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OSLO DISTRICT COURT

JUDGME

Pronounced:	4 January 2018 in Oslo District Court,	
Case no.:	16-166674TVI-OTIR/06	
Judge:	District Court Judge	Hugo Abelseth
The case involves:	Review of administrative decision	

Plaintiffs	*Counsel*
Föreningen Greenpeace Norden	Advocate Cathrine Hambro Advocate Emanuel Feinberg
Natur og Ungdom	Advocate Cathrine Hambro Advocate Emanuel Feinberg
Intervener	
Besteforeldrenes klimaaksjon	Advocate Cathrine Hambro Advocate Emanuel Feinberg

versus

Defendant	*Counsel*
The Government of Norway through the Ministry of Petroleum and Energy.	Attorney General Fredrik Sejersted
	Co-counsel Advocate Anders Flaatin Wilhelmsen Advocate Ane Sydnes Egeland

No limitations on access for public communication

JUDGMENT

1 THE CASE IN BRIEF

The first question in the case is whether the Royal Decree of 10 June 2016 (hereinafter also called the Decision) is invalid because it is contrary to Article 112 of the Constitution. Secondly, the case raises questions as to whether the Decision is invalid because it relies on an inadequate assessment, there are errors in the factual basis for the Decision or it is inadequately justified.

2 PRESENTATION OF THE CASE

2.1 Joint agreed presentation of parts of the facts in the case

The parties have prepared a joint agreed presentation of parts of the facts in the case. The presentation is dated 30 October 2017 and is based on the Court's decision of May 2017. The statement is included as a part of the basis for decision in the case, see section 9-9, subsection 1, second sentence, in the Dispute Act. The presentation and the introduction to this are incorporated in their entirety in the following.

See the court record from scheduling conference held on 15 May 2017, sub-item 3. The parties' jointly agreed presentation of parts of the facts in the case appears below, see section 9-9 (3) and (4) of the Dispute Act.

The statement below covers those parts of the facts which the parties agree are relevant in the legal assessment of the case. It is primarily the process that led to the decision on awarding the 23rd licensing round on 10 June 2016, including the preceding processes of opening the Barents Sea South (BS) in 1989 and the Barents Sea South-east (BSE) in 2013. In addition, there is a brief presentation of the principal features of the international climate cooperation that Norway is participating in, including the Paris Agreement of 2015 and the participation in the European Union's emissions trading system.

Beyond this, as pointed out in the pleadings and during the scheduling conference, there are divided opinions between the parties regarding what the relevant factual circumstances are in a legal assessment of the validity of the Decision under Article 112 of the Constitution and the other rules that are cited. This disagreement makes it difficult for the parties to draft a joint presentation of matters which only one or the other of the parties considers legally relevant. The parties are therefore of the opinion that it is most appropriate for each of the parties to present on its own in the usual manner during the trial those parts of the facts that will be argued are relevant.

Agreed systematic statement of some factual matters in the case:

1 THE FRAMEWORKS FOR NORWEGIAN PETROLEUM ACTIVITIES AND THE 23RD LICENSING ROUND

1.1 Introduction

On 10 June 2016, the Norwegian Government reached a decision by Royal Decree on awarding production licences in the 23rd licensing round pursuant to Section 3-3 of the Petroleum Act. This case involves the validity of this decision.

Ten production licences were awarded for a total of 40 blocks or sub-blocks. The production licences are called "Production Licences", abbreviated as "PLs". The ten production licences are called respectively PL 609C, 851, 852, 853, 854, 855, 856, 857, 858

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and 859. The production licences indicate precisely where petroleum production may occur. Seven of the production licences (14 blocks) are located in Barents Sea South and three of the production licences (26 blocks) are located in Barents Sea South-east. All the blocks are located north of Norway between 71° 30' and 74° 30' North latitude, and from 20° 40' East longitude to the delimitation line facing the Russian Federation.

1.2 Opening of maritime areas for petroleum activities

Prior to a decision on awarding production licences, an "opening" of maritime areas for petroleum activities occurs, see Section 3-1 of the Petroleum Act. The provision imposes a requirement to weigh the various interests that apply in the area in question. For use in this weighing, "*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 opening process means in practice that the Ministry of Petroleum and Energy conducts an impact assessment for the area on the Norwegian continental shelf that is planned to be opened, see Norwegian Regulations of 27 June 1997 No. 653 relating to petroleum activities (the Petroleum Regulations), Chapter 2. Effects on the environment and nature are among the impacts that are to be assessed.

The opening of a new area for petroleum activities is submitted to the Storting, see Section 6d of the Petroleum Regulations. An explanation must be provided in the case presentation of how the effects from opening a new area for petroleum activities and the submitted consultation statements have been evaluated, as well as the significance that has been assigned to these. The Storting decides on opening an area for petroleum activities on the basis of the submitted impact assessment.

Barents Sea South (BS) was opened for petroleum activities in 1989. The impact assessment was submitted to the Storting in Report to the Storting No. 40 (1988–1989), which the Storting concurred with in the consideration of Recommendation to the Storting No. 216 (1988–1989). A number of production licences have subsequently been awarded in Barents Sea South, and there are two areas in production: Snøhvit and Goliat. In addition, several finds have been made, including "Johan Castberg", "Wisting" and "Alta/Gohta".

Barents Sea South-east (BSE) was opened for petroleum activities in 2013. The basis for this was the treaty with the Russian Federation from 2010 concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean (the Delimitation Agreement). Among other things, the treaty meant that the maritime area east of the already opened Barents Sea South became available for Norwegian petroleum activities. The impact assessment was presented to the Storting in Report to the Storting No. 36 (2012–2013) and the supplementary report to this, Report to the Storting 41 (2012–2013), and the Storting concurred during the consideration of Recommendation to the Storting No. 433 (2010–2011).

The opening of Barents Sea South-east for petroleum activities is the first opening of a new area in 19 years. It is the first opening of new area in the Barents Sea in 24 years.

1.3 Production licence and actual production of petroleum

As mentioned, the case involves the validity of decisions to award production licences in Barents Sea South and Barents Sea South-east.

A production licence grants the licensee exclusive rights to conduct surveys and search for and produce petroleum within the geographic area covered by the licence. The licensee becomes the owner of the petroleum that is produced. The licence also governs the rights and obligations of the holders of a production licence in dealings with the national government. The production licence supplements the provisions in the legislation and imposes detailed conditions for the activities.

If commercially exploitable finds are made under a production licence, the process is started towards actual production of the find in question. This process is governed by Chapter 4 of the Petroleum Act and Chapter 4 of the Petroleum Regulations. Among other things, a licensee must have a plan approved for development and operation, based on an impact assessment, before development and operation can be commenced, see Section 4-2 of the Petroleum Act.

Norwegian petroleum activities must occur in line with what is laid down in the Management Plan for the maritime area where the activities will take place. The purpose of the Management Plan is to provide a framework for creation of wealth through sustainable use of resources and ecosystem services, while maintaining the ecosystems' structure, mode of operation, productivity and natural diversity. The applicable plan for the Barents Sea is contained in Report to the Storting 10 (2010–2011).

1.4 Particulars regarding 23rd licensing round

The 23rd licensing round was started in August 2013. The then Government invited the companies on the Norwegian continental shelf to nominate areas they wished to include in the 23rd licensing round. The deadline for nominating areas expired in January 2014. The oil companies used the nomination process to present their view on which blocks they considered the most geologically interesting. Forty companies submitted proposals for blocks they wished to include in the 23rd licensing round. The nominations comprised 160 blocks, 140 of which were in the Barents Sea and 20 in the Norwegian Sea. Eight-six blocks were nominated by two or more companies.

In February 2014, proposals for blocks to be included in the 23rd licensing round were sent out for consultation. It was proposed to announce in the 23rd licensing round a total of 61 blocks, divided into 7 blocks in the Norwegian Sea, 34 blocks in Barents Sea South-east and 20 blocks in the rest of Barents Sea South. For the newly opened area in the Barents Sea South-east, the only input requested related to whether new, significant information had come to light after the Storting considered Report to the Storting No. 36 (2012-2013) and Report to the Storting No. 41 (2012–2013). For other areas, the only input requested related to whether new, significant information had come to light after the respective management plan had been adopted, see Report to the Storting 28 (2010–2011). After the expiry of the consultation deadline, the Ministry of Petroleum and Energy considered the submitted statements. A proposal to the government was prepared for which areas should be included in the announcement and on what terms, together with an assessment of the consultation statements. The 23rd licensing round was announced in January 2015. The round comprised 57 blocks or parts of blocks. These were divided into 34 blocks in the Barents Sea South-east, 20 blocks in the Barents Sea South and three blocks in the Norwegian Sea.

At the expiry of the application deadline in December 2015, 26 companies had submitted applications to the Ministry to be allocated a new area. After the application deadline, the applications were processed in the usual manner and were assessed by the Norwegian Petroleum Directorate, Petroleum Safety Authority Norway, the Ministry of Labour and Social Affairs and the Ministry of Petroleum and Energy. The negotiation meetings with the companies were held in March 2016, and then the Government decided which companies would receive offers of ownership interests and operatorships including terms and conditions and work programmes. The offers were sent out in May 2016. The exploration and production licences were subsequently awarded on 10 June 2016.

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2 INTERNATIONAL CLIMATE COOPERATION

Norway has participated in the international climate cooperation since this was first put on the agenda. The overarching international legal framework is the UN Framework Convention on Climate Change (UNFCCC), which was adopted in Rio de Janeiro in 1992. Norway ratified this agreement on 11 June 1993, see Proposition to the Storting No. 36 (1992– 93). The Kyoto Protocol is an agreement under the Convention on Climate Change, adopted in 1997 and ratified by Norway in 2002 during the Storting's consideration of Proposal to the Storting No. 49 (2001–2002). The agreement entails quantified emission commitments for Norway and other industrialised countries. The Kyoto Protocol's system allows the emission commitments to be met through flexible implementation mechanisms and cooperation between countries as a supplement to national measures.

The Kyoto Protocol entered into force in 2005. The first commitment period was from 2008 to 2012 and was settled in 2015. The Kyoto Protocol's second commitment period, adopted at the meeting of the parties to the Convention on Climate Change in Doha in 2012, applies for the period 2013 to 2020. The Doha amendments have not yet entered into force, see Articles 20 and 21 in the Kyoto Protocol, but Norway is following the agreement nevertheless in line with the Vienna Convention. Norway has committed itself to reducing emissions by thirty per cent compared with emissions levels in 1990 in the the period leading up to 2020. The target was part of the climate settlement in the Storting in 2012, see Recommendation to the Storting No. 390 (2011–2012), which in turn builds on the climate settlement from 2008.

The Paris Agreement was negotiated in Paris in December 2015 and is the most recently adopted protocol to the UN Framework Convention on Climate Change. It is intended that the Paris Agreement's regulations take over when the Kyoto Protocol's second commitment period expires in 2020. A goal of the Agreement and its mechanisms 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 pre-industrial level, see Article 2. The states which have signed and ratified the Paris Agreement are obligated to determine and communicate "nationally determined contributions", see Article 4, no. 2, first sentence. The national contributions shall be reported or updated every five years, see Article 4, no. 9. Each update shall build on the preceding, successive contribution, see Article 4, No. 2, and involve more ambitious targets, see Article 4, no. 3. Furthermore, states are obligated to obtain necessary information concerning the national contributions, see Article 4, no. 8, account for the national contributions, see Article 4, no. 13, and report under a special mechanism for transparency, see Article 13.

Norway ratified the Paris Agreement on 20 June 2016 based on Proposal to the Storting No. 115 (2015–2016) and Recommendation to the Storting No. 407 (2015–2016). The Paris Agreement entered into force on 4 November 2016. Norway has communicated to the UN a conditional commitment to reduce emissions by at least 40 per cent in 2030 compared with 1990, see Report to the Storting 13 (2014–2015) *New emission commitment for Norway for 2030 – towards joint fulfilment with the EU* and Recommendation 211 (2014–2015).

The UN's Intergovernmental Panel on Climate Change (IPCC) was appointed by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988. The purpose is to provide the nations of the world the best possible scientific basis for understanding climate changes and potential effects on humans, the environment and society. In 1989, the General Assembly of the United Nations decided to assign the IPCC the task of preparing a report which described climate status. This was later followed up by the first conference of the parties under the Convention on Climate Change (the Conference of the Parties, COP). Today it is regular practice for the Conference of the Parties to receive the IPCC's reports. The IPCC submitted its Fifth Assessment Report in 2013–2014.

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> The Assessment Report consists of three sub-reports from three working groups ("The Physical Science Basis", "Impacts, Adaptation, and Vulnerability" and "Mitigation of Climate Change") and a summary of the findings in these (the "Synthesis Report").

Under Section 1.2 in the presentation of the case, it is stated: "The impact assessment was presented to the Storting in Report to the Storting Report No. 36 (2012–2013) and the supplementary report to this, Report to the Storting 41 (2012–2013), and the Storting concurred during the consideration of Recommendation to the Storting No. 433 (2010–2011)". This is not correct. What is correct is that the Storting concurred with Recommendation to the Storting no. 495 (2012-2013).

2.2 Consideration of the case before the Court

A notice of proceedings in the case was filed with Oslo District Court on 18 October 2016. The Government of Norway filed a defence on 14 December 2016. The Norwegian Grandparents Climate Campaign joined the case as an intervener on 11 July 2017. Three scheduling conferences have been held during the preparation of the case. The main proceeding was held from 14–22 November 2017. The party representatives for the Plaintiffs and the Intervener gave evidence. Four expert witnesses did the same. Documentation was provided in the form of digital extracts.

The Court has received three written submissions pursuant to Section 15-8 of the Dispute Act. The submissions are from:

- The Environmental Law Alliance Worldwide (ELAW)
- The Allard K. Lowenstein International Human Rights Clinic
- The Center for International Environmental Law (CIEL)

3 PLAINTIFFS' AND INTERVENER'S PRAYER FOR RELIEF AND GROUNDS

The Plaintiffs and the Intervener (also called the Environmental Organisations) have essentially argued:

3.1 The Decision is contrary to Article 112 of the Constitution

It is primarily argued that the Decision is wholly or partially invalid because it is contrary to Article 112 of the Constitution. Article 112 of the Constitution establishes that "every person has the right to an environment that is conducive to health" and that natural resources shall be managed based on long-term considerations which "will safeguard this right for future generations as well". The Decision is not consistent with this right. It is primarily argued that the Decision is contrary to an absolute limit in Article 112. The wording of Article 112, the prior history and the preparatory works indicate that individuals have rights under the provision. It is clear that the Storting has intended this. The limit for what is permitted must be based on the best possible scientific basis of knowledge.

