Norwegian Petroleum Act. Normally an impact assessment will be completed with the PDO – which also must include emissions to air, see the Norwegian Petroleum Regulations, Section 22a. Emissions to air include emissions of greenhouse gases. The authorities will thus have to take a position on greenhouse gas emissions when considering the application.

(219) The Ministry can withhold approval of a PDO or set conditions for the approval. The Appellants believe, however, that rejection of a PDO or approval on conditions which in practice mean a denial, is unrealistic, so that an impact assessment will lose its function. They refer particularly to the fact that the licence holder – and indirectly the Government as well – at this stage normally would have had large exploration costs, based on an assumption of being able to have these covered by development of a commercially exploitable discovery.

(220) The starting point in the act is clear: Production requires an approved PDO. The act does not set criteria for the approval. It is true that the licence holder is ensured an exclusive right to production through the production licence, but the primary effect is that no others can produce. Before a PDO has been approved, the licence holder cannot enter into substantial contracts or begin construction work without consent from the Ministry, see Section 4-2, fifth paragraph, of the Norwegian Petroleum Act. This will ensure that the companies do not incur major expenses or commitments during the exploration phase for themselves or others. The preparatory works stress that neither does such consent dictate the later handling of an application for a PDO, see Proposition to the Odelsting No. 43 (1995–1996), page 43. This underscores the fact that the licence holder does not have a legal claim to approval of a PDO.

(221) Nor is there within the framework of Section 4-2 of the Norwegian Petroleum Act and general administrative law any obstacle to the authorities imposing such stringent conditions for approval of a PDO that the licence holder chooses not to go ahead with the plan.

(222) I agree with the Court of Appeal that Section 4-2 of the Norwegian Petroleum Act must nevertheless be read in connection with Article 112 of the Constitution. If the situation at the production stage has become such that approving the production will be contrary to Article 112 of the Constitution, the authorities will have both the power and the duty not to approve the plan.

(223) The situation, in other words, is that at the opening of Barents Sea South-East, there was great uncertainty relating to whether petroleum would be found, and if so, how much. Global environmental impacts would not result to any particular degree from the opening or the exploration. And the authorities would have the power and duty not to approve a PDO if climate and environmental considerations at that time so indicate. In my view, this must have great weight in the determination of the requirements that must be imposed for assessing global greenhouse gas emissions as a result of possible production and export of petroleum 17 years into the future.

(224) I also find reason to comment on *the content and scope* of the assessment of the global climate effects.

(225) An assessment is meant to identify the environmental impacts of the measure – cause and effect. The appropriate environmental questions to be assessed will vary based on the type of measure involved and the geographic location. In the Barents Sea, for

example, the special challenges related to the ice edge and the polar front that manifest themselves must be assessed. The climate effect of a measure is in a special category since it is not limited geographically. The effect from emissions of CO_2 and other greenhouse gases is in principle the same, irrespective of where on the planet the emission occurs. In my view, this is an absolutely fundamental aspect which must carry great weight in the determination of the substance of the assessment duty, see also EU Planning Directive Article 5, no. 2.

(226) It has not been alleged that oil or gas from the Barents Sea is in a special category, or that the impact assessment must include extensive research. However, the Environmental Organisations do argue that the impact assessment should have pointed out and considered the combustion effect abroad. This is nothing other than using available knowledge on a selected future fact. It is therefore difficult to see what an assessment of the decision on opening Barents Sea South-East in 2013 would include – other than known effects of combustion of petroleum.

(227) To be sure, it would be relatively simple, when seen in isolation, to *calculate* the greenhouse gas emissions based on the estimates for respectively a high and low production scenario. This is done according to guidelines adopted by the UN's Climate Change Panel, see the 2006 IPCC Guidelines for National Greenhouse Gas Inventories. These have been subsequently updated. The CO_2 emissions are derived from the possible production volumes. It is thus not a matter of a technical discussion of climate effects based on various possible causal factors, but rather a calculation based on estimated quantities. I agree that it would provide a more comprehensive picture if such examples, in the form of calculations, were shown in the impact assessment, but it would not have provided technical knowledge or insight that would appreciably strengthen the decision basis.

