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OFFICE OF THE ATTORNEY GENERAL OF NORWAY

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REPLY TO NOTICE OF APPEAL

TO

SUPREME COURT OF NORWAY

Oslo District Court case no.: 16-166674TVI-OTIR/06

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1 OUTLINE OF MAIN ASPECTS

We refer to the Court's letter of 22 February, where a postponed deadline for a reply to the notice of appeal has been set for Friday, 9 March 2018.

The Government of Norway will argue that the District Court's judgment is correct in its result and will request that the appeal be denied and that the Government of Norway be awarded legal costs.

The case involves the validity of the decision taken by the King in Council on 10 June 2016 on awarding licences in the 23rd Licensing Round. This decision has been challenged on two bases. Firstly, it is alleged that the environmental impacts of the decision taken as a whole are so harmful that they violate a substantive limit under the first paragraph of Article 112 of the Constitution. Secondly, it is alleged that the decision-making process suffers from procedural errors.

The Government prevailed at the District Court on both points, and both points have been appealed for the most part as they existed at the District Court, in their full breadth and with some elaboration.

For the interpretation of Article 112, the Government will adhere to its principal argument, which is that the legal substance of the provision arises from the third paragraph, which is a duty to take measures, and that the first paragraph must be seen more as a principle. Alternatively, the Government adheres to its alternative argument, which is what the District Court has adopted, and which is that the first and third paragraphs must be seen in context, so that the first paragraph may indicate a substantive threshold, but it must be assessed in light of the measures taken. In the Government's view, on the other hand, there is no basis in law for the Plaintiffs' alternative interpretation, which is that the first paragraph of Article 112 grants a right independent of measures under the third paragraph.

Irrespective of interpretation alternative, the Government will argue, as before the District Court, that the decision on the 23rd Licensing Round is valid irrespectively, as it has neither resulted in, nor could it with any degree of probability and causal relationship result in, such harmful effects for the environment or the climate that any threshold under Article 112 has been violated. As before the District Court, the Government will show how the blocks which were awarded in the 23rd Round represent only a very small part of the activities on the Norwegian continental shelf, that no discoveries have been made so far and that any commercially exploitable discoveries will trigger a comprehensive process with new assessments of socio-economic benefits, environmental impacts, etc., before there is talk, perhaps many years in the future, of possible production. If this decision were to be contrary to Article 112, it is difficult to see which parts of Norwegian petroleum policy are not.

As before the District Court, the Government will also call attention to how both the specific question of the 23rd Round, and the relationship between petroleum policy and environmental and climate policy more generally, have been before the Storting a number of times and are continuously being debated in public.
This is an area where Norwegian democracy is at its most active, and in the view of the Government it must continue to be decided through democratic, administrative and technical processes – and not be juridified before the courts through expansive interpretation of a general constitutional provision.

As respects the allegations of procedural errors, the Government can primarily point to the District Court's thorough review and will expand on this during the appeal proceedings. Firstly, the Government will show how the processes which led to the decision on the 23rd Licensing Round was conducted in full compliance with applicable law and practice, which is also in line with the requirements which can be inferred from Article 112. Secondly, the Government will point out that most of the allegations regarding procedural errors relate to the earlier proceedings regarding opening Barents Sea South-East (BSE) in 2013 and not to the decision on awarding the 23rd Round in 2016. These allegations make no sense legally unless it is simultaneously argued that the Storting's decision on opening BSE in 2013 was invalid. But this has not been argued, and it is obviously not the case, either.

As respects the request for a direct appeal to the Supreme Court under Section 30-2 of the Dispute Act, the Government will note that the Act's conditions cannot be regarded as having been met, as in the view of the Government the case does not raise questions on “which it is important to ascertain promptly the position of the Supreme Court”. Otherwise the Government agrees that the case “raises particularly fundamental issues” (sic), but it will note that this only involves the interpretation of Article 112 and not the detailed allegations of procedural errors which have also been appealed. Nor has the constitutional interpretation proceeded any further than that it will continue to benefit from a round at the Court of Appeal for further work, before it might be brought before the Supreme Court.

2 SUBJECT OF THE LAWSUIT – THE DECISION ON THE 23RD LICENSING ROUND

One important aspect of the case is that only the validity of a single decision, on awarding licences in the 23rd Licensing Round, is being challenged. At the same time, many of the arguments the Appellants have presented during the proceedings are of a far more general nature and apply partly to the entire opening of Barents Sea South-East, partly to petroleum activities in the Barents Sea in general and partly to activities on and exports from the Norwegian continental shelf in the most general sense.

This is presumably the reason the District Court found it necessary at page 28 in the judgment to clarify that 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”.

