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Borgarting Court of Appeal
Via Aktørportalen

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NOTICE OF APPEAL TO

TO

SUPREME COURT OF NORWAY

Court of Appeal case no.:	18-060499ASD-BORG/03
Appellants:	Föreningen Greenpeace Norden BOX 15164, 04 65 Stockholm, Stockholm County, Sweden Natur og Ungdom Torggata 34, 0183 OSLO, NORWAY
Interveners:	Besteforeldrenes klimaaksjon (Norwegian Grandparents Climate Campaign) c/o Lund & Co, Akersgt. 30, 0158 Oslo, Norway Naturvernforbundet (Friends of the Earth Norway) Mariboes gate 8, NO-0184 Oslo, Norway
Counsel:	Advocate Cathrine Hambro Wahl-Larsen Advokatfirma AS Fridtjof Nansens plass 5, 0160 Oslo, Norway
Counsel:	Advocate Emanuel Feinberg Advokatfirmaet Glittertind AS PB 1383 Vika, NO-0114 Oslo, Norway
Respondent:	The Government of Norway, represented by the Ministry of Petroleum and Energy. PO Box 8148 Dep. NO-0032 Oslo, Norway
Counsel:	Office of the Attorney General of Norway in the person of Attorney General Fredrik Sejersted and Co-counsel Advocate Anders Wilhelmsen and Advocate Ane Egeland

1 INTRODUCTION

Borgarting Court of Appeal pronounced judgment on 24 January 2020 in case 18-060499ASD-BORG/03 with the following decision:

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

The Environmental Organisations hereby appeal the judgment of the Court of Appeal. The appeal involves both the application of the law and the assessment of the evidence. The Environmental Organisations on the whole agree with the facts on which the Court of Appeal has based its decision, but there is a need to supplement the facts somewhat. The assessment by the Court of Appeal of the Environmental Organisations' procedural claims is also appealed.

We will first summarise the case overall in Section 2 and then the substantive allegations in the case in Section 3. In Section 4 we deal with the Appellants' arguments regarding procedural errors.

2 OVERALL SUMMARY OF THE CASE

The case involves ten production licences for petroleum activities in Barents Sea South-East and Barents Sea South that were awarded through the Royal Decree of 10 June 2016 (the 23rd Licensing Round). The Appellants, Foreningen Greenpeace Norden and Natur og Ungdom, and their Interveners, Besteforeldrenes klimaaksjon and Naturvernforbundet, (together **"the Environmental Organisations"**) argue that the licensing decision is invalid.

The licensing decision means that a new area is being opened for petroleum activities, further north and east than ever before, and marks the start of a new chapter in the history of petroleum in Norway. The licensing decision will not result in production until 2035 at the earliest, at a time when the world agrees that the use of fossil resources must be rapidly phased out. Any use of petroleum resources results in the emission of CO2, and any single emission across the entire planet is marginal in relation to total emissions. The world agrees that there is a climate crisis and that CO2 emissions must be reduced extremely rapidly to a net level of zero around 2050.

Based on this, it is argued that the decision is contrary to Article 112 of the Norwegian Constitution.

The Court of Appeal concluded the following regarding the interpretation of Article 112:

> *"… that Article 112 of the Norwegian Constitution must be understood to mean that the provision grants substantive rights that can be reviewed before the courts and that it applies to all environmental harm that has been cited – local environmental harm, greenhouse gas emissions that occur in connection with the production of petroleum and greenhouse gas emissions that occur in connection with combustion." (Judgment, page 10)*

The conclusion means that the Norwegian Constitution's environmental provision is a rights provision which the courts have the duty and authority to apply when reviewing the validity of administrative decisions. This issue was contested at the District Court and the Court of Appeal. The Government asserted that the first and second paragraphs of Article 112 do not establish rights for citizens, while the third paragraph imposes duties on the Government without granting rights to citizens.

The legal rule in Article 112 must be assessed in light of the facts regarding the climate. University of Bergen Professor Eystein Jansen and Cicero Senior Researcher Bjørn Samset gave evidence as expert witnesses before the District Court and the Court of Appeal. They are among Norway's foremost climate experts. At no point has the Government disputed the witnesses' presentation of the facts, which appear to be agreed.