(228) In this context, I place great weight on the fact that even though the specific emissions were not calculated, the effects of global greenhouse gas emissions were included as a fundamental part of the basis for decision. At the time of the opening, there was no doubt that if petroleum were found and subsequently produced, the known climate impacts from production and combustion of oil and gas would occur.

(229) Even though the effects of combustion of Norwegian oil and gas after any eventual export after production in the Barents Sea South-East were not specifically exemplified in the impact assessment itself – and later in the opening report – the relevance for the global climate of opening the area was a topic that was high on the political agenda. The climate effects were identified and addressed in several rounds during the process and were included in the basis for decision for the Storting and the government:

(230) During the consultation rounds following the impact assessment, a number of organisations, among them Natur og Ungdom and Greenpeace, brought up in a joint consultation statement the relationship to global greenhouse gas emissions. They referred, among other things, to the fact that "UN's Climate Change Panel has determined that the emissions of greenhouse gases must be reduced by up to 85 per cent by 2050, and 40 per cent by 2020 in order to avoid a temperature increase of more than 2 °C", and that it would be "heading in the wrong direction" to open the areas "at a time when the world's emissions must decline". The Organisations also pointed out weaknesses in the international emissions trading system and the fact that the International Energy Agency (IEA) had shown that 75 per cent of the discovered fossil fuel resources in the world must remain in the ground if the two-degree target is to be kept.

(231) The impact assessment and the consultation statements on it were collected in an annex to the Report to the Storting on the opening of Barents Sea South-East, Report to the Storting No. 36 (2012–2013). The consultation statements have received comments by the Ministry in the annex.

(232) In response to the consultation statements from Natur og Ungdom, Greenpeace et al., it is pointed out that the opening of Barents Sea South-East is assessed under overarching frameworks, for the Government's overarching objectives in the climate policy and for the Climate Policy Report – Report to the Storting No. 21 (2011–2012) – which was the basis for the "climate settlement" in the Storting in 2012, see Recommendation to the Storting No. 390 (2011–2012). The Report is based on the reports from the UN's Climate Change Panel which thoroughly account for climate changes resulting from global greenhouse gas emissions and the need for emissions reductions.

(233) The Ministry also pointed out in the annex to Report to the Storting No. 36 (2012–2013) that Norway is linked to the European Emissions Trading System. It was stated that the System "for the period 2012–2020 [will] tighten the total emissions from Norway and the EU by about 11 million tonnes of CO_2 in 2020".

(234) Combustion emissions abroad are a general consequence of Norwegian petroleum activities and petroleum policy. At the same time, the net effect of the combustion emissions is complex and controversial, as it is related to the global market and the competitive situation for oil and gas. If gas is replaced by coal, cuts in gas exports will have a negative CO_2 effect. If the gas competes with gas from other suppliers, the effect will be nil. Cuts on Norwegian oil production could be replaced by oil from other countries. And the total emissions will not necessarily be affected if Norwegian oil or gas is used within a sector required to surrender allowances. It is sufficient here for me to point out that the net impact of Norwegian exports of oil and gas on global emissions is complex and debated. There is an obvious need to look at all emissions from Norwegian production on a combined basis. In my view, it must then be up to the Ministry and the Government to decide whether it was appropriate to refer to and deal with the question of climate effects at an overarching level – in other words, as part of the Norwegian climate policy – instead of discussing them in the specific impact assessment.