Despite this clarification, as the Government reads the Notice of Appeal, general arguments continue to be presented which in part considerably exceed what is directly relevant for the decision of 10 June 2016 on awarding licences in the 23rd Licensing Round under Section 3-3 of the Petroleum Act.

There are, therefore, once again grounds to remind briefly what the case actually involves – and thus what are the relevant facts and the correct subject for assessment, including before an appellate court.

Firstly, it must be remembered that this is a lawsuit challenging the validity of a single decision, not a declaratory judgment action regarding the constitutionality of Norwegian petroleum activities in the Barents Sea or in general. This means that it is the effects, if any, of *this decision* on the environment and climate that are to be reviewed against Article 112 – not effects of Norwegian petroleum activities in general.

Secondly, this is a decision which only involves a small, limited part of the Norwegian continental shelf. It includes 10 licences, with a total of 40 blocks (or parts of blocks) that have been awarded to 13 companies. In comparison, licenses have been granted through the years on the Norwegian continental shelf for activities on 2394 blocks, with continuous activity occurring on a large number of these. Just in the Barents Sea alone, licences have been granted so far on 432 blocks. Licences are granted in part in so-called numbered rounds, with the one at issue here being number 23, and partly in unnumbered rounds (Norwegian acronym: TFOer ("Licensing in Pre-Defined Areas")).

Thirdly, the licence under Section 3-3 initially only grants the companies a right to exploratory drilling, on the specific conditions which apply for this and dependent on special consent in each instance. If commercially exploitable discoveries are made, authorisation must be sought in that event under Section 4-2 for development and operation. This is a comprehensive and lengthy process, with stringent requirements for further assessment of environmental impacts, socio-economic benefit, technical solutions, etc. This means that if commercially exploitable discoveries were to be made on the blocks covered by the 23rd Round, additional assessments and evaluations would be carried out before any approval is granted for a development and production plan – on whatever conditions the authorities may lay down.

Fourthly, it is still entirely unknown whether commercially exploitable discoveries will be made on the blocks awarded in the 23rd Round. To this point, exploratory drilling has been conducted for one season, without major discoveries. Further exploratory drilling will be carried out later in 2018, but it is unknown whether anything will be found. And if commercially exploitable discoveries are made, any production will lie many years into the future. On average, the time from discovery to first production (so-called lead time) on the Norwegian continental shelf is 11 years, and it is normally longer if it involves areas without existing infrastructure, as in the Barents Sea.

This means that if discoveries were to be made on the blocks covered by the 23rd Round, production will presumably not be an issue until 10–15 years into the future. Moreover, it is impossible to know today whether in such case there will be oil or gas, what its extent will be, what conditions will be set or what technology will be available to prevent or remedy environmental or climate discharges. And if there is development of any size or significance, the matter will be submitted to the Storting.

In comparison, at the end of the year there were 85 producing fields on the Norwegian continental shelf. Five of these were put into production in 2017. In addition, plans were submitted for development and operation (PDOs) for ten new projects, while nine are under development. Last year, 34 exploratory wells were completed, 3 fewer than the year before. Half of the wells were drilled in the Barents Sea, 12 in the North Sea and 5 in the Norwegian Sea. One of these wells was drilled in the newly opened area in BSE. For 2018, 3 exploratory wells are planned in BSE.

Fifthly, the extent of any future activity and production on the blocks covered by the 23rd Round will represent (almost irrespective of the size of the discoveries) a minor share of the total Norwegian petroleum activities – and with respect to any greenhouse gas emissions, it is difficult to see what would distinguish this share from the activities otherwise.

It will be further noted that no environmental harm has arisen from the exploratory drilling which so far has taken place on the blocks covered by the 23rd Round, nor have there been other adverse impacts for the environment or climate. Accordingly, the question for the Court only involves possible future risk of such harm. With respect to traditional environmental harm, the probability of this is not any greater than on other parts of the Norwegian continental shelf where exploratory drilling is continuously carried out. Admittedly, some of the blocks in question are located further north, and closer to the ice edge, but this has been thoroughly assessed and taken into account in the form of special conditions – and these areas are not otherwise more demanding to operate in than many other places on the Norwegian continental shelf, where drilling is carried out at greater depths and under far more difficult circumstances.

Finally, it will be noted that this is not at all the first time petroleum activities are being permitted in the Barents Sea, as one might now and then get the impression of from the Appellants' arguments. Of the 10 licences in the 23rd Round, 7 of them (in 14 blocks) are in Barents Sea south, where there have been petroleum activities since the end of the 1970s. Three of the licences (in 26 blocks) are in Barents Sea South-East, which was opened to petroleum activities by the Storting in June 2013. The reason that the area was not opened earlier is that the delimitation line with Russia was not clarified until 2010.