At the Court of Appeal, the Environmental Organisations argued in the alternative that the decision is invalid because it is contrary to Articles 2 and 8 of the European Convention on Human Rights, see Articles 93 and 102 of the Norwegian Constitution. Even though the Environmental Organisations believe that Article 112 of the Norwegian Constitution provides far better environmental and climate protection than Articles 2 and 8 of the European Convention on Human Rights, the argument was advanced because the Government maintained before the Court of Appeal that Article 112 of the Norwegian Constitution does not grant substantive rights. Given such a legal interpretation, Norwegian law would not include any overarching, rights-based protection of the environment that puts into practice the mentioned provisions in the European Convention on Human Rights. The European Human Rights Court has on a number of occasions interpreted Articles 2 and 8 of the European Convention on Human Rights to mean that the right to life and the right to a private life include the right to a liveable environment. The Environmental Organisations will take a position on whether it is necessary to invoke the European Convention on Human Rights when the response to the notice of appeal is available.

3 THE LICENSING DECISION IS SUBSTANTIVELY INVALID

3.1 Summary of the Environmental Organisations' substantive arguments

The Environmental Organisations on the whole agree with the legal interpretation by the Court of Appeal. The Court of Appeal correctly concludes that:

- The harmful effects of the decision must be assessed in a wider context, so that it is not only the emissions from the individual licences that are relevant in the assessment of validity (Judgment, pages 19-20).

- The harmful effects of the decision also include the risk of future harm to the climate, and this must be included in the assessment under Article 112. This means that it is not only harm that has been triggered and is imminent that is legally relevant (Judgment, page 17).

- The harmful effects of the decision in the form of combustion emissions in other countries are relevant in the Article 112 assessment (Judgment, page 21).

The application of the law and the decision are nonetheless erroneous because:

- In the assessment of which harm to the climate is important under Article 112, the Court of Appeal concludes that it is *effects in Norway* that are the key ones and that effects from the climate changes outside Norway are of less importance (see Judgment, page 21). The Environmental Organisations disagree here with the Court of Appeal's legal and factual assessment because:

  – The interpretation is difficult to reconcile with the fact that the provision protects the inherent value of the environment and poorly corresponds to the environmental paragraph's origin in the Brundtland Commission's report "Our Common Future", in which a key message was to view global environmental challenges across national boundaries. The interpretation is also out of step with the "do no harm" principle of international law, which establishes the responsibility of nation states to avoid environmental harm in other countries. Taken to an extreme, the interpretation will mean that Norway can contribute to entire nations crumbling as a result of harm to the environment, without the environmental paragraph of the Norwegian Constitution setting limits for that – simply because the harmful effects occur outside Norway.

  – The effects of climate changes in Norway are also dramatic and far more serious than the Court of Appeal would appear to conclude.

- In the assessment of whether the first paragraph of Article 112 has been infringed, the Court of Appeal looks to the Government's emissions-reducing "measures", see the third paragraph of Article 112 of the Norwegian Constitution, and asserts that the Government has "great discretionary freedom" in choosing measures (Judgment, page 18). However, the Court of Appeal overlooks the fact that even if the Government has discretionary freedom in *choosing* measures, a court must assess whether the measures the Government has chosen actually are *suited* to compensating (reducing emissions) *sufficiently* on the basis of what is necessary to ensure that the right under the first paragraph is not breached. The right in the first paragraph is safeguarded only if the Government's emissions-reducing measures will ensure that Norway achieves emissions reductions in accordance with Norway's responsibilities, in light of global needs for reduction and recognised burden-sharing principles.

- The Court of Appeal grants the Government broad "discretion"[1] in asssessing whether measures under the third paragraph of Article 112 are sufficient to achieve

[1] The Court of Appeal uses the term "discretion" without further specification and asserts that this is not the same as intensity of review (Judgment, page19). The term "discretion" is used in the notice of appeal as the

required emissions reductions. However, it is the *nature* of the right to a natural environment that determines whether the Government has such discretion and how broad it is. This is not discussed by the Court of Appeal. There are a number of factual and legal circumstances indicating that the Government is not to be granted such discretion as the Court of Appeal has assumed, see Section 3.2.1 below.