(235) The opening report for Barents Sea South-East, Report to the Storting No. 36 (2012–2013), page 36, states that in addition to the impact assessment, the Government relied on the submitted consultation statements. During the consideration of the report in the Standing Committee on Energy and the Environment, the representative from the Christian Democratic Party opposed the opening, out of concern for the global emissions, see Recommendation to the Storting No. 495 (2012–2013), page 6. The topic was also brought up during the Storting debate, see Stortingstidende (2012–2013), page 4699. A broad majority supported the decision on opening.

(236) The Storting has, on a number of occasions, taken a position on full or partial phasing out of the Norwegian petroleum activities on the basis of the global CO_2 emissions. All proposals have been rejected by a broad political majority. Proposals have been advanced to stop awarding licences in the 23rd Licensing Round with such a justification, see Recommendation to the Storting No. 206 (2013–2014) and Recommendation to the Storting No. No. 274 (2015–2016). The first of these proposals was defeated immediately after Article 112 of the Constitution was adopted.

(237) To provide a complete picture, I will mention that several proposals have also been advanced after the 23rd Licensing Round, see for example Recommendation to the

Storting No. 258 (2016-2017), Recommendation to the Storting No. 130 (2017-2018), Recommendation to the Storting No. 253 (2017-2018), Recommendation to the Storting No. 368 (2017-2018) and Recommendation to the Storting No. 321 (2018–2019). The proposals were defeated with references to the role the petroleum activities play for the Norwegian economy and that there will also be a place in a low-emissions society for oil and gas, see for example Recommendation to the Storting No. 258 (2016–2017), page 3.

(238) Global climate impacts from combustion emissions were thus thoroughly assessed in connection with the opening of Barents Sea South-East and repeatedly in the following years, up to the present. The Norwegian Climate Policy Report, based on the reports from the UN's Climate Change Panel, which thoroughly account for climate changes resulting from global greenhouse gas emissions and the need for emissions reduction, was an important basis for the assessments. I cannot see that the fact that the assessments were made on a more general basis and not on the basis of specific – but highly uncertain – calculations of global greenhouse gas emissions resulting from potential exports of petroleum from the maritime area resulted in an inferior basis for decision – quite the contrary.

(239) When the handling of the opening of Barents Sea South-East is viewed in context, it is difficult to see why it would be a mistake that the impact assessment did not provide examples of the greenhouse gas emissions on the basis of one or more potential production volumes, and thus the climate effects as well from the possible combustion abroad of Norwegian petroleum when viewed in isolation.

(240) This applies even more to the net effect of potential future production. An assessment of the net effect for the global emissions must also have been based on exemplifying characteristic political priorities abroad and at home, for instance production and combustion of gas versus production and combustion of coal.

(241) My conclusion is that no procedural errors were made related to the climate effects under the impact assessment for the opening of Barents Sea South-East in 2013. The climate effects are continually assessed politically – and will be assessed for impacts in the event of any application for a PDO. Nor does this mean, therefore, that the decision regarding the production licences in the 23rd Licensing Round is invalid for this reason.

(242) Although it is not decisive for my opinion, I will add that any errors in the impact assessment cannot result in the decision being set aside as invalid.

(243) Impact assessments are meant to identify the political balancing questions on which the authorities must take a position. In the present case, it is the assessment of the combustion effect abroad that is sought by the Appellants. However, the Storting has taken a position on this subject in a number of instances, as I have mentioned earlier. Possible deficiencies in the impact assessment cannot, therefore, have anything to say for the decision on the opening of Barents Sea South-East. Considerations other than the effect on the climate were nevertheless determinative. The authorities' policy was that measures for reducing global greenhouse gas emissions and the harmful effects of these would be implemented in ways other than stopping future petroleum production. The decisions on production licences in the 23rd Licensing Round are thus valid nonetheless, see the principle in Section 41 of the Norwegian Public Administration Act.