Emissions abroad which occur based on oil and gas exports from Norway are relevant when assessing whether the limit in Article 112 has been exceeded. Norwegian law is based on a solidarity principle. When interpreting Article 112, Norway's international obligations are relevant, including those under the European Convention on Human Rights.

The Government's alternative interpretation of the first paragraph of Article 112 and the Environmental Organisations' primary interpretation are nearly identical. The parties agree under these circumstances that the provision entails in part a prohibition against certain official measures that may lead to negative effects for the environment and nature above a certain threshold. The parties also agree that the first paragraph must be interpreted in the context of the third paragraph, which means that the first paragraph is not contravened if appropriate measures are taken. The Environmental Organisations are of the opinion – in contrast to the Government – that a high threshold does not apply for overruling a decision. Furthermore, it is not enough that the measures taken pursuant to Article 112, third paragraph, are appropriate. They must be sufficient.

The fact that the Government has pointed to a number of measures is not sufficient to determine that there is no breach of the first paragraph of Article 112. There are two principal reasons why the Decision is not consistent with Article 112. The first (the climate argument) is because the world is experiencing serious anthropogenic global warming that requires drastic and immediate measures. The Decision means the opposite. It will lead to enormous emissions.

Secondly, the Decision involves areas close to and partially in the movable ice edge and the polar front, i.e. in an area with a very special ecological system (the vulnerability argument). Oil spills will result in a catastrophe for this ecological system. Soot emissions (”Black Carbon“, abbreviated as BC) will have major negative impacts. Production has never previously been permitted so close to the ice edge and so far from land. The Norwegian Environment Agency and the Norwegian Polar Institute advised against 20 of 40 blocks.

The climate argument and the vulnerability argument jointly and severally entail a breach of Article 112.

The Decision must also be assessed in a broader context. These are the first licences granted after there is reliable knowledge that the world's proven fossil fuel resources exceed what can be burned in order to reach the goals in the Paris Agreement. The way is being opened for petroleum activities further east and north than ever before. The objective is to maintain petroleum production at the current level despite the fact that emissions must be reduced at a dramatic tempo. The Decision will stimulate extensive investments and technology development that will contribute to increased fossil fuel production (the path argument). It will be difficult to reverse the trend with respect to climate deterioration. We are now at a crossroads (the crossroads argument). There is not even room for emissions from discovered oil and gas reserves in the carbon budget. Everyone must take

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responsibility, and Norway occupies a special position. The Government must point out which countries will let their resources lie unused so that the Government can produce more. The demand for oil and gas will be reduced in such a way that it is far from certain that the production from the blocks the Decision covers will be profitable.

If Article 112, first paragraph, see the third paragraph, must be understood with the limitation that a proportionality assessment must be carried out, it is argued that the Decision is disproportionate and for that reason is contrary to Article 112. This is because it has limited economic benefit.

In order for a decision to be contrary to Article 112, there must be a relationship between the decision and climatic and/or environmental harm. However, it is the potential for harm that must be assessed. The Government cannot wait until the problems materialise before initiating measures. Those who have been awarded licences for exploration and production will make major investments. In reality, it will not be possible to reverse the licences through permission to develop and operate under Section 4-2 of the Petroleum Act. From a legal perspective, there is only a limited opportunity to reverse the Decision.

The courts have the authority and obligation to review whether the licences are contrary to Article 112, see Article 89 of the Constitution. The case shows that constitutionally-established environmental protection is important and illustrates that Article 112 must be interpreted in such a way that the courts set limits for environmental encroachments.

3.2 The Decision is contrary to Section 3-3 of the Petroleum Act, see Section 3-1, see Article 112 of the Constitution Alternatively, it is argued that the Decision is wholly or partially invalid because it is contrary to Section 3-3 of the Petroleum Act, see Section 3-1, as these provisions must be understood in light of Article 112 of the Constitution.

3.3 Breaches of case-handling rules etc. result in invalidity

Alternatively, it is asserted that the assessment prior to the Decision being reached was deficient and that the Decision is based on factual error. It is also asserted that the Decision does not meet the requirements that apply for justification.

Requirements for an assessment appear in both Chapter 3 of the Petroleum Act and Section 17 of the Public Administration Act. Article 112 of the Constitution supplements and reinforces the requirements out of concern for the environment and what is to be balanced against the environment.

The climatic effect of the Decision has been inadequately assessed. The Decision opens a new field and continues exploration activity in Barents Sea South for the purpose of maintaining Norwegian petroleum production at the same level as today beyond 2020. The climatic consequences of this must be thoroughly assessed.

An assessment has not been carried out of whether it will actually be possible to meet Norway's need for emissions cuts while maintaining the production level on the

Norwegian continental shelf beyond 2030. An assessment has not been carried out related to stimulating investments and technology development. Nor has it been assessed what significance this has for increased fossil fuel production. Nor has an assessment been carried out related to whether the emissions trading system will be effective.

The assessments that have been carried out are not thorough enough.

The Decision moves petroleum activities further north than ever before and partially into the variable ice edge at the polar front. The assessment leaves major questions with respect to challenges related to the variable ice edge and polar front. This is expressed with particular clarity in advice against proceeding from the Norwegian Polar Institute and the Norwegian Environment Agency. It will not be possible to bring this up with the companies afterwards. An assessment must be carried out for each licence.

There are several errors attached to the assessment of the economic consequences of opening Barents Sea South-east. It is an error that revenues and expenditures were not discounted. The employment effects have been estimated imprecisely and costs of CO emissions have not been calculated. The errors that were committed in the opening of Barents Sea South-east have affected the Decision. The obligation to provide sufficient grounds for the Decision stems from both general administrative principles and Article 112 of the Constitution. Deficiencies in the justification reflect the deficiencies in the assessment.

If the Decision is to be valid despite the procedural errors, there must be grounds to assume that the error cannot have been a deciding factor for the substance of the Decision. In this instance, the errors have individually and as a whole evidently – in any case, probably – affect the substance of the Decision. This is particularly the case for the awards that have been granted in Barents Sea South-east.

3.4 Prayer for relief

The Plaintiffs and the Intervener 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 wholly or partially invalid.
2. Föreningen Greenpeace Norden, Natur og Ungdom and Besteforeldrenes klimaaksjon are awarded legal costs.

4 DEFENDANT'S PRAYER FOR RELIEF AND GROUNDS

The Government has essentially argued the following:

4.1 The Decision is not contrary to Article 112 of the Constitution

The Decision is valid. It is not contrary to Article 112 of the Constitution. It is primarily argued that there is no substantive limit in the provision as the Plaintiffs have asserted. In

any case, the Decision does not breach any such possible limit. The first paragraph of Article 112 cannot be understood to be a rights provision in itself. The provision protects common (collective) interests. Even though the provision does not constitute an independent basis for substantive environmental rights, the provision does have legal significance, including in statutory interpretation.

The wording of Article 112 and the context argue against the provision being understood as an individual rights provision. The preparatory works and the prior history for Article 112 do as well. So do the purpose of the provision and policy considerations of fairness, justice and feasibility. There is no legal basis for saying that (former) Article 110 b was fundamentally changed by adopting Article 112.

The provision has intentionally been worded differently than other rights provisions in the Constitution, and must be interpreted autonomously, on the basis of its own special nature and its own sources of law. Norway's international obligations, including to the European Convention on Human Rights, are irrelevant in the interpretation.

Under Article 112, third paragraph of the Constitution, state authorities have a duty to “take measures" in order to implement the “principles" stated in the first and second paragraphs. The concept that this duty to take measures is the essential legal substance of Article 112 stems from the wording, context, purpose, preparatory works and policy considerations – as well as the prior history of the paragraph during the adoption in 1992 and the amendment in 2014, in which the third paragraph was revised to make the duty to take measures clearer and more operative.

The legal issue to be considered in the case is not whether the Decision contravenes an (unclear) substantive bar in the first paragraph of Article 112, but whether the authorities (the Storting and the Government) have taken measures in this area to the extent Article 112 requires. This raises in turn questions regarding how far the duty to take measures extends, what is required to say that it has been met and how far the courts can and should go in reviewing this.

The most important measures the authorities take to comply with Article 112 is through generally applicable rules provided by the Storting and the Government, at the statutory and regulatory levels. This occurs in part through individual acts in the environmental and climate area (the Pollution Control Act, the Nature Diversity Act, the Climate Change Act, etc.) and in part through rules in other legislation attending to environmental considerations. The measures attend to both the duty related to possible national emissions and the risk of environmental harm. Article 112 establishes no duty for Norwegian authorities to take measures with respect to emissions abroad, nor emissions stemming from the export of oil and gas from Norway. Norway also participates in a number of measures as a part of the international work on climate change.

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The Storting's choice of measures is not subject to judicial review. Furthermore, it is unclear how far the duty to take measures is otherwise intended to be subject to such review. The Government's primary view is that it is not.

Which specific measures are taken will vary over time and depends on many factors of a technical and political nature. Often there is technical or political disagreement about which measures are best suited to meet an environmental challenge. Other times it may depend on financial aspects. And not rarely, consideration for the environment and the climate must be balanced against other legitimate considerations and societal interests. In the view of the Government, based on the sources of law this must be regarded most naturally as a circumstance which Article 112 is not intended to juridify, and where the discretionary assessments should not be subject to judicial review.

Alternatively, it is argued that if the courts should consider themselves to have jurisdiction to carry out a review, then there must be a high threshold which respects the authorities' legitimate need for room in which to act, as well as the many technical and political assessments and the balancing constantly carried out by the responsible technical authorities, by the Government and not least by the popularly elected majority of the Storting.

Legal minimum requirements for a causal relationship between the risk of environmental harm and the Decision must be met by being able to set aside the Decision under Article 112. There is also a requirement of foreseeability. There was broad agreement at the Storting on the opening of Barents Sea South in 1989, on the subsequent development of this area, on the opening of Barents Sea South-east in 2013 and on the activities that have subsequently been conducted there. Even though the Decision was formally taken by the Government (the King in Council), the awarding of licences has also been up for a vote in the Storting three times, in 2014, 2015 and 2016. In the last year a number of proposals have also been voted on regarding more general changes in the relationship between petroleum policy and environmental and climate policy, and there is currently pending a proposal to halt the ongoing 24th licensing round. All of the factual circumstances which the Plaintiffs have so far brought forward in the case have been or are currently before the Storting, as a part of the current democratic debate. This is a strong argument against the courts reviewing the Decision.

Questions regarding socio-economic benefits are not relevant in the interpretation of Article 112. In addition, efforts have been made to formulate petroleum policy so that development only occurs to the extent it is profitable. It was not possible when the Decision was taken, nor is it now, to say whether the blocks will be profitable. This depends on what is found. In that event, new thorough calculations will be made in accordance with Section 4-2 of the Petroleum Act.

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4.2 The Decision is not contrary to Section 3-3 of the Petroleum Act, see Section 3-1, see Article 112 of the Constitution The Decision is not contrary to Section 3-3 of the Petroleum Act, see Section 3-1, even when these provisions are understood in light of Article 112 of the Constitution.

4.3 There are no procedural errors etc. resulting in the Decision being invalid Article 112 of the Constitution is operationalised in the petroleum legislation through requirements for an impact assessment in sections 3 1 and 4 2 of the Petroleum Act and by supplementary rules in regulations and long-standing administrative practice. The requirements resulting from Article 112 for the proceedings must be considered to be met through these rules. New, separate (unwritten) procedural requirements cannot be inferred from Article 112 beyond those the lawmakers have laid down in the petroleum legislation. The Public Administration Act applies in principle, but it does not lead to more rigorous obligations compared to the requirements of the Petroleum Act.

No procedural errors have been committed, much less errors that are relevant for the validity of the Decision. The Decision does not rest on an erroneous factual basis, and it meets the requirements for justification.

The Plaintiffs are mixing together the proceedings during the opening of Barents Sea South-east in 2013 and the proceedings prior to the Decision. Any procedural error during the opening of Barents Sea South-east in 2013 is only relevant in the assessment of the Decision if the error has meant that the decision on opening is invalid.

Impact assessments prior to the opening of Barents Sea South in 1989 and Barents Sea South-east in 2013 satisfied all requirements for assessment and justification. The Decision met all requirements under the Petroleum Act for procedure at this stage. Questions related to matters such as the ice edge, Black Carbon, vulnerable waters, emergency response, finance and emissions have been covered by all appropriate assessments and procedures n connection with the opening proceedings. In the event of any development and operation, a new assessment will be carried out. In addition, questions related to emissions of greenhouse gases are assessed and evaluated as a step in climate policy.

There are no serious defects in the assessments of possible future revenues from Barents Sea South-east. The information in the report – where the revenues were estimated – is sufficient for the purpose. It is a matter of estimates; it is unknown what will be found. The assessments state that only an overall assessment with uncertain calculations is involved. The report contains a calculation error, but this was corrected. The net figures are nevertheless correctly presented. There was no need for discounting. The reason the figures were not discounted is that they were intended to provide the right basis for the other calculations, such as the assessments of national and regional value-added and employment effects that were made by Statistics Norway and Pöyri, respectively.

New assessments will be carried out with respect to the environment, climate change issues and finance pursuant to Section 4-2 of the Petroleum Act development and operation of one or more of the blocks are proposed in the 23rd round.

4.4 Prayer for relief

The Defendant has submitted the following prayer for relief:

1 The Government of Norway through the Ministry of Petroleum and Energy is found not liable.
2 The Government of Norway through the Ministry of Petroleum and Energy is awarded legal costs in the case.

5 COMMENTS BY THE COURT

5.1 Introduction

The parties disagree whether Article 112 of the Constitution means that the Decision is invalid. The disagreement involves how the provision is to be understood, but also how the provision might be applied.

The Environmental Organisations have primarily maintained that the first paragraph of Article 112 is a rights provision, so that it imposes a prohibition on certain official decisions that involve a risk of negative effects for the environment. However, they agree that if sufficient measures have been taken, see the third paragraph of Article 112, then a decision is nevertheless not prohibited. The Environmental Organisations have argued in the alternative that if a proportionality assessment is to be carried out under Article 112, where on the one hand weight shall be attached to environmental impacts and on the other hand to socio-economic effects, then the Decision must be regarded as disproportionate. The Government has primarily argued that the first paragraph of Article 112 is not a rights provision in itself, but that the legal issue is whether the duty to take measures under the third paragraph of Article 112 has been met. The Government's primary understanding is that the courts cannot review this question. The Government has argued in the alternative – if the first paragraph of Article 112 is to be understood as a rights provision – that a high threshold applies for the courts to be able to review the Decision. Nevertheless, this cannot occur if appropriate measures have been taken, see Article 112, third paragraph. The Government is of the opinion that there is no legal basis to conduct a proportionality assessment such as the Environmental Organisations have argued for.