3 REGARDING THE INTERPRETATION OF ARTICLE 112 OF THE CONSTITUTION

3.1 General comments on the interpretation of the first and third paragraphs of Article 112

The central legal question in the case is how Article 112 (formerly Article 110 b) of the Constitution should be interpreted. This has not previously been before the Norwegian courts. Even though the provision primarily dates back to 1992, it has only been cited so far in a small cluster of cases, where the central interpretation questions have not come to the fore. In comparison, this case raises

questions which are difficult to decide without the Court taking a position on fundamental aspects of the Article which are disputed between the parties.

At one point along the way, the parties seem to agree on the interpretation of Article 112. The provision both expresses an important policy principle and has legal significance which, according to the circumstances, one might imagine being invoked before the courts in various situations. Legally, Article 112 may be relevant as a guideline for the legislature, as a guideline for the administration's discretion and as an element in the interpretation of other rules. A right to information arises from the second paragraph, and a duty to take measures arises from the third paragraph, which by its nature is legally binding on the authorities, even though it is a more open question how much it grants individuals rights that can be invoked before the courts.

Where the parties differ is in their view on whether Article 112 grants substantive rights to individuals beyond this, how far they go in such case and how far they can and should be reviewed by the courts. The disagreement involves not only the specific demarcation, but the fundamental meaning itself of the first and third paragraphs of Article 112 – and the relationship between the two paragraphs.

During the proceedings before the District Court, both parties stated for the first time their views on the interpretation of Article 112 in a notice of proceedings and a notice of defence in the autumn of 2016, and this was developed only to a modest degree in the pleadings up until the closing statements in November 2017. However, through a seven-day proceeding with constructive disagreement before the District Court, the legal arguments gradually became more clarified.

This was the basis for the Government submitting on the fifth day during its main address to the Court a supporting document in which we tentatively arranged the main alternatives in the interpretation of Article 112.

Exhibit 1. Supporting document submitted by the Government in Court on 20 November 2017 – *"Alternative models for interpretation of Article 112"*

As indicated here, in the Government's view three different interpretations of Article 112 have been submitted in the case, and they are fundamentally different, even though they can be claimed to overlap each other to some extent:

1. The first paragraph of Article 112 is a principle, not a prohibition which in itself triggers a right for individuals to a particular result. The legal aspect lies in the connection to the third paragraph – the duty to take measures. The subject for assessment for the courts becomes whether the duty to take measures has been met.

2. The first and third paragraphs of Article 112 must be interpreted in context. The first paragraph may suggest a substantive threshold, but whether it has been exceeded will depend on whether appropriate measures have been taken. The subject for assessment becomes in part what negative effects a decision or action might result in – and in part which measures have been taken.

3. The first paragraph of Article 112 is an independent rights provision, which according to the circumstances may be violated irrespective of what measures have been taken, if the harmful effects exceed a certain threshold. This is the subject for assessment, and it can be divided into two possibilities – either as an absolute rule, or as a more relative rule (with unenumerated exception criteria).

From the Government's side, it was Alternative 1 that was presented in the notice of defence and the closing statement, whereas Alternative 2 was presented orally during the main address before the District Court, as a subsidiary argument.

From the Plaintiffs' side, it was Alternative 3 that was presented in the notice of proceedings, the closing statement and the main address before the District Court. However, the Plaintiffs' counsel made statements in the reply which normally could be understood to mean that one had in any event partly changed one's view. This is probably the reason that the District Court at the bottom of page 17 in the judgment writes that an interpretation in which the first paragraph of Article 112

must be seen in context with the third paragraph is “in accordance with the argument of the Environmental Organisations and also in accordance with what the Government has argued in the alternative”.

For its part, the District Court decided that interpretation alternative 2 was the correct one, as indicated by the Court's discussion at pages 13–17 in the judgment.

In the notice of appeal, it is argued that “that the first paragraph of Article 112 must be assessed in isolation independently of the third paragraph” (page 3), with a further elaboration, which the Government understands as a continuation of the interpretation the Appellants originally argued (alternative 3). In other words, that the first paragraph of Article 112 sets an absolute limit, irrespective of which measures are taken. It is also argued that the first paragraph also includes a relative limit (pages 11–12).

For its part, the Government will stand by its principal assertion (alternative 1) in the appeal. Based on the sources of law and standard Norwegian doctrine of the sources of law, in the Government's view it is clearly most reasonable to interpret Article 112 so that the first paragraph is a principle, while the legal obligation arises from the third paragraph. This is the best approach in line with the wording, the preparatory works (the constitution drafter's intention) and policy considerations – and there are no other compelling sources weighing in favour of another (expansive) interpretation.