(244) The European Court of Justice issued a judgment on 25 June 2020 in case C-24/19 *A. et al.,* which also involves the question of the legal effects of a violation of the EU Planning Directive. The European Court of Justice concludes that the Member States have a duty to ensure that environmental assessments are made in line with the

Directive, where this is applicable. In the event of violations, national authorities and national courts have a duty to intervene, see paragraph 83:

> "Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are required to eliminate the unlawful consequences of such a breach of EU law. It follows that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are therefore under obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may, for a 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment, consist, for example, of adopting measures to suspend or annul that plan or programme (see, to that effect, judgment of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraphs 31 and 32), or of revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgment of 12 November 2019, Commission v Ireland (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraph 75 and the case-law cited)."

(245) I do not take a position on whether Article 3 of the EEA Agreement, which corresponds to Lisbon Treaty Article 4, No. 3, regarding good-faith cooperation, implies a duty for the courts to rectify violations to the extent this is possible under national law.

(246) However, I will mention that in the present case, neither the opening in 2013 nor the licensing decision in 20-16 led to emissions of greenhouse gases. The authorities will thus be able to correct – "remedy" – through the ongoing process any deficient assessment prior to the opening in 2013 of the combustion effect abroad from future production of petroleum in Barents Sea South-East. As mentioned, this will not occur until the PDO stage, through the impact assessment that will be the basis for the authorities' decision on whether licences are to be granted for development and operation, and if so, on what conditions. But it can also occur through a general political decision to gradually reduce the petroleum activities if the Storting thinks this is right. This must clearly be sufficient under the requirements set by the European Court of Justice. The fundamental purpose of the rules is to ensure that the environmental effects are sufficiently investigated and evaluated before they actually occur. This is encapsulated in the assessment regime that applies to this area, through approval of a PDO not being possible before an impact assessment. The authorities thus have full control of whether the environmental effects will occur or not.

Should the opening decision have been reconsidered after the fall in petroleum prices?

(247) The Environmental Organisations have finally alleged that the price of oil fell so dramatically from the opening decision up to the awarding of the production licences that a new financial assessment should have been made at that time.

(248) As I have already mentioned, there is no requirement for a new assessment at this time under the Norwegian Petroleum Act or the Norwegian Petroleum Regulations. In principle, it is conceivable that extraordinary circumstances might suggest that Article 112, or ordinary administrative principles could indicate that a new assessment must be done of matters that already were considered in connection with the decision on opening.

(249) However, I cannot see that the change in the price of oil between the opening decision and the awarding of production licences is such an extraordinary circumstance. The price of oil has always fluctuated a great deal. And the economic calculations have been very uncertain, since it was unknown whether anything commercially exploitable would be found. At the same time, it was clear that the price of oil was low at the time of the decision. The economics of a possible production will nevertheless be evaluated later,

when the companies possibly seek approval of PDOs. As mentioned, Section 4-2, second paragraph, of the Norwegian Petroleum Act, see Section 21 of the Norwegian Petroleum Regulations, states that the plan shall account for economic conditions associated with the development. There is therefore little need to make an economic evaluation at the stage for the awarding of production licences.

(250) My conclusion is accordingly that there was no error that can lead to invalidity through the awarding itself of the production licences, i.e. at the time the Royal Decree was issued.

Conclusion

(251) Accordingly, the appeal must be denied. The Government has not demanded legal costs.

(252) I vote for the following

JUDGMENT:

The appeal is denied.

(253) Justice Webster:

Dissent

Introduction

(254) I essentially concur with the first-voting as regards the meaning and application of Article 112 of the Constitution. I also agree with him in that ECHR Articles 2 and 8 have not been infringed by the 23rd Licensing Round.

(255) With respect to the administrative proceedings, I can essentially concur with the first-voting's depiction of the requirements imposed for the administrative proceedings when opening new areas for petroleum activities. The procedural rules in the petroleum legislation must be assessed in light of Article 112 of the Constitution. The impact assessment is meant to ensure information for - and create a basis for participation by – the population in the decision process. The assessments must therefore be objective and so comprehensive and complete that they are suited to providing the population real insight into the effects of the planned encroachments.