The Court takes a position under Section 5.2 on the Environmental Organisations' argument that the Decision is invalid because it is contrary to Article 112 of the Constitution.

The Environmental Organisations and the Government also disagree whether procedural errors etc. have been committed that can lead to the Decision being invalid. The Court takes a position on this under Section 5.3.
The Court's conclusion appears at Section 5.4.

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Finally, in Section 5.5, the Court takes a position on the legal cost claims.

5.2 Is the Decision wholly or partially contrary to Article 112 of the Constitution?

5.2.1 Is Article 112 a rights provision?

As mentioned, the parties disagree whether the first paragraph of Article 112 should be understood as a rights provision in itself, which means that the Decision – if it violates the right – is invalid.

Article 112 of the Constitution was adopted in 2014. Its predecessor was (former) Article 110 b from 1992. The starting point in the interpretation is the wording in Article 112 as it is understood in ordinary usage.

Article 112 of the Constitution reads as follows:

> 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 authorities of the state shall take measures for the implementation of these principles.*

The word "rett" is used in the first sentence of the first paragraph. This indicates that the provision is a rights provision. Such an understanding of the wording would appear, for example, to be consistent with what is pointed out by Smith in "Konstitusjonelt demokrati" ("Constitutional democracy") at page 320. He states that the provision cannot be understood other than according to the wording, which must imply that the wording in isolation must be understood so that "rett" means right.

The wording in the second sentence of the first paragraph of Article 112, which deals with "denne rett" ("this right") also argues for seeing the first sentence in the first paragraph as a rights provision.

The third paragraph in Article 112 calls the rights under the first paragraph "principles", which – based on a linguistic understanding – argues that the expression "rett" in the first paragraph should not be understood as a right, but as a common fundamental value. When the first and third paragraphs are read in context, it is thus unclear whether "rett" in the first paragraph means right. However, the wording in the third paragraph does not rule out "rett" meaning right and only indicates that there is another alternative interpretation.

The preparatory works for Article 112 are relevant when the provision is to be interpreted.

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As mentioned, Article 112 was adopted in 2014 as a step in a constitutional revision in which a number of provisions were added to Chapter E, "Human Rights". However, the substance of Article 112 was not new in 2014. As mentioned, the provision has a predecessor in (former) Article 110 b from 1992.

Article 112 of the Constitution was proposed in Document 16 (2011–2012) "Report to the Presidium of the Storting by the Human Rights Commission concerning Human Rights in the Constitution" (hereinafter called the Human Rights Commission report). The Court considers it appropriate to quote some parts of the report. At page 243 in the report, it is stated regarding (former) Article 110 b:

> The Storting also assumed that private citizens or organisations in a given case can proceed with their environmental rights under Article 110b before the courts. This was presumed in the original constitutional proposal and seems to have been assumed by the Standing Committee on Foreign and Constitutional Affairs and by the Storting. However, it is not clear under what circumstances such direct requirements can be asserted, which may have weakened the importance of the provision.

From page 244:

> It cannot be ruled out that the wording of the third paragraph of Article 110b of the Constitution may be a contributing reason for the provision's limited importance in practice.
>
> ………….
>
> Article 110b of the Constitution is worded to a much greater degree than Articles 110 and 110a as a rights provision. Paragraphs 110 and 110a open with "It is the responsibility of the authorities of the State to create conditions enabling" various rights, while Article 110b specifies that there is a "right to an environment that is conducive to health". This linguistic difference and the clear statements in the preparatory works indicate that the provision must be regarded as a rights provision.

From page 245:

> 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. From pages 245 and 246:
>
> However, the Commission has considered whether the third paragraph in the provision should have a more appropriate wording, primarily 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. 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 with a view to it being a duty for the authorities of the state to pursue the right to an environment conducive to health. The Commission wishes to recommend that the third paragraph be replaced with a wording that the authorities of the state have a duty to take measures to implement the first and second paragraphs of Article 110b 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.

It is difficult to see this other than that the Human Rights Commission regarded (former)

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Article 110 b as a rights provision and that the Commission wanted to strengthen this right, by clarifying the provision in the third paragraph.

The proposal of the Human Rights commission for Article 112 has been considered in the Storting's Standing Committee on Scrutiny and Constitutional Affairs. The following is quoted from Recommendation to the Storting No. 187 (2013-2014), pages 25 and 26:

> A majority of the Committee, all except the Members from the Norwegian Progress Party, believe that the relationship between the environment and human rights should be linked more closely. The Human Rights Commission has proposed, referring to the fact that development of rights related to the environment is evolving internationally, a new Article 112 in the Constitution regarding the right to an environment conducive to health as an extension of Article 110 b of the Constitution. The majority agrees with the proposal.
>
> The provision in Article 110 b was added to the Constitution in 1992. It can be regarded as a result of recommendations from the United Nations through the World Commission on Environment and Development and shall be read as a legally binding provision. The majority cites Recommendation to the Storting no. 163 (1991–1992) where it is stated: “legally a constitutional establishment will mean that a constitutional provision will take precedence over ordinary legislation if they conflict with each other”. The provision should be read as an attempt to protect the quality of life and health for future generations and the individual.
>
> 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 safeguard the environment. The proposal that is 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.
>
> ……
>
> The Committee's Members from the Norwegian Conservative Party point out that the provision regarding a right to an environment conducive to health already exists in the Constitution and that the expansion is so marginal that these members can assent to the proposal for a new Article 112. The constitutional provision in question is intended to be a rights provision, and after the amendment in the third paragraph this will appear more clearly, in the view of these Members.

The majority thus agreed to the proposal of the Human Rights Commission, and it was confirmed in the special comment from the Norwegian Conservative Party that Article 110 b is intended to be a “rights provision”. It is also stated that the third paragraph of Article 112 will clarify the nature of the right. The representative of the Norwegian Conservative Party, Tetzschner, stated during the Storting debate that the “real” legal norms were being blended with the “quasi”, for example, in the proposal for the Article 110 series, where one has “Articles 110 and 110 a, which do not grant rights, in contrast to Article 110 b, which can be invoked as a specific rights provision for the individual”.

The Government's opinion is that the first paragraph of Article 112 bears the mark of being declarative in nature, i.e. the provision expresses a political manifesto. As support for its view, the Government has cited individual provisions in the Constitution, i.e. Article 93, fourth paragraph, Article 95, second paragraph, Article 98, second paragraph, Article 100,

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sixth paragraph, Article 102, second paragraph, Article 104, third paragraph,

Article 108, Article 109, second paragraph and Article 110. It is difficult to see that the referenced provisions can be cited in support of Article 112 not being a rights provision. Some of the provisions the Government has cited indicate instead – as the Court sees it – that Article 112 is such a provision. Note in this connection that the Human Rights Commission stated that (former) Article 110 b, in part because of a different wording than (former and currently applicable) Article 110 and (former) Article 110 a (now Article 108), indicated that Article 110 b was a rights provision. See also Tetzschner's statement in the Storting debate, referred to above.

The Government has cited the fact that the Climate Change Act of June 2017 does not grant private rights and that a broad majority at the Storting on a general basis wanted to "advise against juridifying Norwegian climate policy". The statement has – as the Court sees it – limited weight in the understanding of Article 112. It is not related to Article 112, and in any event it does not apply to the entire area Article 112 covers, only the climate area.

The Government has also cited the prior history of Article 112 as support for its view. In this connection, the Government has maintained that (former) Article 110 b could not be understood to be a rights provision. There are grounds, however – as the Court sees it – to characterise (former) § 110 b as a rights provision, but with extremely limited content. The Court cites Backer in connection with this: "The courts and the environment" in Lov og Rett 1993 and "Innføring i naturressurs- og miljørett 2012" ("Introduction to natural resource and environmental law 2012"), where it is stated that the courts in given situations could interpret (former) Article 110 b as a bar. Fauchald in Tidsskrift for Rettsvitenskap (hereinafter TfR) 1-2/2007: "Forfatning og miljøvern – en analyse av Grunnloven § 110 B ("Constitution and environmental protection – an analysis of Article 110 B of the Constitution") thinks that (former) § 110 b could be an independent rights basis. See also what has been quoted above from the Human Rights Commission's report.

The Government has maintained that the need for technical and political room to act argues against Article 112 being regarded as a rights provision. The Government has also argued that political processes are generally far better than legal ones for clarifying environmental and climate questions and that there is a need to embed policy choices democratically. In the opinion of the Court, the considerations the Government points to here argue for, not against, Article 112 being regarded as a rights provision. However, these considerations are relevant when a position is to be taken on whether the duty to take measures has been complied with and thus in the assessment of whether the right has been infringed. The Court will return to this. In the article "En standardtilnærming til Grunnloven § 112" ("A standard approach to Article 112 of the Constitution") in TfR 1/2017, Thengs concludes the following – after a review of wording and preparatory works – at page 44: The conclusion must accordingly be that the first paragraph of Article 112, see the third paragraph, is a rights provision that grants each individual a right to an environment

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conducive to health and a natural environment whose productivity and diversity are maintained.

The Court concurs in this conclusion. Article 112 is a new provision and the preparatory works must be accorded substantial weight. These clearly indicate that Article 112 is a rights provision. Such an understanding lies within the wording of the provision, and no determinative sources of law indicate the contrary.

5.2.2 What does the right in Article 112 entail?

The Court has concluded under Section 5.2.1 that Article 112 is a rights provision. Before deciding whether the right has been infringed in this case, it is deemed appropriate to explain the Court's view on what the right generally entails. An effort will be made to limit the explanation to what is relevant for the case.

The sources of law provide little guidance, but something can be inferred from the wording, the preparatory works and the prior history. In addition, the substance of the right – as the Court sees it – must depend on the policy considerations that come into play.

The parties agree that both (traditional) environmental harm and climate deterioration are covered by the provision. There are no grounds for the Court to have a different view on this. The word “environment" is used sometimes in the following in such a way that it encompasses both environment (in a narrow sense) and climate. Traditional environmental harm in the case involves possible harm to what are called particularly vulnerable areas, whereas climate deterioration is related to emissions of greenhouse gases, where CO is the most important.

At the outset, the Court will point out that it considers it obvious that Article 112 of the Constitution cannot be invoked for every encroachment that has a negative impact for the environment, which can be expressed as the right only arises with encroachments of a certain scope, or in other words: it must exceed a certain threshold. The Court understands that the parties agree on this. However, what they disagree on is how much is required before the threshold is exceeded. The Government has argued that the threshold must be high, while the Environmental Organisations have stated that the encroachment must be above a certain threshold. This case does not give rise to a reason for the Court to specify a more precise limit.

The right under Article 112 must be seen in context with the third paragraph. Such an understanding is in accordance with the argument of the Environmental Organisations and also in accordance with what the Government has argued in the alternative. Such an interpretation can be rooted in the proposal of the Human Rights Commission. It can be inferred from the proposal – as the Court sees it – that a right exists under Article 112 if the duty under the third paragraph has not been fulfilled. This means, consequently, that a decision such as the one here is not prohibited if the duty to take measures under the third paragraph of Article 112 is fulfilled. There is no disagreement between the parties whether

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the Decision triggers a duty to take measures.

In order for a measure to fulfil the duty under the third paragraph of Article 112, it must be appropriate and necessary. See the report from the Human Rights Commission. As mentioned, the Commission considered whether the third paragraph in (former) Article 110 b should be given a more appropriate wording, primarily to clarify the duty for the authorities to take “appropriate and necessary measures”. In addition, the Court points out that the majority emphasised during the consideration by the Storting that it was necessary to clarify the duty for the authorities to comply with the principles regarding taking “appropriate and necessary measures”. As indicated above, Article 112 cannot be invoked for every encroachment. It is only encroachments over a certain threshold that make the provision relevant. The relationship between the first and third paragraphs of Article 112 thus indicates that the measures under the third paragraph must bring the encroachment “down to” the permitted threshold. This can be expressed as the measure must be sufficient. A measures that is sufficient will satisfy the requirement that it must be “appropriate and necessary”.

The term “measures” is broad linguistically and covers legislation, regulations and appropriations. There is no reason to understand the term more narrowly.

The parties disagree whether CO emissions that occur after combustion of Norwegian oil and gas abroad are covered by Article 112. As mentioned, fulfilment of the duty to take measures under the third paragraph of Article 112 will mean that a decision which is otherwise prohibited becomes lawful. How Norwegian authorities would be able to fulfil their duty to take measures for exported oil and gas has not been clarified for the Court. Important means for reducing national emissions of CO include a CO tax and a scheme with emissions allowances. According to what the Court understands, such measures will not be available to Norwegian authorities for emissions from activities abroad. The relationship between the first and third paragraphs of Article 112 therefore argues against – as the Court sees it – considering emissions abroad as covered by Article 112.

The second paragraph of Article 112 of the Constitution imposes requirements for the proceedings in a matter before a measure that may harm the environment is initiated. An assessment must be carried out to ensure that citizens are provided knowledge about planned “encroachment(s) on nature, so that they can look after “the right” they have under the first paragraph of Article 112. As the court will come back to in Section 5.3.2, the duty to carry out an assessment under the second paragraph of Article 112 of the Constitution is considered to be met by the requirements stated in Sections 3-1 and 4-2 of the Petroleum Act. In the opinion of the Court, the duty to carry out an assessment under these provisions does not cover the possible effect of CO emissions from exported oil and gas, see more specifically Section 5.3.5. The relationship between the first and second paragraphs of Article 112 therefore also argues against – as the Court sees it – considering emissions abroad from Norwegian oil and gas as covered by Article

112.

Under international law, each country is responsible for greenhouse gas emissions on its territory. The Court thus understands this to mean that the international obligations of Norway and other countries under both the Kyoto Protocol and the Paris Agreement relate to national emissions targets. Neither Norway nor countries in the same situation have any duty to take measures to compensate for the effect from oil and gas exported to other countries. However, obligations under international law do not limit protection rules in domestic law, for example, under Article 112 of the Constitution. Nevertheless, it appears unclear what consequences it would have for international cooperation if Norway should be responsible for emissions from exported oil and gas in addition to the emitting country.