Consequently, the Government will primarily argue that the District Court's interpretation at pages 13–17 is incorrect, and this will be elaborated upon in greater detail before the appellate court, in line with the Government's argument in the first round. As part of this the Government will argue that the District Court at the outset lays out a mistaken perspective in its discussion on page 13 when it declares that “Article 112 of the Constitution was adopted in 2014”. It is more accurate to say that this is a rule which was promulgated in 1992, as then Article 110 b, and which was amended on a minor point in 2014, by the duty to take measures being made more rigorous. The interpretation must therefore continue to be based on the sources of law from 1992, and it must be carried out in two steps. The first question is what legal substance the Article was given in 1992 and how it was interpreted up until 2014. The next question is whether the constitution drafter in 2014 intended to amend and expand the provision's fundamental nature.

In the Government's opinion, it is clear from the sources of law that the constitution drafter in 1992 did not intend for the first paragraph of Article 110 b to include a substantive right, nor was it the intention to introduce such a fundamental change through the revision of the third paragraph in 2014.

Alternatively, the Government will argue that the District Court's interpretation (alternative 2) is legally possible, even though it is weakly rooted in the sources of law and even though it entails an expansive interpretation which raises difficult questions and will entail a new juridification of questions which better belong in the political and technical arena. Under this alternative, the Government can mostly concur in the District Court's interpretation of what the right specifically involves (pages 17–28 of the judgment), but with a few nuances and some supplementary and amplifying comments.

With respect to the Appellants' interpretation (alternative 3), the Government will argue that it must be seen more as a legal policy argument lacking support in the sources of law and impossible to arrive at on the basis of standard interpretation doctrine. Furthermore, the Government will argue, as it did before the District Court, that compelling policy considerations weigh against such a greatly expansive interpretation, which will entail an extensive juridification of significance not only for Norwegian petroleum policy but potentially for a long series of areas of society – and which will in principle alter the relationship among the branches of government in both petroleum policy and in climate and environmental policy.

Irrespective of interpretation alternative, the Government will argue at the same time, as before the District Court, that Article 112 nevertheless has not been violated, since the decision on the 23rd Licensing Round has not actually resulted in, nor could it probably result in, harmful effects to such an extent that it represents a constitutional violation.

3.2 Particulars regarding interpretation and application of Article 112 to climate issues

As Article 112 is formulated, it is clear from the wording and the preparatory works that it is primarily intended to cover what we today call traditional environmental harm. Even though the climate challenges to some degree were known early in the 1990s, they did not occupy a central position on the agenda and are not discussed in the preparatory works for Article 110 b. Nor are they discussed in the brief preparatory works for the revision in 2014.

Today the situation is different, and there is widespread agreement that the climate changes resulting from global warming are a very serious challenge. Against this background, the Government agrees that Article 112 in principle must also be considered to include climate deterioration. This is the case both to the extent the Article expresses an important political and fundamental principle and to the extent it comes in as a guideline when interpreting other provisions or reviewing the exercise of discretion. The duty for the authorities to take measures that arises from the third paragraph could also be claimed to include national climate measures.

At the same time, in the Government's opinion it is clear from its wording that Article 112 is not formulated with an eye to the particular problems raised by climate policy and there are limits to how far it can or should be used to juridify this field. This raises a number of questions which the Government raised before the District Court and which will be elaborated on before the appellate court.

However, one question will be briefly commented on here, as it has been a central one throughout the entire case. It is the question of whether Article 112 of the Constitution will be applied to greenhouse gas emissions resulting from combustion abroad of oil and gas exported from Norway.

The Government argued to the District Court that emissions abroad fall outside the scope of application for Article 112 and won support for this from the District Court, after a thorough discussion at pages 18–20 in the judgment. This is commented on and criticised in the Notice of Appeal at pages 15–17. At the appellate court, the Government will cite the District Court's interpretation on this point and elaborate on it further.

This will include the Government arguing first that it follows from an ordinary interpretation of Article 112 that it is not intended to cover emissions abroad resulting from Norwegian exports of oil and gas, neither when the provision was first promulgated in 1992 nor when it was revised in 2014. In 1992, this was already Norway's largest export industry, and if it had been intended to introduce legal limits for these exports, it would have to have been clearly specified. In other words, there is a clear presumption that the constitutional drafter did not intend for this to be covered, either in 1992 or in 2014. If a problem had been made out of this, it is on the contrary overwhelmingly likely that the provision neither would have received an ordinary majority at the Storting, much less the two-third majority necessary for a constitutional amendment.

Secondly, the Government will argue that the same results from more general considerations regarding the geographic scope of the Constitution, which generally follows Norwegian territory and Norwegian jurisdiction. When the first paragraph of Article 112 speaks of “every person”, it must be understood as every person in Norway, and when it refers to a right to “an environment“ and “a natural environment”, it must be understood as the environment and natural environment in Norway, in areas subject to Norwegian jurisdiction. In the absence of other clear grounds, there is no basis for interpreting Article 112 as being intended to reach further than this to persons and the environment elsewhere in the world.