- The Court of Appeal only takes into account some of the emissions in addition to those from the specific licences, because the judgment only takes into account future emissions in Barents Sea South-East but entirely omits emissions from Barents Sea South, which is a much larger area (Judgment, page 32).

These circumstances together lead to the Court of Appeal erroneously subsuming: it is concluded that because of the Government's measures, the decision is within the Government's discretion. This is despite the fact that no other individual decisions have similar potential for harm, and despite the fact that global warming has catastrophic consequences and is demonstrably not under control. Correctly interpreted and applied to the current climate crisis, and assessed with respect to the combined harmful climate effects of the decision, Article 112 of the Norwegian Constitution grants the Government a far more limited discretion.

In an actual review of whether the Government's measures are useful and with sufficient certainty protect the right to a liveable environment, the conclusion is that the decision represents a violation of Article 112 of the Norwegian Constitution. In this assessment, the following circumstances are particularly important:

- Licences for petroleum production are the individual decisions that without comparison contribute the most to emissions in public administration in Norway.

- These are the first petroleum licences awarded after the Fifth Assessment Report of the Intergovernmental Panel on Climate Change established an indisputable basis for the enormous harm anthropogenic global warming has already caused and will cause.

- These are the first production licences awarded after all countries in the world signed the Paris Agreement and agreed that each country shall do its utmost to protect the planet's climate.

- These are the northernmost and easternmost production licences ever awarded and the first awarded in areas the Government's own agencies have classified as particularly valuable and vulnerable areas – areas with an entirely unique ecological value.

Court of Appeal uses the term, but without the Environmental Organisations taking a position here on what we think is appropriate and/or correct use of terminology.

- Several of the licences are the first awarded in an entirely new area in over twenty years – referred to by the Government itself as the start of a new chapter in the history of petroleum in Norway.

- These are licences for petroleum production in areas entirely without established infrastructure, which will first come into production in 2035 with the aim of producing petroleum far into the next century – in a period in which Norway and the nations of the world agree that the entire world is to be emissions-neutral.

3.2 Particulars regarding the grounds for appeal

3.2.1 The Court of Appeal grants the Government discretion for which there is no basis

The Court of Appeal does not review whether the Government's "measures" are adequate and thereby grants the Government broad discretion. The justification is that the question of the validity of the licensing decision involves political questions of great societal importance, but the Court does not discuss why this should result in broad discretion. Legal questions that are also political in nature are not excluded from judicial review by reference to discretion. It is the *nature* of the right in Article 112 of the Norwegian Constitution – the right to a natural environment – that determines whether the Government has such discretion. The issue is whether the right to a natural environment is of such a *nature* that the Government has or does not have discretion. Norwegian courts have not taken a position on this so far, nor does the Kløfta discretion three-part doctrine resolve the question of discretion/intensity of review.

The following legal and factual circumstances indicate that the Government is not granted any discretion or that this is strictly limited:

- The Government's discretion is more limited in areas involving infringement of individual freedom. The climate crisis is a threat to the individual and society and thus individual freedom, even though it partly affects individuals at a future point in time. The Court of Appeal points out this very fact (Judgment, page 17: "*The environment is fundamental in the broadest sense for humans' living conditions …*"), but without viewing this in the context of the discretion.

- Because future generations lack the opportunity to safeguard their own need for a liveable environment, Article 112 of the Norwegian Constitution protects precisely these "future generations". This is essential when determining the discretion, which must be narrowed if the concern for "future generations" requires it. The Court of Appeal does not discuss the concern for "future generations" when determining the discretion.

- The Government has itself set a number of emissions reduction goals in the last thirty years, without reaching any of them. A history of failing to achieve one's own reduction goals does not support broad discretion. The discretion must be narrowed, and eventually lost, when emissions reductions are not achieved.