The Environmental Organisations have argued that Norwegian law rests on a solidarity principle and that emissions from exported oil and gas from Norway are also covered by Article 112. In connection with that, they have cited : Innføring i naturressurs- og miljørett ("Introduction to natural resources and environmental law"), pages 64 and 65, where it is pointed out:

> This is a central element in the Brundtland Commission's way of thinking that the planet must be seen as a whole and that the natural resources on the planet must not be consumed by contemporary generations without thought for those who will come after us. This is now encapsulated in Norwegian law in Article § 110 b of the Constitution. It is also found in legislation, as in section 1, third paragraph, first sentence of the Land Act and Sections 1 and 57 of the Nature Diversity Act.
>
> Nevertheless, at several places in Norwegian legislation it is evident that the authorities must pay the same attention to the environmental impacts of a measure whether they arise in Norway or *abroad* (or affect areas that fall outside national jurisdiction). This has been laid down as a fundamental guideline for the application of the Pollution Control Act (Section 2, no. 6). A principle of non-discrimination with respect to foreign citizens and environmental impacts abroad has also been adopted in the Nordic Environmental Protection Convention of 1974, which has been implemented in Norwegian law by the Act of 9 April 1976 No. 21. It is also evident in Section 14-4 of the Planning and Building Act regarding impact assessments in connection with transboundary effects (see also Section 4-2, third paragraph, of the Planning and Building Act). Section 16, second paragraph of the Environmental Information Act of 9 May 2003, No. 31, also expresses solidarity across national boundaries by granting a right to environmental information on effects on the environment outside Norway when they are caused by products handled by Norwegian enterprises and produced or distributed outside Norway's boundaries.
>
> Based on this, it can be said that there is a legal principle in Norwegian law of solidarity across boundaries and generations when the disposition of natural resources is involved.

As for the citation to (former) Article 110 b in the first paragraph of the quotation, it involves the relationship between generations, not the relationship between countries.

As the Court sees it, the legal provisions cited in the second paragraph in the quotation from Backer have in common that they regulate negative impacts to the environment abroad from activity in Norway. Viewed this way, the provisions are in accordance with a

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principle that it is the country where the environmentally harmful activity occurs that is responsible for limiting the harm. Substantial transboundary environmental effects of petroleum development are also regulated in Section 22c of the Petroleum Regulations. The Court cannot see how the provisions hold Norway responsible for environmental harm after exports of Norwegian raw materials.

The provisions cited by Backer thus cannot be cited in support of Norway having a duty to take measures under Article 112 for emissions after combustion of Norwegian oil and gas abroad. Nor can the Court see that other sources of law have been cited which do so. Accordingly, the Court concurs with the Government's view on this point. Emissions of CO abroad from oil and gas exported from Norway are irrelevant when assessing whether the Decision entails a violation of Article 112.

In order for the Decision to entail a violation of Article 112, there must be a relationship between it and undesirable environmental impacts. This raises in turn a question of whether there must be a degree of certainty – in such case, how large – in order for undesirable impacts to occur. The Court finds that the parties agree that the "precautionary principle" indicates that there is no requirement that it be shown that the effects most likely will occur. Both parties have stated that risk is a more comprehensive criterion. This must be determined on the basis of impact and probability. Thus, there may be an acceptable risk even though the undesirable impact is great, when the probability that it will occur is sufficiently small.

The Human Rights Commission stated at page 246 that – after an intensification in the third paragraph - there "would still be plenty of room for political discretion with respect to which measures are put in place at which time". This indicates that the courts should be restrained in reviewing whether a given measure is sufficient.

If the Storting has taken measures, in the Court's opinion there are particular grounds to attach importance to this. This is because of the prior history of Article 112, i.e. (former) Article 110 b. Backer has stated the following in Lov og Rett 1993 and "Innføring i naturressurs- og miljørett 2012" ("Introduction to natural resource and environmental law 2012") regarding the meaning of this provision:

> It is not intended for the courts to review the Storting's legislative decisions on which solution should be chosen to attend to environmental considerations. It can be said that the constitutional provision leaves it to the Storting to chose the way forwards for protecting the environment.

As mentioned, Backer has also stated that (former) Article 110 b under certain circumstances could be interpreted as a bar. After the right was strengthened through the adoption of Article 112, there are grounds in any event to assert that it [is] not without substance in areas that are regulated by statute, see Thengs "En standardtilnærming til Grunnloven § 112" ("A standard approach to Article 112 of the Constitution") in TfR 1/2017 at page 44:

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> Based on this, it can be asserted that it is no longer correct to understand the environmental provision in such a way that it loses its independent legal significance in areas regulated by statute, in other words, where the Storting has "taken a position". The presumption that the constitutional provision has been implemented where rules have been provided cannot be tenable any longer in light of the wording and the statements in the preparatory works quoted above.

Such an interpretation has also been pointed out by Fauchald in the article: "Hva er konsekvensene av Grunnlovens miljøparagraf?" ("What are the consequences of the Constitution's environmental paragraph?"), where he states that it is no longer tenable to assert that the Constitution's environmental provision loses its importance in areas that are regulated by statute. Application of Article 112 as well to areas regulated by statute does not mean that measures adopted by the Storting may be disregarded. As the Court sees it, there are grounds – based on both the prior history and the statement from the Human Rights Commission – to attach importance to the Storting having taken measures when deciding whether the duty to take measures has been fulfilled.

The Storting's opinion can also be important if the Storting has taken a position on the constitutionality. This is not at issue in this case because the Storting has not considered the question. However, the Storting has taken a position on a predicate for the Decision, i.e. the decision on opening Barents Sea South-east. Then the Storting has more directly taken a position on the Decision, which the Court will return to in section 5.2.4. As the Court sees it, the concern that legal decisions in the area have a democratic basis warrants attaching great importance to the Storting's position.

5.2.3 What risk of environmental harm does the Decision entail?

The Court has determined above in Section 5.2.1 that Article 112 of the Constitution is a rights provision, which means that the Decision is invalid if it violates the right. In section 5.2.2, the Court has sought to describe more specifically what the right in general entails. Before it is decided whether the right has been infringed in this instance, it is necessary to look more closely at the risk for negative environmental consequences from the Decision. Based on some of the Environmental Organisations' reasoning, the Court finds reason to specify that there are possible effects from the Decision that are relevant, not from the opening of Barents Sea South-east, Barents Sea South or Norwegian environmental protection policy and climate policy in general.

The risk for environmental harm because of the Decision can be divided – as the case stands – into (traditional) environmental harm and climate effects due to CO_2 emissions. As mentioned, the risk for (traditional) environmental harm is related to affects in particularly vulnerable areas. With respect to CO_2 emissions, the Environmental Organisations have emphasised that national emissions as well as emissions from combustion of exported oil and gas are relevant. As indicated under Section 5.2.2, it is the Court's opinion that CO_2 emissions abroad from exported oil and gas have no significance in the assessment of whether there is a violation of Article 112 of the Constitution.

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An attempt has been made to calculate the costs of CO emissions from possible discoveries in Barents Sea South-east in the report “Petroleum activity in Barents Sea South-East – climate, economics and employment” by Mads Greaker and Knut Einar Rosendahl. As indicated in Section 2.1 of the Decision, 7 production licences (14 blocks) have been granted that are located in Barents Sea South, while three of the production licences (26 blocks) are located in Barents Sea South-east. The calculations of Greaker and Rosendahl thus do not apply specifically to the blocks involved in the Decision.

Greaker and Rosendahl have based their calculations on the document “Scenarioer for petroleumsvirksomhet i Barentshavet sørøst” (“Scenarios for petroleum activities in the Barents Sea South-east”), prepared by the Norwegian Petroleum Directorate (NPD). The report from NPD is referred to in “Konsekvensutredning – vedlegg til melding til Stortinget om åpning av Barentshavet sørøst for petroleumsvirksomhet” (“Impact assessment – annex to Report to the Storting on opening Barents Sea South-east for petroleum activities”) (the IA) at page 17 as follows:

> Two scenarios have been established for petroleum activities in the assessment area. The source data related to the petroleum resources in the area are limited (see text box). Among other things, this means that the authorities do not currently have a resource estimate for the area. The scenarios are therefore based on possible resource outcomes (producible resources) assessed on the basis of current knowledge about the geology in the area. The resources proven to be in the area if it is opened may be both substantially greater and less than this. The size of the producible resources can only be determined through opening and subsequent exploratory drilling.
>
> The probability for making gas discoveries in the area is presumed to be greater than the probability for making oil discoveries. The resource outcomes in the two scenarios are also controlled by a need for substantial discovery sizes to be able to result in profitable development.

Consequently, it must be stated that the extent of oil and gas in Barents Sea South-east is quite uncertain. In addition, there is uncertainty related to the question of whether production will occur if discoveries are made.

As the quotation above shows, two scenarios are provided in the report from NPD (called the High scenario and the Low scenario), which Greaker and Rosendahl (as mentioned) have based their calculations on. Based on these two scenarios, Greaker and Rosendahl have estimated national emissions at 22 million tonnes of CO in the High scenario and 4.5 million tonnes of CO in the Low one. Greaker and Rosendahl have also estimated emissions abroad at a gross 370 million tonnes of CO in the High scenario and a gross 100 million tonnes in the Low one.

Norwegian CO emissions constitute in total 0.15 per cent of the emissions in the world. Twenty-eight (28) per cent of the Norwegian emissions stem from the petroleum sector. An isolated increase because of national emissions – even if the High scenario is assumed – means only an extremely marginal increase of total Norwegian emissions and for the petroleum sector's share. As the Court sees it, there is thus a basis for what is said

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in Report to the Storting No. 36 (2012-2013) at page 33 – with reference to the impact assessment – that “air emissions from petroleum activities in the opening area will result in marginal contributions to the total load”.

With respect to (traditional) environmental risk, the Court will refer to Report No. 36 (2012-2013) to the Storting, page 6, where the following appears:

> “The impact assessment shows that a major sudden spill may have a serious environmental effect, but based on experience from Norwegian petroleum activities in other areas, the probability for such a spill is deemed low. Limitations on drilling periods could substantially reduce any consequences of a sudden spill. Petroleum activities will have few negative environmental impacts from normal operations.”

At page 8 in the impact assessment, it is stated:

> The analysis of environmental risk is based on the assessments of impact potential but looks simultaneously at the statistical probability for such a serious spill incident (oil well blow-out). Conservative assumptions have generally been used as a basis for the analysis, where for example the environmental resources with the highest potential for harm have been assessed for the most vulnerable season. Overall, the activity in the High scenario results in a probability of one oil well blow-out per 1,200 years in operation, while the probability for the Low scenario is one oil well blow-out per 2,400 years in operation. Combined with the impact potential, the environmental risk is thus that one incident is estimated to occur in the exploration phase, with three exploration wells annually, with *serious* environmental harm (i.e. restoration time greater than 10 years) to seabirds per 15,000 years and *moderate* environmental harm (i.e. restoration time of one to three years) per 6,000 years, plus one incident with*serious* environmental harm to the ice edge per 11,000 years and *moderate* environmental harm per 7,500 years.
>
> In the development and operation phase, with facilities as in the scenarios, there is a 40 per cent probability of *no* harm to seabirds (i.e. less than 1 per cent population loss and thus no quantifiable impacts). There is a 90 per cent probability of *no* harm to the ice edge (i.e. [stranding] quantities less than 1 tonne per 10 x 10 km route and thus no quantifiable impacts). There is an extremely low probability of serious environmental harm. One incident with moderate environmental harm to seabirds per 4,000 years in operation and one incident with *moderate* environmental harm to the ice edge per 2,000 years in operation.
>
> Emergency response measures (oil spill response) for acute contamination could reduce the potential for harm for exposed environmental components.

What has been specified as impacts in the impact assessment applies for oil and gas production in Barents Sea South-east, not specifically for the blocks the Decision applies to.

The Court finds, among other things based on the evidence given by Samset, that black carbon has a great potential for harm in northern areas. The Court cannot see that the effect of such emissions has been quantified. In connection with preparation of the impact assessment, the Norwegian Institute for Air Research (NILU) was asked to conduct an expert assessment regarding ”ordinary air emissions“.

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The following is stated at page 39 in the report from NILU regarding black carbon:

> In recent years, the climate effect of soot particles in the Arctic has gained some attention. However, any quantification of this effect is quite uncertain.

At page 43 in NILU's report it is stated:

> The emissions from the planned activities at Jan Mayen and the Barents Sea have a composition similar to current emissions in the Arctic. Seen in light of the publication from Ødemark et al. (2012), it is therefore natural to conclude that the climate effect related to the new facilities will be extremely small. However, if future emissions from vessel traffic and petroleum activities change composition, for example, through reduced sulphur emissions, the total climate effect may change.

As regards the risk for environmental harm as a result of the Decision, the available information and what is cited above show – in the Court's view – that it can be concluded that the risk can be characterised as limited. The Court is of the opinion that this conclusion is sustainable even when the consultation statements of the Norwegian Polar Institute and the [Norwegian Environment Agency] are taken into account. The Court will return to these under Section 5.3.4.

5.2.4 Has the duty to take measures under the third paragraph of Article 112 been met?
Under Section 5.2.2, the Court has held that the right in Article 112 of the Constitution is not violated if the duty to take measures under the third paragraph of the provision is met.

The Court has concluded under Section 5.2.2 that Article 112 does not cover CO emissions abroad from exported oil and gas. It is therefore not required that the Court assess whether sufficient measures have been taken to remedy the risk related to such emissions.

Under Section 5.2.3, the Court has concluded that the risk for environmental harm related to the Decision can be characterised as limited. Whether the duty to take measures under the third paragraph of Article 112 has been met will be assessed according to this.

It is stated under Section 5.2.2 that the courts should be restrained in reviewing whether a given measure is sufficient. It is stated at the same place that importance must be placed on the Storting having taken measures. Several of the measures at issue and which the Government has cited are legislation, i.e. measures laid down by the Storting.

It is also stated in Section 5.2.2 that it is the Court's opinion that importance must be placed on the Storting having taken a position on a predicate for the Decision, i.e. the decision on opening Barents Sea South-east, and that the Storting has more directly taken a position on the Decision. Questions related to the 23rd licensing round have thus been up for a vote in the Storting three times, i.e. in 2014, 2015 and 2016.

In 2014, Storting Member Rasmus Hansson proposed that the process of awarding

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blocks covered by the Decision be halted. The following is quoted from the proposal, included in Recommendation 206 to the Storting:

> The proponent shows in the Member proposal that the UN's Intergovernmental Panel on Climate Change concluded in autumn 2013 that it is extremely likely that human activity is a key reason for the observed global warming. It is pointed out that Norway has committed itself to a target of limiting global warming to two degrees compared with the pre-industrial period.
>
> ….
>
> The work on the 23rd licensing round is now under way on the Norwegian continental shelf, and the Government consultation letter is setting the stage to announce exploration blocks in heretofore untouched areas in the Barents Sea. Because of the long time horizons in the oil and gas industry, areas that are opened now for exploration, and where commercially exploitable discoveries are made, will not come into production until the 2030s. The proponent thinks that the supposition that any new discoveries in the 23rd licensing round will be producible is irresponsible towards the oil and gas industry, the taxpayers and future generations. It is pointed out that climate changes are the greatest challenge humanity is facing. As a step in this, the proponent believes that Norway should start a controlled shut-down of the oil and gas activities over a twenty-year period. The first step should be to halt the awarding of new exploration blocks in the 23rd Licensing Round.