Thirdly, the Government will point out that there is a firmly established fundamental principle in the international climate cooperation that each state is responsible for its own emissions. This applies to both political cooperation and legal cooperation as established in binding agreements under international law, primarily the treaties entered into under the auspices of the United Nations, most recently in the Paris Agreement of 2015 – where the responsibility lies with countries where emissions (consumption) occur, and not with the countries which produce and export goods such as coal, oil or gas. There are compelling reasons the international climate cooperation has been constructed in this manner. There is no basis for arguing that Article 112 of the Constitution deviates from this or imposes on Norwegian authorities a duty to reduce emissions abroad for which Norway under international law has no responsibility and which breaks with the fundamental approach in international climate cooperation and national climate policy.

Fourthly, the Government will point out that Norwegian climate policy and climate legislation also rest on the principle that an individual nation is responsible for its own national emissions. This is how the Storting so far has discussed and regulated the obligations incumbent on the authorities in this area, and it can also be seen as an expression of the Storting's view on which obligations arise from Article 112. This was most recently confirmed by the process that led to the adoption of the new Climate Change Act of 2017, which regulates only national emissions and where a broad majority in the preparatory works also very clearly emphasise that the climate issues by their nature are not suited for juridification and must be decided through democratic processes, not before the courts.

Finally, the Government will point out that if Article 112 were to be interpreted to also cover emissions resulting from combustion abroad, it will create an extremely difficult subject for legal assessment, which will raise a number of questions, parts of which are in dispute. There is in no way any simple causal relationship between the scope of Norwegian exports and global emissions, either with respect to oil or (even less so) gas. In a European context, imports of Norwegian gas are considered a prerequisite for the EU to be able to reach its own climate goals, and the International Energy Agency (IEA) has recommended on several occasions that Norway must continue to expand its production, which is politically more secure, more predictable and less polluting than many of the alternative suppliers. It is in no way given that a reduction in Norwegian production and exports will lead to a corresponding reduction in global emissions. To the contrary, this is a complex debate, without sure answers, which runs continuously at the technical and political levels but is ill-suited for judicial review.

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In the event that the appellate court should nevertheless decide that exports in principle are covered, the Government will point out (in the alternative) that the duty to take measures under the third paragraph has nevertheless been met. As demonstrated before the District Court, Norwegian climate policy also includes extensive international cooperation and a number of international measures and initiatives. These are the measures the Storting and the Government have taken bilaterally and internationally, and whether they are sufficient or not is a question which according to the preparatory works for Article 112 the courts should be very constrained in reviewing.

As another alternative, the Government will point out that the lawsuit only involves the licensing in the 23rd Round, which is a small number of blocks where no discoveries have yet been made and where there will not be any production for many years at the earliest. Nor is it possible today to say whether it will be oil or gas, or what technology will be available to counteract or remedy any climate effects when any production starts, many years into the future. If a limitation is first read into Article 112 for exports of oil and gas, the threshold for a constitutional violation in such case must lie far beyond the uncertain and relatively modest production which might eventually come from the licences awarded in the 23rd Round.

Norway has exported oil and gas for many decades and does it continuously each day. If the argument is that this is contrary to Article 112, then the Government wonders why the lawsuit is directed at the validity of the decision on the 23rd Round, given that there still are no exports from these fields, and any exports lie many years in the future and will regardless only constitute a very small share of total Norwegian exports.

4 THE SIGNIFICANCE OF INTERNATIONAL LAW IN BRIEF

In the original Notice of Proceedings and subsequent Statement of the Case, the Appellants also presented international law arguments, and this is also adhered to in the three pleadings in support that were submitted to the District Court. As the Government eventually understood the arguments, no claim was presented regarding a direct violation of international law rules or principles, but only that these had to be brought into the interpretation of Article 112 of the Constitution.

However, during the proceedings before the District Court little attention was devoted to the international law arguments on the part of the Environmental Organisations, and like the District court, the Government understood the situation to mean that they were no longer being maintained. In other words, the Government's view is that the judgment at pages 27–28 suitably expresses what was presented during the trial, even though the Appellants at page 17 in the appeal now claim that there is a misunderstanding. The District Court therefore correctly concluded that this lay outside what the Court should take a position on under Section 15-8, second paragraph of the Dispute Act, see Section 11-2, first paragraph.

Based on Section 6.2 in the appeal, and the references there to Section 9.2.2 et seq. in the original Notice of Proceedings, the Government understands this as once again it is being argued that international law must be brought in as a relevant consideration in the interpretation and application of Article 112. More specifically, reference is made here to an international law “precautionary” principle, the so-called “no harm principle”, and what is asserted as a “human rights law climate protection” with reference particularly to Articles 2 and 8 of the European Convention on Human Rights and Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights.