- At the same time the means for reducing emissions have shown themselves to be wholly inadequate, when assessed according to the actual need for emissions reductions that has been agreed (endeavouring to keep the temperature increase under 1.5 C, see Article 2 of the Paris Agreement) and assessed according to any accepted burden-sharing principle (Judgment, page 26), it is clear that global warming is accelerating and might have catastrophic consequences.

It makes little sense to grant the Government broad discretion when reduction goals and means are inadequate, while the climate crisis is not under control at all.

3.2.2 The Court of Appeal's limitation to the effects of climate changes in Norway is too narrow an approach and factually erroneous

The Environmental Organisations allege that limitation to harmful effects in Norway is erroneous legal interpretation.

Firstly, the Court of Appeal overlooks the relationship between the concern for future generations in Norway and climate effects in other countries and the direct effects of this for Norway. Secondly, this interpretation undermines the global nature of the climate problem, as pointed out in the preparatory works.

The Human Rights Commission pointed to global climate changes as part of the justification for proposing a strengthening of the third paragraph of Article 110 b (now Article 112) of the Norwegian Constitution: "… *[E]nvironmental challenges can lead to serious problems such as desertification … extirpation of species, shortages of water and food, spreading of epidemics. … It is against this background that a question must be raised whether the right to a healthy environment is at least as important for the individual's existence …*" (Document 16 (2011-2012), page 245) (**JU – Part I, page 284**).

The Court of Appeal has also overlooked the fact that an environmental paragraph was established in the Norwegian Constitution as a result of recommendations from the World Commission on Environment and Development, see among other things Recommendation to the Storting S No. No. 163 (1991-92), page 3 (**JU – Part 1, page 191**). The report therefore illuminates the purpose of the provision. The Brundtland Commission's main point was that the future is shared and environmental problems are global ("Our Common Future") and that this must be taken into account in the formation of rules and policy. The limitation to climate harm in Norway is not in accordance with the purpose of Article 112.

The Court of Appeal points to a number of places in the Climate Risk Commission's report NOU 2018:17 and believes it finds evidence there that the scope of climate harm in Norway will actually be limited or manageable. The Court overlooks the fact that a principal finding of this commission was that climate harm in other places will indeed affect conditions in Norwway in absolutely critical ways. With respect to NOU 2018:17, it is pointed out:

- The Commission's task was to assess climate-related risk factors for the Norwegian economy and not climate changes per se. The relationship between changes and

risk was stated as: "*Climate changes result in climate risk*" - underestimated risk in Norway, see Section 1.1 of the report . (**FTU page 631**).

- If climate policy "*continues as today*", "*it is highly uncertain whether it will be possible for humanity to adapt itself to such changes*", see the report, page 52. There is little doubt that such an outcome will also affect Norway. (**FTU page 684**).

- *"… Norway in an international context is among the countries that are most vulnerable to also being affected by climate changes in other countries"* see the report, box 5.5 (**FTU page 706**).

3.2.3 Interpretation and review of "measures", see third paragraph of Article 112 and the relevance for whether there is an infringement on a right

3.2.3.1 Summary of what a court should review

In the assessment of whether Article 112 has been violated, the Government's compensatory "measures" must be evaluated, see Article 112, third paragraph, see Judgment, page 20.

In the Human Rights Commission's report on page 246 it is stated that there "*will be plenty of room for political discretion with respect to which measures are put in place and at which times*» (**JU – Part I, page 285**).

As mentioned in Section 3.1, the compensatory effect of the measures in sum must be sufficient in relation to what is necessary to ensure that the right under the first paragraph is not violated. The right in the first paragraph is safeguarded only if emissions reduction goals and achieved reductions are appropriate with respect to the Paris Agreement and accepted burden-sharing principles. The Paris Agreement means that there is consensus in the world on what is required for emissions reductions in order to ensure that climate-related risk is held to a proper level. It is necessary to ensure that the average temperature increase compared with the pre-industrial level is held well under 2 ºC, while endeavouring simultaneously to limit the temperature increase to 1.5 ºC, see Article 2 of the Paris Agreement (**FU pages 4651 et seq.)**).