The proposal was not adopted. The recommendation from the Storting's Standing Committee on Energy and the Environment shows that there were several different combinations of majorities. It was emphasised in these that at petroleum policy must be united with environmental and climate policy and that the main goal in Norwegian petroleum policy is to arrange for profitable production of oil and gas for the long term, but that the management must occur within stringent frameworks when it comes to health, safety and the environment.

In 2015, the Christian Democratic Party, the Liberal Party, the Socialist Left Party and the Green Party presented two proposals in connection with the consideration of a new management plan for the Barents Sea (Report to the Storting 20 (2014-2015)). In Recommendation 383 to the Storting, it is stated that the proposal from the mentioned parties involved the Storting asking the Government to ensure that petroleum activities would not be started in the areas along the ice edge and the polar front. The other proposal involved the Storting asking the Government to refrain from awarding specified blocks in the 23rd Licensing Round in line with the consultation input from the Norwegian Polar Institute and the Norwegian Environment Agency. None of the proposals were adopted.

In 2016, Storting Members Audun Lysbakken, Siv Elin Hansen and Heikki Eidsvoll Holmås submitted a total of five proposals reproduced in Recommendation 274 to the Storting. Three of the proposals read as follows:

1. The Storting asks the Government to halt the ongoing 23rd licensing round to await an independent, knowledge-based review of which Norwegian oil can be extracted in light of the climate agreement in Paris.
3. The Storting asks the Government to carry out an independent, knowledge-based review of which Norwegian oil can be extracted in light of the climate agreement in Paris.

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4. The Storting asks the Government to submit a report to the Storting on the consequences for Norwegian petroleum policy in light of the climate agreement in Paris, based on an independent review of which Norwegian oil can be extracted if the global climate goals are to be reached.

None of the proposals were adopted. There were also during the consideration of these proposals several combinations of majorities in the Storting's Standing Committee on Energy and the Environment. In some of these, reference is made to several measures to reduce greenhouse gas emissions.

Both the broad agreement in the Storting on the opening of Barents Sea South-east and the consideration of the three proposals that have been cited cannot easily be understood other than as the majority in the Storting has regarded as acceptable the risk for environmental harm and climate deterioration due to the Decision, in part because of the existing measures.

As the Court sees it, it can be asserted after this that the Storting's involvement in itself is sufficient to find that the duty to take measures has been fulfilled. However, a specific assessment of the measures the Government has cited also provides a basis for concluding this. The Court points out in connection with this that the Government, as regards measures to remedy the risk for environmental harm due to national CO emissions, has cited the system with a CO tax, that the emissions are included in the national emissions trading system and that burning of excess gas is generally prohibited. It has also been emphasised that the introduction of a prohibition on shore-based power is being considered and that research and technology development are being concentrated on. The last two measures mentioned are relevant because possible emissions in connection with production of one or more of the blocks in question is 10 to 15 years into the future.

As regards measures for remedying the risk for (traditional) environmental harm, the Government has pointed out that there are a number of safety measures that will attend to environmental concerns on the Norwegian continental shelf in general and for the blocks the Decision covers in particular. According to what the Court understands, measures for remedying the risk for national CO emissions will also be important for the risk related to black carbon.

The Government has also pointed out that there are both geographic and temporal limitations for exploration drilling, in that exploration drilling shall not occur closer than 50 kilometres from the actual observed ice edge from 15 December to 15 June. It has also been pointed out that further assessment will be carried out under Section 4-2 of the Petroleum Act in connection with any development and operation of one or more of the blocks and that in connection with that, additional environmental requirements can be imposed on the operators at that time. Reference has been made to the discussion in Proposition No. 43 (1995-96) to the Odelsting at page 34 of the relationship between the process related to opening of a new area and in connection with any development:

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> The Ministry of the Environment has stated in its consultation statement that the Act should be clarified, so that the balancing that will take place before opening new areas will also cover the operating phase.
>
> Under the legal definition of petroleum activities in Section 1-6 c), both production and use of petroleum are covered, in other words, the operating phase is included in the term "petroleum activities". By replacing the term "activities" with "petroleum activities" in the text of the Act, it becomes clearer that the assessment that must be done before opening new areas includes all stages in the activities. However, the Ministry will point out that it is primarily the effects from the activities in the exploration phase that must be assessed pursuant to Section 3-1. At the time for consideration of opening, it is impossible to have a clear opinion of whether discoveries will be made or these will be the object of development. Because of this, it can be difficult in practice to have particularly extensive assessments regarding the development and operating phase. In addition, there are special provisions in the Act regarding impact assessments before development can be commenced, see Section 4-2, second paragraph which is also given corresponding application for Section 4-3.

The Environmental Organisations have pointed out that emissions from petroleum production are Norway's largest impetus for emissions and that Norway so far has not been close to achieving its emissions targets. They have stated that Norway is not doing enough.

Whether enough is being done in climate policy generally lies outside what the Court must review. As indicated above, the measures meet the requirements that can be inferred from Article 112 of the Constitution. In relation to this requirement, enough is therefore being done. The Environmental Organisations have emphasised that the Decision must be assessed in a broader context. They have pointed out that these are the first licenses granted after there is reliable knowledge that the world's proven fossil fuel resources exceed what can be burned in order to reach the goals in the Paris Agreement. They have also emphasised that the Decision opens the way for petroleum activities further east and north than ever and have alleged that the purpose is to maintain petroleum production at the current level despite the fact that emissions must be reduced at a dramatic pace. They have also argued that the Decision contributes to extensive investments and technology development that contribute to increased fossil fuel production (the path argument) and that we are confronting a crossroads (the crossroads argument). They have pointed out that there is not even room for emissions from discovered oil and gas reserves in the carbon budget. They have stated that everyone must take responsibility and that Norway occupies a special position and that The Government must point out which countries will let their resources lie unused so that the Government can produce more. They have also emphasised that the demand for oil and gas will be reduced in such a way that it is far from certain that production from the blocks the Decision covers will be profitable.

As the Court sees it, none of these arguments are relevant in the assessment of whether the Decision violated Article 112 of the Constitution. In part it is talk of possible impacts from the Decision that are too remote in relation to the risk that is relevant to assess, and in part the issues involve overall assessments that are better assessed through political processes that the courts are not suited to reviewing.

Accordingly, it is the Court's opinion that the Decision as such or parts of it are not contrary to Article 112 of the Constitution. This is because the duty to take measures has been fulfilled.

5.2.5 Pleadings in support pursuant to section 15-8 of the Dispute Act

As mentioned above under Section 2.2, the Court has received in connection with the case three written submissions. The submissions are included in the decision basis in the case, see section 15-8, second paragraph, second sentence of the Dispute Act.

The following appears in the electronic version of the second edition of the commentary on the Dispute Act (by Tore Schei, Arnfinn Bårdsen, Dag Bugge Nordén, Christian H.P. Reusch and Toril M. Øie) :

> Inclusion of the submission in the decision basis does not mean that any exception is being established to the disposition principle in cases regarding legal relationships subject to the parties' unlimited right of disposition, see section 11-2, first paragraph [of the Dispute Act]. Thus other claims may not be advanced through pleadings in support, nor may another prayer for relief or other grounds for a prayer for relief be submitted other than what has been claimed in the case.

The pleadings in support argue that Norway – under principles of international law – has a duty to refrain from awarding production licences. It is also argued that the Decision is contrary to Norway's obligations under rules on international human rights, particularly the European Convention on Human Rights. The pleadings in support also contain references to comparative law materials. The Environmental Organisations have not claimed that the Decision is contrary to international obligations, including the European Convention on Human Rights. Therefore the Court will not consider– because of the disposition principle – whether such arguments can lead to the Decision being wholly or partially invalid. The Court cannot otherwise see that the pleadings in support contribute to any extent worth mentioning to resolving the questions the Court must decide. Therefore they will have no importance for the Court's conclusions.

5.2.6 Other substantive arguments from the Environmental Organisations

The Environmental Organisations have claimed as an alternative argument that if Article 112 of the Constitution is to be understood such that a proportionality assessment must be carried out, then the Decision is disproportionate.

As alternative grounds for their prayer for relief, they have argued that the Decision is contrary to Section 3-3 of the Petroleum Act, see Section 3-1, when interpreted in light of Article 112 of the Constitution. The argument has not been elaborated on very much.

Based on the understanding the Court has expressed under Sections 5.2.1 and 5.2.2 on the meaning of Article 112, the Court sees the matter in such a manner that neither of these two arguments leads to a different result than what appears in Section 5.2.4. Nor do these

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arguments thus mean that the Decision is invalid.

5.2.7 Summary and conclusion on the question of whether the Decision is contrary to Article 112 of the Constitution

Article 112 of the Constitution is a rights provision, which can mean that decisions like the one at issue here are invalid.

However, the decision in this case does not violate Article 112. The risk of both (traditional) environmental harm and climate deterioration as a result of the Decision is limited, and remedial measures are sufficient.

Some issues that the Environmental Organisations have raised fall outside what is supposed to be reviewed by the Court. The case involves the validity of the decision on awarding licences in the 23rd Licensing Round, not the decision on opening Barents Sea South-east, Barents Sea South or Norwegian environmental and climate policy in general. Whether Norway is doing enough in the environmental and climate area and whether it was prudent to open fields so far north and east are questions that involve overall assessments which are better evaluated through political processes that the courts are not suited to reviewing.

5.3 Have procedural errors etc. been committed that result in the Decision being invalid?

5.3.1 Introduction

The Environmental Organisations have argued in the alternative that the Decision is invalid for three alternative reasons. Firstly, because the duty to assess impacts has been breached. Secondly, because the Decision rests on erroneous facts. As the Court understands this argument, it is related to the duty to assess impacts; further assessment would have produced correct facts. The argument is also understood to be particularly related to what has been alleged regarding errors concerning economic assessments. Thirdly, it is argued that the Decision has not been sufficiently justified. It has been emphasised that the deficiencies in the justification reflect deficiencies in the impact assessment.

The Environmental Organisations have argued that the errors individually and as a whole obviously – in any event, probably – have affected the substance of the Decision, especially for those awards that have been made in Barents Sea South-east. The Decision is thus invalid in their opinion.

The arguments are related to the climate question, questions regarding (traditional) environmental harm in particularly vulnerable areas and to economic assessments. The arguments encompass both the decision on opening Barents Sea South-east and the Decision, in the sense that it is alleged that errors related to the opening have formed a basis for the Decision, which means that the Decision is invalid. The Court does not understand it to mean that it is alleged that there are errors in the decision on opening Barents South in 1989 that result in the Decision being invalid.

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Since the Environmental Organisations' principal argument – that the Decision is wholly or partially contrary to Article 112 of the Constitution – has not succeeded, the Court will take a position on the arguments regarding procedural errors etc.

The government has argued that none of the three alternative grounds invoked lead to the Decision being invalid. The Government has emphasised that all requirements for assessment have been met. It has been argued that the assessments satisfy the Petroleum Act with regulations and requirements stemming from administrative practice. The Government has also argued that the Environmental Organisations are blending together the proceedings related to the decision on opening Barents Sea South, Barents Sea South-east and the proceedings related to the Decision. The Government has asserted that procedural errors related to the determination of the opening processes are only relevant if these decisions are invalid. The Government has also argued that there are no errors in the factual basis for the Decision, nor are there errors related to the justification.

The Court comes back to the parties' arguments in more detail below.

5.3.2 Legal bases

As mentioned in Section 5.3.1, the Environmental Organisations' arguments are related to both the decision on opening Barents Sea South-east and to the Decision. They involve the proceedings (breach of the duty to assess), they involve questions of whether the Decision rests on erroneous facts, and they involve the question of whether the Decision is sufficiently justified. Legal requirements for *assessment* stem from the Petroleum Act, but in principle from other rules as well. It is thus without question that Section 17 of the Public Administration act applies. However, it has not been shown that this provision has independent significance in connection with the assessment of the decision on opening Barents Sea South-east or the Decision.

Article 112 of the Constitution also imposes requirements for the proceedings, but these requirements must be considered fulfilled through the rules in the Petroleum Act, see more specifically below.

Assessment requirements before an area is opened for production stem from Section 3-1 in the Petroleum Act. The first paragraph in the provision reads as follows:

> 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.

It is stated in Proposition to the Odelsting No. 43 (1995-1996) at page 33:

> In 1992, the Constitution acquired a new provision in Article 110 b. The provision establishes that assessments shall be done of the environmental impacts of measures which may have an effect on the environment. Among other things, the assessment shall arrange for information for citizens and create a basis for their participation in the decision process.

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> The Ministry finds that Section 3-1 satisfies the requirements Article 110 b of the Constitution establishes..

Regarding the scope of the duty to assess impacts at the opening stage, the Court also points to the quotation from Proposition to the Odelsting No. 43 (1995-96) at page 34, reproduced above under Section 5.2.4, where it is stated that the duty to assess impacts encompasses all stages in the activities, but the Ministry points out that it is primarily "the effects of the activities in the exploration phases that must be assessed pursuant to Section 3-1". The Ministry emphasises in connection with that: "At the time for consideration of opening, it is impossible to have a clear opinion of whether discoveries will be made or these will be the object of development. Because of this, it can be difficult in practice to have particularly extensive assessments regarding the development and operating phase. In addition, there are special provisions in the Act regarding impact assessments before development can be commenced, see Section 4-2, second paragraph which is also given corresponding application for Section 4-3".

In "Petroleumsloven. Kommentarutgave" ("The Norwegian Petroleum Act. Commentary Edition") (by Ulf Hammer, Trond Stang, Sverre B. Bjelland, Yngve Bustnesli and Amund Bjøranger Tørum) – digital version – it is stated for Section 3-1 that the duty to assess impacts primarily relates to impacts in the exploration phases, but also to certain questions related to the development and operation phase. It is thus said:

> Based on this, it must be natural to require that some key questions concerning possible development of a deposit be assessed to a degree sufficient for the authorities to undertake a prudent balancing of risk and disadvantages against economic and social benefits, if petroleum should be found in commercial quantities in the area that is opened. In other words, comprehensive, detailed impact assessments related to the development and operation phase are not required

When licensing under Section 3-3 of the Petroleum Act, requirements for the processing of the matter result from Section 3-5 in the Petroleum Act, Chapter 3 in the Petroleum Regulations and administrative practice. Licensing is also based on the processing of the matter during the opening of an area.