In response to this, the Government will first state that upon closer inspection there is nothing about these international law rules and principles indicating that Article 112 is to be interpreted differently or more expansively than what stems from the Norwegian sources of law. As regards the “precautionary” aspect, there is no international law principle that extends further than what already stems from Norwegian environmental law, as it implements Article 112. As regards the “no harm principle”, this is taken care of through Norwegian rules on the duty to assess environmental impacts for other states from activities in Norway, as this is laid down at several places, including Section 6c (g) of the Petroleum Regulations. And as regards the modest amount of case law related to application of Articles 2 and 8 of the European Convention on Human Rights in environmental matters, this involves entirely different types of traditional environmental effects than what is alleged in this case.

Secondly, the Government will more generally point to the principle of autonomous Norwegian constitutional interpretation, particularly for articles such as Article 112, which are not directly based on international legal rules. To the extent international law enters into interpreting and applying Article 112, the Government will argue that it is instead an argument that it has not been violated, neither with the decision on awarding the 23rd round, nor in the petroleum policy more generally. It has not been alleged by the Appellants that Norway has violated its international law obligation in the climate area, neither under the Kyoto Treaty, the Paris Agreement nor other binding agreements. To the contrary, it is clear in the Government's opinion that Norway so far has complied with all of its obligations in this field, and it is the firm and express policy of the Government and the Storting that this will also be done in the future.

This was thoroughly accounted for on the part of the Government before the District Court, and it will also be illuminated before the appellate court – and it is an independent argument that Article 112 has not been violated either.

5 REGARDING THE APPLICATION OF ARTICLE 112

As pointed out before the District Court, the subject of assessment and the application of Article 112 to the decision on awarding the 23rd Licensing Round is controlled to a great degree by which interpretation is adopted. If the Government's principal interpretation is adopted, there is a question initially of whether Norwegian authorities have net their duty to take measures, to the extent this is relevant for the decision on the 23rd Round. If it is concluded that there is a substantive threshold in the first paragraph of Article 112, an assessment is required to a greater extent of which more specifically which (sic) effects the contested decision might have for the environment and climate. How far this review should go depends, however, on the specific interpretation, and on which threshold should apply for violations, and how far may and should go (sic) in reviewing the assessments carried out by the Storting and the responsible authorities.

The Appellants have alleged throughout the entire proceeding several different effects of the decision which they think "as a whole" violate a limit in Article 112, and this has been continued in the appeal. As previously pointed out on the part of the Government, the allegations roughly fall into three categories, which by their nature are different, both legally and factually:

(i) Traditional environmental impacts from exploration and development and operation of any fields which may be developed and produced in the production licences included in the 23rd round, including questions about emissions, the ice edge, particularly vulnerable areas, etc.

(ii) Norwegian (national) air emissions of CO_2 and other gases which can affect the climate as a result of future development and operation of any fields which may be developed and produced in the production licences included in the 23rd Round.

(iii) Global emissions as a result of oil and gas which may be produced at fields in the production licences included in the 23rd Round being exported and combusted in other countries at some time in the future.

As regards category (i), the Government has obtained the District Court's agreement that the risk of traditional environmental harm as a result of the decision on the 23rd Round is limited and that the authorities have taken necessary measures to prevent this from happening. A modest amount of space has been devoted to this in the Notice of Appeal, but the Government understands this to mean that the original allegations are being maintained.

The Government for its part will refer here to the many measures Norwegian authorities have taken generally to prevent traditional environmental harm on the Norwegian continental shelf, which have resulted in Norway being among the world leaders in health, safety and the environment in petroleum activities. Regulation and supervision of the activities are based on extensive and lengthy experience of extremely demanding circumstances.

In addition, the Government will point out that the risk of traditional environmental harm was thoroughly studied and evaluated in the processes leading up to the decision on the 23rd Round, with respect to both the Barents Sea in general and Barents Sea South-East in particular, including the blocks included in the 23rd Round. As the technical and political authorities have evaluated the matter, the risk of traditional environmental harm in the exploratory phase and in developing any discoveries in the area in question is not of such a nature that it hinders the awarding of licences, and this will be handled within the current safety regime on the Norwegian continental shelf. And if commercially exploitable discoveries are made in the licences included in the 23rd round, new impact assessments will be undertaken under Section 4-2 before any approval of plans for development and operation.

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As regards category (ii), the Government has obtained the District Court's agreement that national greenhouse gas emissions resulting from activity on the blocks covered by the decision on the 23rd round will be entirely marginal, and that Norwegian authorities in general have taken a number of measures to limit such emissions from the Norwegian continental shelf, including a duty to surrender emission allowances, a CO2 tax and a number of other measures. Once again, modest attention has been devoted to this in the Notice of Appeal, but in such a fashion that the allegations are also maintained here.