Whether the compensatory effect of the measures in sum is sufficient to meet such a reliability level requirement is a question at the core of the legal protection established by the first paragraph of Article 112. A court must therefore fully review this.

As pointed out by the Climate Risk Commission, the assessment of what is appropriate is affected by a change in factual circumstances, a change in the level of knowledge, etc. (NOU 2018:17, page 20 (**FTU page 652**)). The more precarious the situation is, the stronger the requirements that are imposed for the effect of Norwegian measures.

3.2.3.2 Which measures are relevant?

In the report from the Human Rights Commission at page 245 (**JU – Part I, page 284**), it is indicated that the authorities have a duty to take"*appropriate and necessary*" measures, which is repeated in the Storting's preparatory works.

The Environmental Organisations are arguing that a "measure" must be sufficiently concrete to be relevant in the application of the law. A measure is concrete if the emissions reductions to which it contributes are certain and quantifiable.

The Court of Appeal does not set up any general qualification requirement for the measures but nonetheless has correctly pointed out that technology for carbon capture and storage is not available on a large scale (Judgment, page 23). This measure has also been omitted in the assessment of measures (Judgment, Sections 3.2 and 3.3).

The Court of Appeal calls attention to the Government's "role as a driving force" in international climate work as a "measure", see the Judgment on page 28. However, this is not a "measure" under the third paragraph of Article 112, but a characterisation the Government has given itself on its own. Even though it is said from political sources that Norway is a driving force in international climate cooperation, it is highly uncertain why the Government characterises itself in this way and whether this results in emissions-reducing effects. The opinion is also not shared internationally. The term "The Norwegian Paradox" has gradually been introduced to describe Norway's double role as petroleum producer and self-appointed "climate driving force", and it is used among others by the UN's Special Envoy for Human Rights and the Environment, in the report from his visit to Norway in autumn 2019 (**FTU page 1225**).

The Environmental Organisations argue that if measures that provide the necessary emissions reductions are not available at the time of the decision, an emissions-generating activity may be prohibited because adequate measures do not exist. For comparison purposes, the Legal Department stated in the "Gas Power Case" (JDLOV-2000-4183 on page 7) the following (**JU – Part I, page 964**)):

> *"If establishing gas power plants results in significant emissions of greenhouse gases without … a corresponding reduction of emissions …, in the view of the Legal Department rather weighty legal objections may be raised against awarding an emissions permit under the Norwegian Pollution Control Act."*

A list of the measures the Government has cited is provided in an attached supporting document which also briefly states the Environmental Organisations' arguments regarding the measures.

Exhibit 1: "Government measures" supporting document

The Government must state in the response why the measures are relevant, when the effect of a measure will occur and which emission reductions the measures contribute to. Only if this information is provided is it possible to assess whether the sum of the Government's measures ensures that Article 112 of the Norwegian Constitution has not been infringed.

3.2.3.3 The assessment by the Court of Appeal of the Government's measures

The Court of Appeal discusses some of the Government's measures on pages 25 and 28. However, the Court of Appeal does not assess which effects the measures can be expected to have and when the effect will appear.

Neither does the Court of Appeal assess whether the measures in sum ensure that required emission reduction goals are reached, see above. Such assessments must be made in the application of the law, and as mentioned it is argued that a court must fully review this.

The Court of Appeal states as part of the assessment of the measures that "*a low-emissions society will also have to make room for certain emissions*" and that "*unlike the internal emissions, Norway has no control over the prioritisation of emissions internationally*" (Judgment, page 28) - something which no other country has – and "*cuts in Norwegian production might quickly be replaced by offers of oil from other countries*" (Judgment, page 32).

The assessments on this point in the judgment seem to support the view that the effect of the measures can be assessed less stringently, partly because there is "room for" slightly more emissions before the temperature goals are exceeded, partly because what Norway does has limited importance in a global context and partly because other countries might be willing to enter into an accord on what represents responsible state conduct. The Environmental Organisations do not concur in such an assessment, in part because:

- Relief from responsibility is never afforded because other countries might not do what is required of them.