The licences granted in the Decision have not yet led to development and operation of petroleum deposits. For the sake of context, however, it is also considered appropriate to briefly explain the requirements for assessment that apply to this stage. The first, second and third paragraphs of Section 4-2 of the Petroleum Act read as follows:

> If a licensee decides to develop a petroleum deposit, the licensee shall submit to the Ministry for approval a plan for development and operation of the petroleum deposit.
>
> The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased. The plan shall also comprise information on facilities for transportation or utilisation comprised by Section 4-3. In the event that a facility is to be placed on the territory, the plan shall in addition provide information about what applications for licences etc. have been submitted according to other applicable legislation.

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> The Ministry may, when particular reasons so warrant, require the licensee to produce a detailed account of the impact on the environment, possible risks of pollution and the impact on other affected activities, in respect of a larger defined area.

Regulations for the Petroleum Act have also been issued which are relevant for the duty to assess impacts, and guidelines have been issued by the Ministry of Petroleum and Energy and the Ministry of Labour and Social Affairs in "Guidelines for plan for development and operation of a petroleum deposit (PDO) and plan for installation and

operation of facilities for transport and utilisation of petroleum (PIO)" (PDO/PIO Guidelines).

With respect to Section 4-2 in the Petroleum Act, it is stated in Proposition No. 43 (1995-96) to the Odelsting, pages 42 and 43:

> Environmental effects are included in the term "environmental conditions". The provision thus authorises requirements for preparation of impact assessments. This rule must be seen in light of the requirements both national and international regulations establish for impact assessments including the provision in Article 110 b of the Constitution. See page 33 of the Proposition under the discussion of Section 3- l.

The quotation from the Proposition concerning Sections 3-1 and 4-2 relates to requirements in (former) Article 110 b, second paragraph, in the Constitution, a provision which – in a new linguistic style – has been carried forwards in the second paragraph of Article 112. The Court has no reason to see things differently than that the requirements in Sections 3-1 and 4-2 satisfy the requirements for assessment in the second paragraph of Article 112.

If an administrative decision rests on an *erroneous factual basis,* this can mean that it is invalid, see for example, Eckhoff/Smith: Forvaltningsrett ("Administrative law"), 6th edition, page 580. If the duty to assess impacts has not been complied with, a decision is nevertheless valid when there are grounds to conclude that the error has not been decisive for the substance of the decision, see Section 41 of the Public Administration Act. A similar rule applies for errors in the factual basis for a decision, see for example, Eckhoff/Smith: Forvaltningsrett ("Administrative law"), 6th edition, page 581. The Decision on awards in the 23rd licensing round has been taken by the King in Council, i.e. the Government. The Decision is thus only invalid if there is an error related to the duty to assess impacts or an error in the factual basis, if there are grounds to conclude that it has decisively affected the Government's decision.

The Court is of the opinion that the Environmental Organisations' allegation of *inadequate justification* does not relate to the requirement in Section 25 of the Public Administration Act, but to a requirement established in case law that the justification must provide sufficient basis for determining whether a decision suffers from substantive errors, see for example, Rt. 1981, page 745. Such a deficiency can mean that a decision is invalid.

The Environmental Organisations have also pointed out that particularly stringent

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requirements result from Article 112 of the Norwegian Constitution.

5.3.3 The argument regarding deficient assessment of climate questions

The Environmental Organisations have primarily alleged that climate effects have not been sufficiently assessed. They have pointed out that a field has been opened in Barents Sea South-east and that exploration activity in Barents Sea South is continuing with the aim of maintaining Norwegian petroleum production at the same level as today after 2020. Climatic consequences of this must be thoroughly assessed. In their opinion, this has not been done.

The Environmental Organisations have also alleged that no assessment has been carried out related to whether it actually will be possible to meet the demand for emissions cuts while at the same time the production level on the Norwegian continental shelf is maintained after 2030. They have further stated that no assessment has been carried out related to stimulating investments and technology development, nor has it been assessed what significance this has for increased fossil fuel productions. Nor has an assessment been carried out related to whether the emissions trading system will be effective.

The argument from the Environmental Organisations encompasses all blocks covered by the Decision, i.e. not only those in Barents Sea South-east, but also blocks in Barents Sea South. The Court understands the argument to say that it relates to deficient assessment of impacts that may arise if development and production are started. In any event, it has not been specifically pointed out which risk may arise from exploration activity.

As regards the Government's arguments, see Section 4.3 and Section 5.3.1. With respect to the question of assessment related to greenhouse gas emissions, the Government has argued that all requirements with respect to assessment have been met, that a new assessment will be carried out in the event of any development and operation and that conditions can be set in connection with that which address the concerns at issue. The Government has also cited the fact that issues such as this are considered as a stage in climate policy.

The Court notes that the following appears in Report No. 36 (2012-2013) at page 33, regarding national greenhouse gas emissions:

> Several bodies invited to comment on the Report point out that petroleum activities in Barents Sea South-east will contribute to increased Norwegian greenhouse gas emissions. The Ministry cites the impact assessment where it is stated that air emissions from petroleum activities in the opening area will result in marginal contributions to the total burden. It is also pointed out that the government's overall goal in climate policy is to contribute to limiting the anthropogenic temperature increase to a maximum of two degrees Celsius compared to the pre-industrial level. Regulation of CO_2 emissions from the petroleum sector is an integral part of the climate policy in effect, see Report to the Storting No. 21 (2011-2012).

As stated in the report, the impact from national air emissions – as a result of the opening

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of Barents Sea South-east – has been assessed as: Emissions will result in marginal contributions to the total burden. As regards CO_2 emissions abroad from exported oil and gas, there is no obligation - as the Court will come back to in Section 5.3.5 – to assess this.

In addition – as it is also stated – emissions of greenhouse gases are assessed as a part of climate policy. There are, therefore, a number of studies, assessments and debates in the Storting regarding the climate question. Among other things, it is dealt with in the "Climate Settlements" in 2008 and 2012, in several Reports to the Storting – including the one cited in the quotation – Report to the Storting to the Storting No. 13 (2014-2015) and in other documents, for example, Proposition No. 114 to the Storting (2014-2015) on the development of the Johan Sverdrup field.

Proposals which would have had consequences for the Decision – if any of them had been adopted – have been considered by the Storting. See Section 5.2.4 regarding the consideration in the Storting of questions related to the 23rd Licensing Round in 2014, 2015 and 2016. The proposals in 2014 (Recommendation No. 206 to the Storting (2015–2016) and Recommendation to the Storting No. 274 were based on climate considerations.

See also Recommendation No. 258 to the Storting (2016-2017), where it is stated that the Storting considered a proposal from Rasmus Hansson regarding strategic adaptation and phasing out of Norwegian petroleum production in order to reduce Norway's economic risk and meet the climate goals in the Paris Agreement. The proposal was not adopted. The following is quoted from Recommendation to the Storting No. No. 258 (2016-2017):

> A third majority, the members of the Labour Party, the Conservative Party, the Progress Party, the Christian Democratic Party and the Centre Party, point out that the prospects for both the oil and gas markets in the foreseeable future form a basis for production of Norway's petroleum resources, provided that the cost trend is kept under control. This also applies in scenarios that are in line with international climate objectives. This majority cites the letter from the Minister where it is stated that Norwegian climate policy objectives will be reached while at the same time we have strong and competitive petroleum activities.
>
> This majority points out that the petroleum activities will thus for many decades play a central role in creating wealth and in employment, technology development and societal development. There will also be demand in a low-emissions society for petroleum products. This majority points out that through global pricing of CO_2 emissions, the resources produced with the lowest emissions will be positioned to meet the demand for fossil fuel resources in such a scenario.

It is the Court's opinion, based on what the Environmental Organisations have argued on this point, that neither the decision on opening Barents Sea South-east nor the Decision is invalid. Nor does the Decision rest on an erroneous factual basis.

5.3.4 Argument regarding deficient assessment of traditional environmental harm related to particularly vulnerable areas

The Environmental Organisations have cited the fact that the Decision moves petroleum

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activities further north than ever and partially into the variable ice edge at the polar front. They have argued that the assessment leaves major questions with respect to challenges related to these areas. They have emphasised that this is expressed with particular clarity in advice against proceeding from the Norwegian Polar Institute and the Norwegian Environment Agency. They have argued that it will not be possible to bring this up with the companies afterwards. They have pointed out that an assessment must be done for each licence.

The argument is related to the fact that blocks in particularly vulnerable areas and covers both blocks in Barents Sea South and in Barents Sea South-east. Advice against proceeding from the Norwegian Polar Institute and Norwegian Environment Agency has been cited, but the blocks in question have not been specifically indicated.

The Court understands the argument to say that it relates to deficient assessment of impacts that may arise if development and production are commenced. In any event, it has not been pointed out specifically which risk may arise from exploration activity.

As regards the Government's arguments, see Section 4.3 and Section 5.3.1. Regarding in particular the question of assessing impacts for particularly vulnerable areas, the Government has referred to the fact that questions related to matters such as the ice edge, black carbon, vulnerable waters and emissions have been covered by all appropriate assessments and procedures in connection with the opening of Barents Sea South-east. The Government has emphasised that in the event of any development and operation, further assessment must be carried out and that in connection with that, conditions can be set which address the concerns in question.

The reference by the Environmental Organisations to the Norwegian Environment Agency and the Norwegian Polar Institute involves consultation statements of 27 March 2014 and 4 April 2014, respectively. The statements have been provided for the proposal by the Ministry of Petroleum and Energy of 14 February 2014 regarding blocks to be announced in the 23rd Licensing Round.

The proposal from the Ministry of Petroleum and Energy was sent for consultation after areas that were of interest were nominated. The proposal by the Ministry of Petroleum and Energy states: For the newly opened area in Barents Sea South-east, the only input requested relates to whether new, significant information has appeared after the Storting considered Report to the Storting No. 36 (2012- 2013) *New opportunities in Northern Norway - opening of Barents Sea South-east to petroleum activities* and Report to the Storting no. 41 (2012-2013) *Supplement to Report to the Storting No. 36 (2012- 2013).* For other areas, the only input requested is that related to whether new, significant information had appeared after the respective management plan was adopted, see Report to the Storting No. 28 (2010-2011) *An industry for the future - Norway Ïs petroleum activities.* Any new, significant information will be included in the decision basis for the announcement of the

23rd Licensing Round.

Before the Court undertakes a specific assessment of whether additional assessments should have been carried out with respect to the matters the Environmental Organisations have cited, it is considered appropriate to quote from the advice against proceeding from the Norwegian Polar Institute and the Norwegian Environment Agency. It is also considered appropriate to account for main features of the process related to the issues in question.

The consultation letter from the Norwegian Polar Institute states in part:

> The knowledge basis regarding species and ecosystems in Barents Sea South-east is still very deficient. In the impact assessment in connection with the opening of Barents Sea South-east, it was claimed that the knowledge about natural resources in the area was ”considerable“ and ”comparable with the level of knowledge for areas opened in Barents Sea South“. The Norwegian Polar Institute will again emphasise, in line with our comments on the impact assessment, that even though the status of knowledge does not differ substantially from other parts of the Barents Sea, this is not synonymous with having sufficient knowledge.
>
> The gaps in knowledge are great, not least as regards variation through the year and between years, with respect to both environmental value and vulnerability. The Norwegian Polar Institute also wishes to emphasise the need to improve the knowledge about and the understanding of how climate changes will affect environmental value and vulnerability, and then to what extent petroleum activities might affect these values in light of the expected changes.
>
> **Particularly valuable and vulnerable areas**
> Particularly valuable and vulnerable areas (Norwegian acronym: SVO) have been identified in the area sought through the *Management Plan* . Limits have been set for activities in connection with the particularly valuable and vulnerable areas, including for petroleum activities. Figure 1 shows that the *Management Plan* specifies that in Barents Sea South and South-east, petroleum activities shall not be commenced in the particularly valuable and vulnerable areas *Bear Island*, *Variable ice edge* and *Polar front*. Some of the proposed blocks in northern parts of Barents Sea South-East directly overlap with identified particularly valuable and vulnerable areas (see Figure 2) *This involves blocks 7335/3,7435/10-12, 7436/1 and 7435/9.*
>
> ……………..
>
> **The polar front in particular**
> The polar front is the term for the boundary that occurs where warm Atlantic water meets cold Arctic water. This temperature gradient contributes to stirring of water masses, which in turn makes the area extremely productive. This production contributes to the area being an extremely important feeding area for a large number of animal species, for example, many species of migratory seabirds, seals and whales.
>
> Climate changes can alter the location and intensity of the polar front through changes in sea temperature and ocean currents. Examples of this can be seen along the west coast of Spitsbergen, where large variation in temperature, salinity and current patterns has been seen in the last decade.
>
> Some of the proposed blocks in northern parts of Barents Sea South-East (7335/3, 7435/10-12 and 7436/1,10) directly overlap with the *Polar front* particularly valuable and vulnerable area (see Figure 2).

The Management Plan says the following about limits for petroleum activities in connection with the polar front:

"*In the areas along the ice edge and the polar front, petroleum activities shall not be commenced in this Storting period"*.

The marginal ice zone in particular

The Norwegian Polar Institute finds it appropriate to highlight particular circumstances concerning ice extent and the marginal ice zone that are relevant for the area covered by the proposal for blocks in the 23rd Licensing Round.

The marginal ice zone, from the outer limit for ice extent and in the entire area where light passes through the ice cover, is an area with elevated ecological vulnerability. Depending on which vulnerable environmental and natural resource values are involved, there is elevated vulnerability from the limit for maximum ice extent (for example, populations of seabirds and sea mammals), in under the ice (for example, primary production) and within the limit for close drift ice or permanent ice (for example, polar bears occur in particularly large density in a belt along areas with less ice cover). The ecological vulnerability is greatest in the spring and summer. The marginal ice zone (and the polar front) are also among the most important habitats and feeding grounds for key species such as capelin and Arctic cod. These species are also extremely important as prey for many species of seabirds and sea mammals, in addition to being important for the commercial fisheries.

………

Figure 3 shows the monthly limit for maximum ice extent throughout the year, based on data materials from the 30-year period of 1984–2013. The maximum ice extent is occasionally well south of the established *Variable ice edge* particularly valuable and vulnerable area. Several of the proposed blocks in central parts of Barents Sea South and the blocks in the northern part of Barents Sea South-east are close to or inside the maximum limit for ice extent from November to June, inclusive. This involves blocks 7234/3, 7235/1-5, 7234/6-9, 7234/11-12, 7235/7 7322/3, 7323/1, 7323/5-6, 7332/9, 7333/7, 7335/1-3, 7336/1, 7434/7-9, 7435/9-12 and 7436/10. This is a circumstance which must be taken into consideration in connection with assessing activity in these areas.

One of the proposed blocks in the northern part of Barents Sea South-East (7435/9) directly overlaps with the *Variable ice edge* particularly valuable and vulnerable area (see Figure 2). The Management Plan says the following about limits for petroleum activities in connection with the ice edge: "«*In the areas along the ice edge and the polar front, petroleum activities shall not be commenced in this Storting period"*.