(256) As the first-voting mentions, the courts should not be reserved in the review of the administrative proceedings. Given that the courts' review of the Storting's decision against the substantive content of Article 112 of the Constitution is modest, there is even more reason to review whether the proceedings have been proper.

(257) I am somewhat more critical than the first-voting of the economic information that was presented in the impact assessment. With this reservation, I have nevertheless concluded that I can concur essentially and in the result with the first-voting's vote on this point.

(258) However, with respect to the question of assessing the climate impacts from combustion, I have concluded that procedural errors have been committed that must lead to the conclusion that the production licences granted in the 23rd Licensing Round in Barents Sea South-East are invalid.

The assessment of the climate effects

(259) There are two forms of climate impacts that have been foremost in the case: Emissions of greenhouse gases during the petroleum activities in Norway (production emissions) and emissions as a result of the petroleum that is produced being burned (combustion emissions). The latter emissions mainly occur abroad because the great majority of the petroleum that is produced is exported.

(260) I agree with the first-voting that both forms of emissions as a starting point fall within Article 112 of the Constitution. In my view, both emission types are also covered by the impact assessment duty. This results from both the Norwegian Petroleum Act and related regulations and the Planning Directive.

(261) In terms of the extent to which the Norwegian rules apply, I refer to the first-voting's review. The rules in Sections 6a to 6c implement the Planning Directive and must be interpreted in accordance with the Directive.

(262) The Planning Directive applies under Article 2 to plans and programmes that are prepared or adopted by the authorities. under Article 3, an environmental assessment must be carried out for plans "which set the framework for future development consent", including for projects that involve production of oil and gas, see the reference in Article 3 to Directive 85/337/EEC Annex II No 2 (f) and (g). The Ministry of Petroleum and Energy, in the comments on amendment to the Norwegian Petroleum Regulations in 2006, concludes that for offshore petroleum activities the Planning Directive "applies in connection with opening of new areas". The same document states that the PDO phase is governed by the Environmental Impact Assessment Directive (Directive 85/337/EEC – now Directive 2011/92/EU).

(263) The combustion emissions from Norwegian-produced petroleum are an environmental impact from our petroleum industry. The emissions affect the global climate, including the climate in Norway and in the EEA Area. The climate impacts are "environmental effects of the petroleum activities", see Section 3-1 of the Norwegian Petroleum Act, see Section 1-6 (c), see also Section 6c, (d) and (e) of the Norwegian Petroleum Regulations. Similarly, the global climate impacts of combustion of Norwegian-produced petroleum are undoubtedly covered by the term "environmental effects" in Article 5 of the Planning Directive, see its Annex I, (e) and (f). I refer also to the footnote in the Annex that the first-voting cites, where it is stated that secondary, cumulative and long-term environmental effects are also covered.

(264) Section 6c of the Norwegian Petroleum Regulations basically requires that all climate effects be described. The assessment duty is not limited to the significant effects. Under the Planning Directive, only "the likely significant environmental effects", including climate factors are to be assessed under Annex I (f). Climate changes are a consequence of the total global emissions over time. It can therefore be questioned whether any emissions from production and combustion of petroleum that might be produced in Barents Sea South-East will have sufficient environmental effect.

(265) However, it is stated in the judgment of the European Court of Justice of 24 November 2011 in case C-404/09 *European Commission v Kingdom of Spain*, paragraph 80, on the scope of application for the Environmental Impact Assessment Directive, that an isolated assessment cannot be made of the environmental effects. The contribution to the

cumulative effects must also be analysed. This can hardly be different under the Planning Directive, which in the footnote to Annex I has the same wording regarding "cumulative" effects as the corresponding footnote provision in the Environmental Impact Assessment Directive that the EU Court of Justice is interpreting. This means that an isolated assessment cannot be made of the climate effects of an opening of Barents Sea South-East. It is also difficult to imagine that any of the plans that come under the Planning Directive, see Article 3, could be found when viewed in isolation to have a substantial climate effect, if the Planning Directive is interpreted in this way. Nevertheless, "climate factors" are expressly mentioned in the Directive among the environmental effects that must be assessed. I refer also to the judgment of the European Court of Justice in case C-473/14, paragraph 50, which has been cited by the first-voting, in which the Court relies on (sic) that provisions that determine the scope of application of the Planning Directive are to be broadly interpreted, and that provisions that limit the application of the Directive are to be narrowly interpreted.