- It is undoubtedly the case that emissions must be urgently reduced if it is to be at all possible to reach the climate goals, see the United Nations Environment Programme's annual "Emissions Gap Report". (**FU page 6960 and FTU page 917**).

- Postponing or easing for the time being the requirements for the totality of measures will enhance the climate threat and increase the risk to society, see among other things IPCC "Global Warming at 1.5 C" (**particularly FTU pages 21 et seq.**).

- The Court's reasoning sets up a competition between petroleum producing countries to be the country that maintains production for the longest period possible.

- The Court's logic *accepts* "the Tragedy of the Commons"; overexploitation of the atmospheric "commons" is accepted, because Norway cannot solve the problem alone.

In summary, the legal issues related to these five points are as follows: To what extent does it increase the Government's freedom under Article 112, first paragraph of the Norwegian Constitution, or ease the Government's duty to take measures under the third paragraph of Article 112, that the climate problem is global and that no country can solve the problem alone? And to what extent does it increase the Government's room to act because some of the climate problems will materialise in the future?

Similar legal issues were discussed in the Urgenda case[2]. The Supreme Court of the Netherlands rejected the reasoning the Court of Appeal has emphasised here and stated there:

> *"Nor can the assertion that a country's own share of global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC[.]*
>
> *(…)*
>
> *The defence that a duty to reduce greenhouse gas emissions on the part of the individual state does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible." (Sections 5.7.7 and 5.7.9)*

The reasoning supports the conclusion that the effect of the Government's measures must be assessed according to a prudential standard where the fact that the complexity resulting from the climate problem is global does not undermine a strict duty for the Government to ensure individuals' rights.

4 INVALIDITY AS A RESULT OF PROCEDURAL ERRORS

4.1 Introduction

The Environmental Organisations argue in the alternative that the licensing decision is invalid as a result of procedural errors. Before the Supreme Court, the argument will concentrate on violations of administrative law *assessment duties* with respect to the following:

- The decision's contribution to greenhouse gas emissions through combustion has not been assessed and evaluated.
- The assessment of the socio-economic utility of the licences is extremely deficient and burdened with gross errors.

The Court of Appeal correctly concludes that the relevant requirements for assessment have an *"important function as a procedural safeguard of the substantive rights under the first paragraph of Article 112, see the wording in the second paragraph"* and that there is "*no reason that the … threshold and intensity of review … should apply in the same manner to the procedural review*"

[2] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007. For background purposes, it will be mentioned that as at 31 December 2018 the Netherlands had reduced CO2 by 1.5 per cent since 1990, whereas Norway's equivalent emissions increased by 24.1 per cent over the same period.

(Judgment page 35). The Environmental Organisations will argue that there is a close relationship between the substantive and procedural rights in Article 112 of the Norwegian Constitution and that any limitations in substantive review under the first and third paragraphs of Article 112 of the Norwegian Constitution support particularly intensive review of the proceedings, see the second paragraph.

In summary, it is a clear weakness that neither the opening of Barents Sea South-East nor the particular production licences occur on the basis of a discussion of the fact that this is petroleum that will be produced far into the future – at a time when CO2 emissions must be rapidly reduced to net zero. It is in this perspective that both the economic aspects and the significance of the emissions must be assessed.

4.2 Failure to assess combustion emissions

4.2.1 In general

The Court of Appeal correctly concludes that the Norwegian Petroleum Regulations (and the EU's Planning Directive) require assessment of greenhouse gas emissions from combustion, in Norway and abroad (Judgment, page 39). This is also a natural consequence of such emissions also being relevant under the substantive rights protection under Article 112 of the Norwegian Constitution.

The Court of Appeal also concludes that these effects have not been assessed (Judgment, page 39). The Government has also confirmed this. The Court of Appeal further correctly concludes that the emissions from combustion of petroleum from the Norwegian Continental Shelf represent emissions twenty times as great as those connected with production (Judgment, page 27).

Accordingly, the Court of Appeal has correctly concluded that the administration has omitted 95 per cent of the potential emissions from the licences and that these emissions should have been evaluated. When the Court of Appeal nonetheless concludes that the decision is valid, this is justified in particular with the following:

- These emissions effects are best assessed at an overarching level.
- The emissions are a known consequence of production.
- The net effect of emissions from such combustion is complicated and controversial.
- The question of cuts in the petroleum activities is the subject of ongoing political debate.