………

The Norwegian Polar Institute believes that the following proposed blocks which directly involve the *Management Plan's* particularly valuable and vulnerable areas *Polar front* or *Variable ice edge* should not be made available: 7335/3, 7336-1 ,7435/9-12 and 7436/10.

Based on the probability of effects in areas with elevated ecological vulnerability in the marginal ice zone and the polar front, **the Norwegian Polar Institute also recommends that the following blocks in Region A (north-eastern part of Barents Sea South-east) and in Region B in Barents Sea South-east not be made available: 7322/3, 7323/1, 7335/1-3 and 7434/7-9.**

In addition, **the Norwegian Polar Institute believes that limitations should be placed on drilling times in Region C, in the middle part of Barents Sea South-east, i.e. following blocks: 7234/3, 7234/6-9, 7234/11-12, 7235/1-5, 7235/7, 7332/9 and 7333/7. Drilling**

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should not be permitted from 1 January – 30 April in this area.

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……

> The Norwegian Polar Institute also believes that the Ministry of Petroleum and Energy (MPE) **should specifically state and document whether existing emergency preparedness is sufficient to deal with accident situations in the areas, and state how it is planned to get preparedness up to a necessary and prudent level when it is not currently sufficient.**

According to what the Court can see, the following blocks advised against by the Norwegian Polar Institute – reproduced in the quotation above – are not covered by the Decision: 7234/7-9, 7234/11-12, 7235/7, 7332/9 and 7333/7, i.e. a total of 8 blocks. It also appears that the Norwegian Polar Institute's proposals with respect to restrictions on drilling times has been accommodated. See in connection with that Production Licence No. 859, where it is stated that drilling is not permitted in an area closer than 50 kilometres to the actual observed ice edge from 15 December to 15 June.

In the consultation letter from the Norwegian Environment Agency, it is stated:

> **The Norwegian Environment Agency believes a more thorough technical process is necessary in order to define a limit for the ice edge that also covers more extreme years. This should be carried out through the cross-sector work on a technical basis for the management plans. Until there is agreement on such a limit, the blocks furthest north-east in Barents Sea South-east should not be announced. This applies to 7434/7, 8 and 9, 7435/9, 10, 11 and 12, 7436/10, 7332/9, 7333/7, 7335/1, 2 and 3, and 7336/1.**
>
> **The northernmost blocks proposed to be announced in Barents Sea South, 7322/3, 7 and 9, 7323/1, 5 and 6, 7324/5, 6 and 10 and 7325/2, 3, 4, 5 and 6, are also located where ice may occur. We recommend that these blocks not be announced before experience with drilling in the already-awarded blocks 7423, 7424 and 7425 has been assessed.**

According to what the Court can see, the following blocks advised against by the Norwegian Environment Agency – reproduced in the quotation above – are not covered by the Decision: 7332/9, 7333/7, 7323/5 and 6, 7325/2, 3 and 6 and 7324/10, i.e. a total of 8 blocks in all.

There are similarities between the statements from the Norwegian Polar Institute and the Norwegian Environment Agency with respect to which of the proposed blocks are considered problematic with respect to the concerns cited, but there are differences to a certain extent. The Norwegian Polar Institute refers in this way to blocks 7234/3, 7234/6-9, 7234/11 and 12, 7235/1-5 and 7235/7 without these being advised against by the Norwegian Environment agency, while the Agency advises against the following blocks which are not referred to by Norwegian Polar Institute: 7322/7 and 9, 7323/5 and 6, 7324/5,6 and 10 and 7325/2-6.

Accordingly, it is found that several blocks the Norwegian Polar Institute and the Norwegian Environment Agency regarded as problematic are not covered by the Decision. Furthermore, it appears that these consultative bodies have differed little in their views on what the consequences of the argument should be.

The Norwegian Polar Institute and the environmental authorities have been consultative bodies in the process preceding the opening of Barents Sea South-east, in connection with consultation on a programme for the impact assessment from 2011 as well as in connection with the impact assessment here. Consultation suggestions have been considered by the Ministry and the Government before the decision on opening was taken. See analyses carried out of impacts referred to in Section 5.2.3. It is stated in Report to the Storting No. 36 (2012-2013) at page 36:

> It is the Government's assessment that the impact assessment and the consultation statements received indicate that it is prudent to open Barents Sea South-east for petroleum activities with the frameworks stated below.

When the report was considered by the Storting, the following comments appeared in Recommendation to the Storting no. 495 (2012-2013).

> A majority of the Committee, all except the Member from the Christian Democratic Party, are of the opinion that the Ministry has conducted a thorough and lawful management of the opening process.
>
> ……..
>
> In the updated Management Plan for the Barents Sea and the maritime areas off the Lofoten Islands (Report to the Storting No. I (20I0-2011)), the Government decided that the area to be opened did not differ significantly from other parts of the Barents Sea. *It is therefore reasonable that the Government used as a starting point the general knowledge from the work on the Management Plan in the work on the impact assessment.*
>
> The Committee has noted that the greatest environmental impacts are particularly in the northern part of the area to be opened, towards the ice edge and all the way south towards land. The Committee points out that the Ministry also outlines a need in the northern part of the area to be opened for new technology and new solutions for oil spill response.

The concern for the ice edge and the polar front has also been assessed by the Ministry and the Government after it was decided to open Barents Sea South-east, i.e. in connection with the consultation round that was started by the Ministry's letter of 14 February 2014.

The Storting has also considered the argument after the opening of Barents Sea South-east. In connection with the consideration of Report to the Storting No. 20 (2014-2015) – where an updated Management Plan was proposed for the Barents Sea (among other areas), including calculation of the ice edge – two proposals were presented (as mentioned under Section 5.2.4) from the Christian Democratic Party, the Liberal Party, the Socialist Left Party and the Green Party. One proposal involved the Storting asking the Government to ensure that petroleum activities would not be commenced in the areas along the ice edge and the polar front. The other proposal involved the Storting asking the Government to refrain from awarding specified blocks in the 23rd Licensing Round in line with the consultation input from the Norwegian Polar Institute and the Norwegian Environment Agency. None of the proposals were adopted.

The review above shows that the concern for the ice edge and the polar front has been assessed both before and after the opening of Barents Sea South-east by the Ministry, the government and the Storting. The Environmental Organisations – and the Norwegian Polar Institute in its consultation statement – have referred to the fact that in the Management Plan, In Report to the Storting No. 10 (2010-2011), it is stated on page 132 that petroleum activities shall not be commenced along the ice edge and the polar front in the Storing period in question. It is difficult to see what independent significance such a statement has for the Court's assessment. It is also stated in Report to the Storting No. 41 (2012-2013) at page 1 – as the Court understands the statement – that the circumstance is not an obstacle to conducting petroleum activities in the entire Barents Sea South-east, and in Recommendation to the Storting No. 495 at page 4 it is stated that the majority in the Storting's Standing Committee on Energy and the Environment was content with the Government proposing to open Barents Sea South-east for petroleum activities. On the other hand, the minority in the committee stated that the proposal exceeded the overall frameworks for the Management Plan, in that petroleum activities would be permitted in the northernmost parts of the opening area which lie within the maximum ice extent for sea ice in the last ten years.

The Environmental Organisations have referred to the fact that Report to the Storting No. 20 (2014-2015) was sent back to the Government by the Storting. As mentioned in Section 5.2.4, the report was dealt with in Recommendation to the Storting no. No. 383 (2014-2015). The majority of the Committee, the Members from the Labour Party, the Christian Democratic Party, the Centre Party, the Liberal Party, the Socialist Left Party and the Green Party stated that petroleum activities in and along the ice edge are not consistent with sound management of our maritime areas. The Storting decided to send the report back to the Government and asked the Government to commence work on a regular overall revision of the Management Plan for the Barents Sea and the maritime areas off the Lofoten Islands and to come back to the Storting with this.

It is not easy to see what independent significance the returning of Report to the Storting No. 20 (2014- 2015) has for the Court's assessment. In any event, the Storting drew no consequences for the opening of Barents Sea South-east from the return, nor from the referenced majority comments from the Labour Party, the Christian Democratic Party, the Centre Party, the Liberal Party, the Socialist Left Party and the Green Party. Instead, the majority rejected the proposal that the Storting ask the Government to ensure that petroleum activities not be commenced in the areas along the ice edge and the polar front and that the Storting ask the Government to refrain from awarding specified blocks in the 23rd Licensing Round in line with the consultation input from the Norwegian Polar Institute and the Norwegian Environment Agency.

It is the Court's opinion, based on what the Environmental Organisations have argued on this point, that the assessment that has been carried out related to the ice edge and polar front issue meets the requirements under the rules referred to in Section 5.3.2 above. The issue has been assessed both before and after the opening of Barents Sea South-east by

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the Ministry, the Government and the Storting. Furthermore, it is the Court's opinion that the Decision does not rest on an erroneous factual basis.

In the assessment of whether the duty to assess impacts has been met, the Court has also placed importance on the fact that a new impact assessment will be carried out and a plan for development must be approved by the Ministry if commercially exploitable discoveries are made, see Section 4-2 of the Petroleum Act. Conditions can be imposed in connection with that. In the opinion of the Court, whether the licences granted through the Decision can be reversed or not is of secondary importance when it is assumed that the issues can be assessed and possibly taken care of through setting conditions.
Whether it is actually difficult or simple for the authorities to impose conditions is not a relevant issue, in the Court's opinion.

As mentioned previously, possible production from the blocks in question lies 10–15 years into the future. There will surely be a new Management Plan then for the areas in question. It will then be possible to take new knowledge into account when setting conditions.

5.3.5 *Argument regarding errors and deficiencies related to economic assessments* The Environmental Organisations have argued that errors and deficiencies related to information about economics in Barents Sea South-east mean that the Decision is invalid. The arguments rely on the report ”Petroleum activity in Barents Sea South-East – climate, economics and employment“ by Mads Greaker and Knut Einar Rosendahl and the evidence Greaker and Rosendahl gave before the Court.

The arguments relate to blocks in the Decision that are located in Barents Sea South-east. As mentioned in Section 5.2.3, the assessments Greaker and Rosendahl have carried out do not relate explicitly to the blocks in the Decision, but to Barents Sea South-east.

The following appears at page 3 in the report by Greaker and Rosendahl, under the heading “Main findings”:

> Our review shows the quality of the economic assessments performed ahead of the Licensing Decision to be inadequate, and that in some cases the information provided is quite simply incorrect or misleading.
>
> The most serious error is that revenues and expenses for petroleum activity are not discounted (to present value), and that the socio-economic costs of CO_2 emissions relating to the activity have not been taken into account. In addition, the impact assessment was performed in 2012–2013, i.e. before the oil price crash in 2014, and was therefore based on relatively high oil and gas prices (almost USD 120 per barrel of oil). However, the Licensing Decision was adopted in 2016, when the oil price was USD 45 per barrel and the market’s price expectations had been significantly lowered. If we assume more reasonable price expectations, consider costs of CO_2 emissions in Norway, as well as discount future revenues and expenses, the net benefit falls from NOK 280 billion (High scenario) and NOK 50 billion (Low scenario) to NOK 41 billion and NOK -2 billion respectively. These are significant changes. We also believe that the costs relating to increased CO_2 emissions

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abroad should be deducted, which further reduces the net present value. Additional non-valued costs also have to be considered: for example, the possibility of uncontrolled emissions.

Some of the impact assessment's estimates for CO_2 emissions in Norway are defective and as mentioned are not included in the economic analysis. CO emissions in Norway have an unequivocal socio-economic cost, which we estimate at NOK 11 billion in the High scenario and NOK 2.3 billion in the Low scenario (present value 2017).

The possibility of increased CO_2 emissions abroad as a result of the petroleum activities is not discussed in the impact assessment. It is highly probable that oil production in Barents Sea South-East would result in increased CO_2 emissions abroad. We estimate the climate costs relating to such emissions at around NOK 20 billion in the High scenario and around NOK 7 billion in the Low scenario (present value 2017).

The impact assessment contains several errors and misleading assertions, some of which are mentioned above. Another error involves the double-counting of value-added effects in the impact assessment, where we believe that Statistics Norway's (SSB) estimates have been used in addition to NPD's estimates. Furthermore, the summary of the impact assessment only states "gross sales value" in the two scenarios, which is extremely misleading. This becomes particularly problematical in light of the fact that the figure stated in the Low scenario is quite simply incorrect, and twice as high as the correct figure (stated in NPD's original calculations in 2012). The difference between the gross sales value reported in the impact assessment summary and our calculation of net present value is striking: The former states revenues of NOK 270 billion in the Low scenario, while our calculation results in a negative net present value.

We believe that the figures for the employment effect are overstated. This applies in particular to the figures that are based on Pöyry's report on regional employment effects. As far as we understand, Pöyry has estimated gross employment effects of development in Barents Sea South-East, and not taken into account the fact that most people who gain employment as a result of this development would have been otherwise employed if this production did not go ahead.

Major uncertainty attaches to future oil and gas prices and to the costs of petroleum production in this area. Despite this uncertainty, the impact assessment does not discuss economic uncertainty or risk. With the exception of two scenarios relating to the number of oil and gas finds, the economic calculations do not assess alternative assumptions.

The Norwegian Ministry of Finance regards the petroleum tax regime as "investment-friendly", which means that the award of licences could result in the implementation of socio-economically unprofitable projects. A further significant imbalance emerges when we compare investments on the mainland with investments on the Norwegian Shelf. Projects that are sometimes extremely unprofitable under the mainland tax regime may be profitable under the petroleum tax regime. This, for example, is the case in NPD's Low scenario, which is commercially profitable under the petroleum tax regime, but not under the mainland tax regime.

Based on our findings we conclude that the impact assessment including sub-reports does not provide an adequately thought-out basis for adopting the Licensing Decision and for the opening of the 23rd Licensing Round. We justify this on three grounds:

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I. The survey contains many errors and defects, some serious.
Il. Petroleum activity in Barents Sea South-East entails a number of non-valued environmental impacts that will not be adequately considered by private oil companies.
Ill. The petroleum tax regime is structured in such a way that investments that are not socio-economically profitable can nonetheless be implemented by private organisations.

As regards the Government's arguments, see Section 4.3 and Section 5.3.1. As regards the question related to economics, the Government has argued that the assessments carried out in connection with the opening decision are sufficient for the purpose. However, the Government acknowledges that there is a calculation error in the impact assessment, but it has pointed out that this was corrected. Otherwise, this involves – as the Government sees it – different ways of presenting the figures.

The Court has noted Greaker and Rosendahl's conclusion. According to what the Court understands, it is not based on the rules in the Petroleum Act and related regulations and administrative practice. As the Court sees it, the question of whether the assessments in the impact assessment satisfy the requirements is accounted for under Section 5.3.2.