(266) Based on the production levels the authorities envisioned at the opening of Barents Sea South-East, it is my view that the climate effects from the production and combustion emissions – both individually and combined – would be so extensive that the Planning Directive requires the emissions be assessed. The production emissions alone are quantified in the Report to the Storting at between 600,000 and 300,000 tonnes of CO_2 per year in the high scenario.

(267) The conclusion is that under both the Norwegian petroleum Regulations and the Planning Directive, possible climate impacts from combustion emissions must be "identified, described and evaluated" in connection with the opening decision, see Article 5, No. 1. This assessment must account for the *environmental objectives* established "at international, Community or Member State level" that are relevant for the plan, see Annex I (e). This includes an assessment of the significance of the plan for Norway's national and international climate obligations and goals.

(268) In addition, Annex I (g) states that an account shall be provided of "measures envisaged to prevent, reduce and as fully as possible offset" the negative environmental impacts, see also the Norwegian petroleum Regulations, Section 6c, first paragraph (i). An assessment should also have been made of the opportunities for limiting the climate impacts from the combustion emissions.

(269) Finally, the environmental assessment should be done as early as possible in the process. The purpose is for the assessment to influence the decision. It is namely at this early stage that "the various alternatives may be analysed and strategic choices may be made", see the judgment of the European Court of Justice of 7 June 2018 in case C-671/16 *Inter-Environnement Bruxelles ASBL,* paragraph 63.

(270) However, the scope of the assessment duty is limited by Article 5, No. 2. The impact assessment shall include only the information that may "reasonably be required". The degree of detail in the plan is to be taken into account in the assessment. The plan could therefore be adapted to knowing little at the opening stage about what will be found. I also do not see that the plan need be more extensive than the assessment the first-voting presumes can be done at the PDO stage.

(271) However, Article 5, No. 2, does not provide a basis for postponing the assessment of important aspects of the environmental effects with the justification that the estimates will become more certain and more detailed at a later stage. This would be contrary to the purpose of the Directive. As mentioned, it is at this early point in time the strategic choices are made.

(272) The Government acknowledges that the climate impacts from the combustion emissions have not been assessed and evaluated in the impact assessment. Nor have the combustion emissions been assessed and evaluated specifically for Barents Sea South-East in other situations. The Climate Policy Report, Report to the Storting No. 21 (2011–2012), does not assess combustion emissions, as far as I can see. It is correct, as the first-voting points out, that the combustion emissions have been addressed in connection with the opening process, including by the Environmental Organisations. Despite this, the climate impacts from the combustion emissions have not been assessed as is required by the Planning Directive. Other assessments cannot therefore compensate for a deficient impact assessment in connection with the opening decision.

(273) Assessing and evaluating the climate effects from combustion before the opening decision is also best according to Article 112 of the Constitution and the former Article 110 b. The obligation to protect the environment under Article 112 is an ongoing obligation for the Government and applies at all stages of the process, from opening of a new maritime area for petroleum activities until any production is concluded and the maritime area is restored. The assessment duty does not prevent the authorities from making the desired political decisions, but it ensures that the obligations in Article 112 of the Constitution are met, including citizens' right to information under the second paragraph. These is therefore good reason to see to it that climate considerations have been sufficiently evaluated before the opening decision. If at this time it can be questioned whether the climate allows for producing what might eventually be found, this should be clarified in connection with the opening of the area. Similarly, it is already natural at the opening stage to evaluate any measures for counteracting the climate impacts of the combustion, see the Norwegian Petroleum Regulations, Section 6c, first paragraph (i) and Article 3 of the Planning directive, see Annex I (g).