For its part, the Government will maintain that national greenhouse gas emissions from petroleum production are an issue which has been high on the agenda for several decades and which has been thoroughly studied, evaluated and regulated, and a long series of measures have been taken. Air emissions from the petroleum activities on the Norwegian continental shelf are currently a part of the EU's general emissions trading system. In addition, the industry has been subject since 1991 to a high CO2 tax and other restrictions, and this has led overall to the emissions from the Norwegian continental shelf being lower than for equivalent production in most other countries. The Government submitted to the District Court documentation for the many measures taken to reduce the emissions from production on the Norwegian continental shelf, and this will also be documented for the appellate court.

As regards the areas covered by the 23rd Round, it is nevertheless too early to say what emissions will result from any development and operation in this instance. It will depend on what is found and what requirements are set in the event of development. But so long as activity on the continental shelf is part of the EU's emissions trading system, decisions on developing individual fields will nevertheless not in themselves result in increased national emissions, so long as the general ceiling for emissions is not raised.

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As regards category (iii), as shown in Section 3.2 above, the Government has obtained the District Court's agreement that emissions abroad resulting from combustion of oil and gas exported from Norway do not fall under what in a legal sense is regulated in Article 112. The Government will maintain before the appellate court that this is a correct interpretation, and in such case it is not necessary to go into this question in any more detail.

In the event that the appellate court should nevertheless conclude that combustion abroad from exports may be covered in principle, the Government will first point out that the duty to take measures under the third paragraph has been met irrespectively. Secondly, the Government will point out that any emissions which might come from combustion abroad of oil or gas from the blocks in the 23rd round will nevertheless constitute such an uncertain and modest contribution that it is presumably immeasurable, and far below any substantive threshold for a constitutional violation.

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Based on this, the Government will argue that Norwegian authorities in all three categories have taken measures to attend to consideration for the environment and the climate, in the manner required under Article 112. Consequently, there is no violation of constitutional obligations here – much less any violation that can be relevant for the validity of the decision on awarding the 23rd Round.

6 REGARDING THE ALLEGATIONS OF PROCEDURAL ERRORS

In addition to the allegation of violation of a substantive limit under Article 112, the validity of the decision on the 23rd round has also been challenged with allegations of procedural errors, specifically violations of a duty to assess, erroneous facts and deficiencies in the justification.

Considerable attention was devoted to this during the proceedings before the District Court, as reflected in the Court's thorough review in the second half of the judgment, at pages 28–46, where the Government prevailed on all points.

In the Notice of Appeal, the arguments regarding procedural errors are maintained at pages 18–27. The presentation is elaborate, but as far as the Government can see it adds nothing significantly new that has not already been before the District Court.

For its part, the Government will primarily satisfy itself with referring to the District Court's discussion and to its own arguments in the previous round, which will be continued before the appellate court. In its original Notice of Defence of 14 December 2016, the Government provided a thorough description of the processes that led to the decision on awarding production licences in the 23rd Round in June 2016 (see in particular pages 9–22), and during the trial this was documented and further elaborated on.

Based on the Notice of Appeal, the Government will just once again point out in this round that under the petroleum Act there are a number of stages leading up to a decision on awarding production licences on the Norwegian continental shelf and subsequently to possible development and operation. Three of the most important stages are:

1. Decision on opening new areas – Petroleum Act Section 3-1 (the Storting)

2. Decision on awarding production licences – Petroleum Act Section 3-3 (the King in Council)

3. Decision on approval of development and operation – Petroleum Act Section 4-2 (the Ministry after the case has first been submitted to either the Storting or the Government – depending on the project's scope and significance)

The lawsuit thus involves the validity of a decision in Phase 2 – on awarding licences in the 23rd round – which was taken in June 2016. The blocks covered by this decision are from two areas – which were opened (Phase 1) in 1989 (Barents South) and 2013 (Barents South-East), respectively. On the other hand, Phase 3 has not yet been reached for these blocks, and that will only occur if commercially exploitable discoveries are made.

The processes and the subject for assessment in each of these phases are different, of course, because there are different questions to be assessed and various types of decisions to be taken. With respect to environmental impact assessments, the Storting has decided through the Petroleum Act's system that assessments shall be carried out in connection with two of the three stages – in Phase 1 and Phase 3, respectively.

When deciding on opening new areas, under Section 3-1 “an evaluation shall be undertaken of the various interests involved in the relevant area”, which shall include “an assessment ... 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”. In the event of subsequent approval of any plans for development and operation, under Section 4–2 the companies must submit plans describing relevant “economic, resource related, technical, safety related, commercial and environmental aspects”, and the Ministry may also require additional explanation of environmental effects.