Greaker and Rosendahl have brought up in particular that there are errors in the impact assessment because the revenue and cost estimates have not been discounted and global climate costs have not been included in the calculations. They have also referred to the fact that other non-estimated costs, for example, the possibility of uncontrolled emissions, have not been taken into consideration, and furthermore that there are errors related to stating employment effects. They also think that it is an error not to have taken into account the decline in the price of oil after the opening decision and that the tax rules may result in commercial investments being made that are unprofitable from a socio-economic perspective.

The Court cannot see that the duty to assess impacts includes climate consequences of CO emissions from oil and gas exported abroad or therefore the costs of such emissions. As the Court sees it, it is contrary to expectation for Norwegian authorities to have such a duty related to emissions that other countries are responsible for under international law. For this to have been the case, it would have to have been stated clearly in the rules. It is not. Nor has it been shown that an attempt to identify such impacts has been made in connection with other opening processes.

Greaker and Rosendahl have cited at page 13 in their report the statement in the guidelines for socio-economic analysis from the Norwegian Government Agency for Financial Management that in principle, everything that affects resource consumption or the welfare of anyone in society should be taken into account, but that this is limited to effects for groups in Norway. However, it is said that in some cases there may also be grounds to include effects for areas or countries outside Norway, something that will be relevant, for example, in analyses of global environmental effects where Norway has obligated itself through international agreements.

The Court cannot see that what is stated in the guidelines for socio-economic analysis can be cited for the proposition that costs related to CO emissions from exported oil and gas should have been assessed. It is natural to interpret the statement to mean that there may be grounds to include environmental effects in other countries because of activity in Norway, i.e. activity for which Norway is responsible. The Court refers to the review of individual provisions regarding this under Section 5.2.2.

The great majority of matters Greaker and Rosendahl have otherwise taken up are what can be characterised as omissions, such as failure to discount, failure to calculate costs related to national CO emissions, failure to calculate other non-estimated costs, failure to assess future oil process and failure to present effects of the taxation system.

Whether it was an error to omit such information as Greaker and Rosendahl have pointed out depends, as mentioned, on whether this can be considered a breach of the duty to assess impacts. Little has been cited in sources of law indicating that it is. As regards the failure to discount, the Environmental Organisations have certainly emphasised that standard practice indicates that it should be done. They have cited the impact assessment from June 1988 prepared in connection with the opening of Barents Sea South in 1989 and the Norwegian Petroleum Directorate's document “Økonomisk vurdering av uoppdagede petroleumsressurser i havområdene utenfor Lofoten, Vesterålen og Senja” (“Economic assessment of undiscovered petroleum resources in the maritime areas off the Lofoten Islands, the Vesterålen Islands and Senja”) from 2010. The Government has responded that the information on reservoirs was far more certain in the two examples than what applies for Barents Sea South-east and that it made sense for that reason to carry out discounting. As the Court sees it, there is no basis to find that there is a breach of administrative practice in not discounting the figures in the impact assessment.

As the Court sees it, the question of whether the omissions breach the duty to assess impacts depends on what is the purpose of this when opening a new area. As stated in “Petroleumsloven. Kommentarutgave” (”The Norwegian Petroleum Act. Commentary Edition”), see Section 5.3.2, it is required when opening that ”some key questions concerning possible development of a deposit be assessed to a degree sufficient for the authorities to undertake a sound balancing of risk and disadvantages against economic and social benefits, if petroleum should be found in commercial quantities in the area that is opened“. The impact assessment must therefore be sufficient for a sound balancing to be carried out at the time of the opening.

What provides a basis for a sound balancing at the time of the opening must be viewed in light of the fact that an impact assessment will be carried out before commencing any operation and production and that a plan for starting requires the Ministry's approval, see Section 4-2 of the Petroleum Act. In the impact assessment at this stage, expected revenues to the Government must be calculated and national employment effects must be estimated, including ripple effects, see the PDO/PIO Guidelines at page 25. The

development and operation plan can only be approved by the Ministry if the project displays acceptable socio-economic benefits and is reasonable and robust against changes in the price of oil and gas. If these conditions are not met, the plan must be presented to the Storting for approval, see the PDO/PIO Guidelines at page 9.

Whether discounted figures etc. were necessary to conduct a sound assessment at the time of opening Barents Sea South-east must also be viewed in the context of the source data on which the calculations are based. As indicated in Section 5.2.3, the estimate of oil and gas is based on a document prepared by NPD, and as indicated it can be confirmed that the extent of oil and gas in Barents Sea South-east is quite uncertain. With such uncertainty, the omissions Greaker and Rosendahl have highlighted have less importance in the assessment of soundness.

Accordingly, it is the Court's opinion that the information in the impact assessment satisfies the requirements stated in Section 3-1 of the Petroleum Act and related regulations, despite the omissions Greaker and Rosendahl have pointed out. The information in the impact assessment was sufficient for the purpose. The missing information pointed out by Greaker and Rosendahl for all intents and purposes will be assessed in the event of any development and operation of one or more blocks.

Some of the matters Greaker and Rosendahl have pointed out involve information in the impact assessment which they think is incorrect or misleading. This primarily involves an error in the impact assessment from the gross sales value in the Low scenario being twice as high as the correct figure. The Government agrees with this. On the other hand, the Environmental Organisations agree that this error has not been propagated to the net figures used in the impact assessment. Furthermore, they agree that the error has been corrected in Report to the Storting No. 36 (2012–2013) and that the error committed in the impact assessment has not had any significance for the decision on opening Barents Sea South-east and therefore not for the Decision either.

Greaker and Rosendahl have also argued that the impact assessment is misleading with respect to employment effects. As the Court understands it, such effects will also be assessed in the event of any development and operation, see the specifics above regarding this. To the extent the impact assessment is misleading on this point, it is also the Court's understanding that there are no grounds to think that the error has been determinative for the decision on opening Barents Sea South-east, and therefore not for the Decision either. The opening of Barents Sea South-east rests on considerations other than just the economic, including strategic concerns. It is difficult for the Court to see that the information Greaker and Rosendahl think is correct with respect to employment effects would have resulted in the opening decision not being taken.

The Environmental Organisations have also emphasised that an assessment at the time of development and operation will only relate to presumptively profitable fields, while fields that are not opened will entail a cost for the Government because of the taxation rules. As

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the Environmental Organisations see it, this effect should have been assessed in connection with opening. The Court understands that the effect of the tax rules is continuously assessed in connection with tax policy. It is also the Court's understanding that the matter involves such marginal matters that there are no grounds to conclude that information regarding this would have resulted in the decision not being taken.

Accordingly, the Court concludes that arguments related to errors and deficiencies concerning economic matters do not lead to the Decision being invalid.

5.3.6 Argument regarding inadequate justification

The Environmental Organisations' allegation of *inadequate justification* relates to a requirement established in case law that the justification must provide sufficient basis for determining whether a decision suffers from substantive errors, see for example, Rt. 1981, page 745. It has been emphasised that the deficiencies in the justification reflect deficiencies in the impact assessment.

The Environmental Organisations have also referred to the notion that particularly stringent requirements for justification result from Article 112 of the Constitution, without this having been specified. In the opinion of the Court, it is difficult to see that this allegation goes further than the requirement established in case law. The Government has argued that the allegations do not result in the Decision being invalid.

In the opinion of the Court, circumstances have not been demonstrated indicating that the Decision is invalid because of inadequate justification. The allegation does not succeed.

5.3.7 Summary and conclusion on the question of whether the Decision is invalid because procedural errors have been committed, because erroneous facts have been relied on or because the justification is inadequate.

There are no errors in the duty to assess impacts that result in the Decision being invalid. Nor are there errors in the facts the Decision rests on that result in invalidity. Nor does the allegation that there are deficiencies in the justification succeed.

5.4 **Conclusion**

The Environmental Organisations' argument that the Decision violates Article 112 of the Constitution has not prevailed. Nor have the arguments regarding procedural error etc. Judgment will therefore be granted in favour of the Government of Norway through the Ministry of Petroleum and Energy.

5.5. Legal costs

The Government has won the case, and the general rule is that the Government is thus entitled to full compensation for its legal costs, see Section 20-2, first and second paragraphs of the Dispute Act. Exceptions are made from this general rule in the third paragraph of the Act, which reads as follows:

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> The opposing party may be exempted from liability for compensation if compelling grounds make it reasonable. Particular importance shall be placed on
> a) whether there was justifiable cause to have the case heard because the case was uncertain or was not clarified from an evidentiary perspective until after the action was brought,
> b) whether the prevailing party can be blamed for the matter having become a legal case or has rejected a reasonable offer of settlement, or
> c) whether the case is important to the welfare of the party and the relative strength of the parties justifies an exemption.

As indicated in the wording of the Act, in order for an exemption to be made for the liability for costs, compelling grounds must make it reasonable. When deciding this, particular importance shall be placed on factors appearing in letters a) – c). In the opinion of the Court, there are no such factors present.

The case has raised questions about the meaning of Article 112 of the Constitution that have not been reviewed previously. Decisions from the Supreme Court show that clarification of fundamental questions can be a compelling reason that makes exemption from the liability for costs reasonable. However, there is no clarification through the District Court's judgment; that will not occur until a decision by the Supreme Court, if any. The Court is thus of the opinion that this factor cannot justify an exemption either.

The conclusion is therefore that the Government is entitled to payment of its legal costs: The Government has presented a claim of NOK 580,000. The claim involves remuneration to counsel and one of the co-counsel. The cost is considered necessary, as it has been concluded based on the importance of the case that it has been reasonable to incur them, see Section 20-5 of the Dispute Act.

Pursuant to Section 20-6, second paragraph, first sentence of the Dispute Act, it is decided that the Plaintiffs and the Intervener shall be jointly liable for the Government's claim to legal costs. Emphasis has been placed in this decision on the provision in Section 20-6, second paragraph, second sentence. Allocation of liability has not been requested under Section 20-6, second paragraph, third sentence of the Dispute Act.

* * *

The judgment has not been issued within the deadline of two weeks in Section 19-4, fifth paragraph, second sentence of the Dispute Act. The reason must therefore be stated in the judgment, Section 19-4 fifth paragraph, fourth sentence. The reason that the two-week deadline has been exceeded is primarily that preparation of the judgment has been labour-intensive, but also because of other ongoing work assignments

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DECISION

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.

Court adjourned

Hugo Abelseth

Instructions regarding the opportunity to appeal in civil cases are attached.

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Guidelines on the right of appeal in civil cases

In civil cases, the rules in Chapters 29 and 30 of the Dispute Act apply to appeals. The rules for appeals against judgments, appeals against interlocutory orders and appeals against decisions vary somewhat. You will find more information and guidance regarding the rules below.

Appeal deadline and fee

The deadline for appealing is one month from the date the decision was made known to you, unless the court has set another deadline. The following periods are not included when the deadline is calculated (court holidays):

- from and including the last Saturday before Palm Sunday up to and including Easter Monday
- from and including 1 July until and including 15 August
- from and including 24 December until and including 3 January

The appellant must pay a processing fee. You can get more information about the fee from the court which has heard the case.

What must be included in the notice of appeal?

You must identify in the notice of appeal

- which decision you are appealing
- which court you are appealing to
- name and address of parties, their representatives and counsel
- what you think is wrong with the decision that has been made
- the factual and legal grounds for the errors
- what new facts, evidence or legal grounds you will present
- whether the appeal involves the entire ruling or only parts of it
- the claim to which the ruling applies, and the result you are requesting
- the basis for the court being able to consider the appeal, if there has been doubt about that
- how you think the appeal should be handled from here

If you wish to appeal a District Court judgment to the Court of Appeal

Judgments from the District Court may be appealed to the Court of Appeal. You may appeal a judgment if you think there are

- errors in the factual circumstances the Court has described in the judgment
- errors in the application of the law (the law has been misinterpreted)
- procedural errors

If you wish to appeal, you must send a written notice of appeal to the District Court which has heard the case. If you are conducting the case yourself without a lawyer, you can appear in the District Court and appeal orally. The Court can also permit legal representatives who are not lawyers to appeal orally.

There is usually an oral proceeding in the Court of Appeal which decides an appeal from a judgment. In the consideration of the appeal, the Court of Appeal will concentrate on the parts of the District Court's ruling that are disputed and have doubt(s) associated with them.

The Court of Appeal can refuse to consider an appeal if it concludes that it is clear that the judgment from the District Court will not be changed. In addition, the Court can refuse to

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consider some claims or arguments, even though the rest of the appeal is considered.

The right to appeal is limited in cases involving property worth less than NOK 125,000. If the appeal involves property worth less than NOK 125,000, consent from the Court of Appeal is required in order for the appeal to be considered.

When the Court of Appeal considers whether it will grant consent, it attaches importance to
- the nature of the case
- the parties' need to have the case examined again
- whether there appear to be weaknesses in the decision that has been appealed or in the case procedure

If you wish to appeal an order or decision of a District Court to the Court of Appeal
You can generally appeal an *order* because of
- errors in the factual circumstances the Court has described in the order
- errors in the application of the law (the law has been misinterpreted)
- procedural errors

Interlocutory orders involving procedural matters in the case, and which have been decided based on discretion, can only be appealed if you think that the exercise of discretion is unsound or clearly unreasonable.

You can appeal a *decision* only if you think
- that the Court was not authorised to make this type of decision on that legal basis, or
- that the decision obviously is unsound or unreasonable

If the District Court has pronounced judgment in the case, the Court's procedural decisions cannot be appealed separately. The judgment may be appealed instead on the basis of procedural errors.

You appeal interlocutory orders and decisions to the District Court that has issued the ruling. The appeal will normally be decided by an order or written proceeding at the Court of Appeal.

If you appeal the Court of Appeal's decision to the Supreme Court
The Supreme Court is the appellate body for the decisions of the Court of Appeal.

Appeals to the Supreme Court from *judgments* always require consent from the Appeal Committee of the Supreme Court. Consent is granted only if the appeal concerns matters which have importance beyond the case in question, or if for other reasons it is particularly important to have the case considered by the Supreme Court. Appeals from judgments are normally decided after an oral proceeding.

The Supreme Court's Appeal Committee can refuse to accept for consideration appeals from *interlocutory orders* and *decisions* . If they are accepted for consideration, it is generally because the issue has importance beyond the case in question, other considerations warrant review of the appeal or the case raises extensive evidentiary issues.

When an appeal from interlocutory orders and decisions at the District Court has been decided by an interlocutory order at the Court of Appeal, generally the decision cannot be appealed further to the Supreme Court. Appeals from interlocutory orders and decisions of the Court of Appeal are normally decided after a written proceeding at the Supreme Court's Appeal Committee.