(274) In my view, it was therefore a procedural error that the climate impacts from combustion of the petroleum that might be produced from Barents Sea South-East were not identified, described and evaluated. Given that prior to the opening decision it is uncertain what petroleum resources will be found, it is sufficient that this analysis is kept at an overarching level. A starting point might have been the so-called scenarios. It was necessary for the assessment to fulfil the requirements, including an assessment of environmental goals and remedial and/or preventive measures within the frameworks Article 5, No. 2 sets.

(275) This conclusion does not prevent the Government from opening Barents Sea South-East for petroleum activities, but it required that the climate be a part of the assessment.

The effect of the deficient assessment of the climate impacts

(276) The starting point in Norwegian law is that a decision does not become invalid as a result of procedural error unless the error may have affected the substance of the decision, see the principle in Section 41 of the Norwegian Public Administration Act. The decision will be invalid if there is a not entirely remote possibility that the error may have affected the decision, see HR-2017-2247-A, paragraph 93 et seq.

(277) I do not disregard the fact that the political discussions in society in general and in the Government and the Storting might have been different if the impact assessment had included an assessment and evaluation of the climate impacts from combustion emissions.

(278) On the other hand, climate, climate measures and emissions from the petroleum sector

have been continually debated in the Storting in recent years. I refer to the first-voting's account. There has been a clear majority at the Storting for continued petroleum activities on the Norwegian continental shelf despite the fact that combustion of Norwegian-produced petroleum has consequences for the climate. It therefore appears less likely that the result would have been different if the climate effects had been dealt with in the impact assessment for the opening of Barents Sea South-East. At the same time, there is little satisfaction in speculating on how political processes could and would have run, if the impact assessment had looked differently.

(279) In my view, it becomes too narrow nevertheless to construct a clean assessment of effects in this case. The preparatory works for Section 41 of the Norwegian Public Administration Act state that other assessments can be brought in, see Recommendation to the Odelsting No. 2 (1966–1967), page 16, which states:

> "The proposed wording is not intended to result in any change in case law and administrative theory as it leaves the specific boundary drawing to the courts. The provision provides an opportunity, to a certain degree, to include other circumstances as well – for example, the effect of invalidity and the significance of the procedural rules in the subject area in question being enforced particularly strictly."

(280) In my view, there are two circumstances which indicate that the procedural rules must be strictly enforced in this instance:

(281) Firstly, the assessment duty under Section 3-1 of the Norwegian Petroleum Act must comply with the requirements under the second paragraph of Article 112 of the Constitution, see Proposition to the Odelsting No. 43 (1995–1996), page 33. The rules of the Norwegian Petroleum Regulations, including the requirement for assessment of climate effects, must be viewed in light of this. Article 112 of the Norwegian Constitution is intended to ensure to the population knowledge about the effects of planned encroachments on the natural environment. The purpose is for them to be able to safeguard their rights under the first paragraph. As the first-voting has explained, this involves to a limited degree rights that can be asserted before the courts. However, the right to information under the second paragraph goes further than the substantive rights the individual has under the first paragraph. The second paragraph grants an independent right to information – and the information has value beyond the individual decision that is made. The second paragraph of Article 112 of the Constitution therefore indicates that an ordinary assessment of whether the error may have had an effect cannot be made under the principle in Section 41 of the Norwegian Public Administration Act. That could undermine the purpose of the constitutional provision.

(282) Secondly, the error relates to the implementation of Norway's international obligation under the Planning Directive. The judgment of the European Court of Justice in case C-24/19, paragraph 83, which the first-voting has cited, says that the state's authorities in such cases have "an obligation to take all the necessary measures ... to remedy the failure to carry out an environmental assessment". This can occur, for instance, by "adopting measures to suspend or annul that plan or programme".