4.2.2 The emissions are best assessed at an overarching level.

The fact that the assessments are best carried out in a wider context is no excuse for not performing any at all at any time. There is no disagreement that these discussions have not been held, neither at an overarching or a specific level. Irrespective of the *best* level on which to make the assessments, it is clearly a procedural error that the assessments have not been carried out at *any* level.

4.2.3 The emissions are a known consequence of production.

It is difficult to understand how the fact that the emissions from combustion are a "known effect" can legitimise failure to investigate the effect. To the contrary, the fact that the general effect is known supports the conclusion that the effect (and its scope and significance) should have been assessed.

It is also extremely unclear whether these emission effects were known to the decision makers when the effect has not been included in an apparently very thorough assessment. At the very least, it is clear that the scope of these effects must have been highly unclear to the decision makers and that the basis for decision for that reason alone has been too weak.

4.2.4 The net effect is complicated and controversial

Even though the net reducing effect of cuts in Norwegian petroleum production is complicated and to a certain extent controversial, there is solid factual evidence that such a reduction has a substantial net effect. The Environmental Organisations have submitted a research article from Statistics Norway which clearly concludes that reduced Norwegian oil production has a reducing net effect on global emissions (**FU page 3496)**. One of the authors of this article gave evidence before the District Court and the Court of Appeal (Knut Einar Rosendahl). He stated that he was not familiar with any research articles that cast doubt on the conclusion in the referenced article. He also stated that he was familiar with international research on the same subject (not particularly related to Norwegian production), which draws a similar conclusion. If this conclusion is accepted, it will mean that, *for the oil production,* only about 1/7 of relevant future emissions have been taken into account.

Under any circumstance, uncertainty and complexity are not an appropriate justification for failing to assess.

4.3 Errors and deficient assessment of socio-economic benefit

The first three licences in Barents Sea South-East were awarded in the licensing decision. This is the first time the opening can be challenged on a legal basis, and these licences were the starting shot for production in Barents Sea South-East.

Before a new area can be opened for petroleum, Section § 3-1 of the Norwegian Petroleum Act stipulates that "an assessment shall be made of the ... economic … effects that may be a result of the petroleum activities." For that reason, the Norwegian Petroleum Directorate made an assessment of possible revenues connected with petroleum activities in Barents Sea South-East, as part of the impact assessment in 2012 (**FU page 3296**). This was also a basis for the Government's and the Storting's decision-making processes.

The Court of Appeal has correctly found that the stated revenues in the impact assessment from 2012 were not discounted and states that *"it has to be expected that quantifying of revenues far into the future is discounted to present value in order to express the actual value."* The Court of Appeal also concludes that this must apply to an even greater extent when net revenues are involved where the costs are incurred first. The Environmental Organisations concur in this and add that a failure

to discount on its own may have led to overestimation of the revenues by approximately NOK 230 billion in one of the two scenarios that were assessed (a reduction of 80 per cent). After corrections for other errors, the assessments that have been made indicate a negative benefit in the second of the two scenarios that were assessed.

Despite this, the Court of Appeal nevertheless does not find that the misleading figures constitute a procedural error that may have affected the decision. As the Environmental Organisations understand the judgment, the Court bases this on two circumstances in particular:

- At the opening stage is not possible to provide precise estimates for future revenues.
- Opening would have nevertheless provided a potential for revenues for the Government.

The Environmental Organisations will firstly argue that the fact that the estimates nevertheless would have been imprecise cannot be an argument against making proper and correct socio-economic calculations. The Norwegian Petroleum Act imposes an explicit requirement for a socio-economic assessment. It is correct that at the time of the opening only figures and information with an inherent degree of uncertainty are available. The fact that figures and information are uncertain is in no way an argument for making poor, deficient or directly misleading assessments.