(283) I do not agree with the first-voting in that it will be sufficient to *postpone* the assessment to a later stage, when the area has been opened and production licences have been awarded. Shifting the environmental assessment out of the decision on opening – and over to the decision process for a PDO – would be contrary to the Directive's purpose of integrating environmental considerations in the preparation and approval of plans and programmes, see Article 1.

(284) Approval of a PDO is also covered by another directive, namely the Environmental Impact Assessment Directive – Directive 85/337/EEC, now Directive 2011/92/EU. Article 11 of the Planning Directive states that an assessment pursuant to the Planning Directive cannot replace an assessment under the Environmental Impact Assessment Directive. It is natural to conclude that this must also apply in the other direction – that a future environmental assessment pursuant to the requirements in the Environmental Impact Assessment Directive cannot replace an assessment under the Planning Directive. In the judgment of 22 September 2011 in case C-295/10 *Genovaitė Valčiukienė* paragraph 59, the European Court of Justice emphasises that "an assessment of the effects on the environment carried out under Directive 85/337 is without prejudice to the specific requirements of Directive 2001/42 and cannot dispense with the obligation to conduct an environmental assessment pursuant to Directive 2001/42 in order to comply with the environmental aspects specific to that directive".

(285) Such a postponement will therefore not "rectify" the fact that the environmental assessment should have already been carried out at the opening stage. An essential purpose of the Directive is to ensure that plans and programmes are subject to an environmental assessment "when they are prepared and prior to their adoption" see the judgment of the European Court of Justice in case C-671/16, paragraph 62. The next paragraph in the judgment states, as mentioned, that the environmental assessment is to be carried out as soon as possible because this ensures that the assessment has the intended effect. In my view, it is therefore not sufficient that the assessment is done before the effect appears.

(286) Article 3 of the EEA Agreement requires parties to the agreement to live up to the obligations under the EEA Agreement in good faith. This implies a duty for the courts to rectify breaches of the Directive's assessment provisions to the extent possible under national law.

(287) The cited preparatory works for Section 41 of the Norwegian Public Administration Act show that there is room to interpret the provision in accordance with the international law obligations resulting from the Directive. The provision must be interpreted in accordance with the requirements imposed by the Planning Directive. I refer to Rt-2000-1811, where the presumption principle is explained on pages 1830–1831. The duty of good faith in Article 3 of the EEA Agreement also points in the same direction.

(288) The oil companies that were given production licences in Barents Sea South-East in the 23rd Licensing Round are not parties in this case. The outcome of the judgment will therefore not have immediate effects on them. The consequence of declaring the Licensing Round invalid will be that the opening of Barents Sea South-East must be reassessed, based on a new impact assessment. In any event, in such a situation the concern for the licence holders does not argue in a decisive way against declaring the awarding of the licences invalid. I have therefore concluded that the result of the deficient assessment of the climate impacts must be invalidity.

(289) Justice **Bull:** I concur essentially and in the result with the second voting, Justice Webster.

(290) Justice **Falch:** The same.

(291) Justice **Østensen Berglund:** The same.

(292) Justice **Skoghøy:** I concur essentially and in the result with the first-voting justice, Justice Høgetveit Berg.

(293) Justice **Matheson:** The same.

(294) Justice **Falkanger:** The same.

(295) Justice **Normann:** The same.

(296) Justice **Kallerud:** The same.

(297) Justice **Ringnes:** The same.

(298) Justice **Bergh:** The same.

(299) Justice **Thyness:** The same.

(300) Justice **Steinsvik:** The same.

(301) Chief Justice **Øie:** The same.

(302) After the voting the Supreme Court of Norway pronounced the following

JUDGMENT:

The appeal is denied.

This document is in accordance with the
original: Kjetil Aasen