Secondly, the Court of Appeal emphasises that the opening of Barents Sea South-East included a potential for revenues for the Government, including if the figures had been discounted. It is startling that such a radical error is dismissed by asserting that a correct estimate also would have been "positive". In assessing whether it is desirable to abandon environmental values to achieve an economic gain, the size of the gain has great importance.

With respect to the question of effect, the Court of Appeal emphasises that the objections to the socio-economic assessments have been presented to the Storting, without the licensing having been stopped. However, this cannot be determinative. The starting point for the assessment of effects must be that the Storting politicians at the time of the decision would have made a rational assessment of the submitted *correct* information. It cannot be relevant that the Storting majority subsequently did not decide, when the matter was still in the public eye, to stop an already started licensing process.

5 CONCLUSION

5.1 Whether the case should be taken under consideration

The Environmental Organisations argue that the case is of particular principal importance. The interpretation of Article 112 of the Norwegian Constitution has never previously been reviewed before the courts. The case is also suited to shed light on the relationship between the substantive protection under Article 112 and procedural requirements in general and particularly in cases where environmental considerations come to the fore. Environmental law has primarily developed as procedural rights, which highlights the importance of the proceedings when precarious environmental interests are in play.

The Environmental Organisations cite the statement of the Court of Appeals on the question of legal costs:

> "*The case involves key values related to the environment and citizens' future living conditions. Issues related to the interpretation and application of Article 112 of the Norwegian Constitution are of principal importance. This applies to whether the Article grants substantive rights to individuals that can be enforced by the courts, to the substance of the rights and to their application to environmental harm – including greenhouse gas emissions – as a result of Norwegian petroleum activities. The issues have not previously been reviewed before the courts. The same applies to the issues related to ECHR Articles 2 and 8 and Articles 93 and 102 of the Norwegian Constitution. The decision could therefore have significance beyond this particular case. It must be assumed that the Government also has an interest in obtaining a clarification of the principal aspects of the case.*"

The Environmental Organisations believe for these reasons that the appeal must be taken up by the Supreme Court as a whole.

5.2 Expert witnesses before the Supreme Court

The Environmental Organisations have proffered before both courts Professor Eystein Jansen and Senior Researcher Bjørn Samset as expert witnesses with special qualifications in climate and climate changes. It is our opinion that the witnesses' direct evidence is not only relevant for the application of the rule, but also for clarifying the relevant legal interpretation questions that specifically involve the climate, for example, the question of whether all of the combustion emissions are relevant in the Article 112 assessments.

The Supreme Court of Norway is asked to appoint Jansen and Samset as the Court's expert witnesses, see Section 3–1 of the Norwegian Dispute Act, Section 25-2. They could be appointed even though to this point they have been proffered as witnesses by the Environmental Organisations. The Government has not objected to the facts they have described, and with a single exception neither has the Government had any questions for either of them.

Exhibit 2: Eystein Jansen CV
Exhibit 3: Bjørn Samset CV

5.3 Counsel before the Supreme Court of Norway

Both the District Court and the Court of Appeal approved the use of two counsels for all parties and interveners, see Section 3–1 of the Norwegian Dispute Act, based on the scope and complexity of the case. Counsel have a division of labour that works. We also ask that the Supreme Court of Norway decide that the parties and the interveners can use the two counsels. In the alternative, Advocate Hambro will be counsel for Greenpeace and Besteforeldrenes klimaaksjon with Advocate Feinberg as co-counsel, and Advocate Feinberg will be counsel for Natur og Ungdom and Naturvernforbundet with Advocate Hambro as co-counsel.

6 PRAYER FOR RELIEF

påstand:

1. The Royal Decree of 10 June 2016 on awarding production licences on the Norwegian continental shelf "the 23rd Licensing Round" be declared wholly or partially invalid.

2. Föreningen Greenpeace Norden, Natur og Ungdom, Besteforeldrenes klimaaksjon and Naturvernforbundet be awarded legal costs for the Court of Appeals and the District Court.

* * *

This appeal has been uploaded electronically in Aktørportalen.

Advokatfirmaet Glittertind AS

Emanuel Feinberg
Advocate

Wahl-Larsen Advokatfirma AS

Cathrine Hambro
Advocate