On the other hand, the Act does *not* require that impact assessments be undertaken in connection with the individual decisions on awarding production licences under Section 3-3 – neither for economic,

environmental or other circumstances, nor for the “numbered" or “unnumbered” rounds. This is not considered necessary or appropriate, since such assessments have already been carried out under Section 3-1 on a general basis for the areas in question, and since new assessments will be carried out irrespectively if commercially exploitable discoveries are made which result in development and operation under Section 4-2.

Even though licensing decisions under Section 3-3 do not require new special impact assessments, there are a number of other steps and assessments in the process in Phase 2. As regards the process that led to the decision on the 23rd Licensing Round, it was thorough and lengthy and extended over nearly three years, from the autumn of 2013 to the summer of 2016.

Before the appellate court (as before the District Court), the Government will thoroughly review and document this process, which meets all the requirements which according to applicable law and practice arise from Section 3-3 and its related regulations and guidelines. To the extent the Appellants attack this with allegations of inadequate assessment of environmental and climate impacts, in reality this is not an attack on the proceedings in this specific case, but on the Act's entire system.

However, several of the allegations of deficiencies in the proceedings do not involve the process itself which led to the decision on the 23rd Round in June 2013, but the *preceding* process regarding opening Barents Sea South-East (BSE), which began in 2010 and led to the Storting's approval of the opening in the spring of 2013. This applies not least to the allegations of deficiencies in the economic calculations from 2012, which great attention has been devoted to both at the District Court and in the appeal.

In response to this, the Government will first state that there are no such procedural errors. To the contrary, the opening of BSE in 2013 was very thoroughly studied and evaluated, through a process which took nearly three years – and that was also the Storting's express opinion when the matter was presented to it in the spring of 2013. All the circumstances that were relevant for the parliamentary decision were thoroughly reviewed and debated, and no circumstances have been identified that would have changed the political assessment if they had been presented differently. As regards the economic estimates from 2012, they are correct as presented to the Storting, and it was expressly stipulated that the estimates were uncertain. This was thoroughly demonstrated to the District Court, and it has also subsequently been accounted for by the Cabinet minister in response to a written question from the Storting.

Exhibit 2. The Cabinet minister's response of 25 January 2018 to question no. 730 for a written response concerning the impact assessment that was the basis for the opening of Barents Sea South-East

Secondly – and just as important – these are assessments that apply to the opening of BSE in 2013 and *not* the decision on awarding production licences in the 23rd Round in 2016. If the Appellants criticism were to be legally relevant, the argument would have to have been that the opening itself in 2013 under Section 3-1 suffers from such deficiencies that it must be considered invalid. But that is not being argued. To the contrary, the Appellants repeat at page 19 that this is not being challenged, while at the same time it is asserted that nevertheless it “is relevant as a part of the proceedings that led to” the decision on the 23rd Round three years later. In the Government's opinion, this make no sense. The economic assessments were included as a (modest) part of the broad basis for the Storting's assessment of whether Barents Sea South-East should be opened. This was unanimously decided in the spring of 2013. With that, this phase was over. Then the next phase started, which was awarding licences under Section 3-3 and which lasted up until the decision in the 23rd Round in June 2016. In this phase, there were other questions to be decided, and the economic estimates from the preceding phase were not part of the basis for decision in connection with this.

In the Government's opinion, the Appellants must make a choice here. Either they must accept the consequence of their criticism of the economic calculations from 2012 and argue that the Storting's decision on opening BSE in the spring of 2013 was invalid. In that case, a broad evidentiary theme opens up under which the entire process must be assessed, from the Delimitation Agreement in 2010 up to the opening in 2013, and in which the most important documents are the 24 sub-reports that were obtained (one of which was the economic one), the subsequent impact assessment from the Ministry of Petroleum and Energy in the autumn of 2012, the consultation comments, Report to the Storting No. 36 (2012–2013*), New opportunities in Northern Norway – opening of Barents Sea South-East to petroleum activities*, Recommendation to the Storting No. 495 (2012–2013) and the minutes from the Storting debate of 19 June 2013. This is the correct context for understanding the significance of the economic estimates, and in this context it is clear in the opinion of the Government that they do not suffer from deficiencies, much less deficiencies significant for the outcome.

If the Appellants are not challenging the validity of the opening of BSE in 2013, then in the Government's opinion they should abandon the allegations that the economic estimates from 2012 are deficient. Because this is quite simply legally irrelevant for what is the subject of assessment in this case, which is the validity of the decision on the 23rd Licensing Round from 2016.

7 REGARDING THE CONTINUING POLITICAL AND PUBLIC DEBATE

As a basis for interpreting, applying and reviewing the legal rules at issue in the case, and particularly Article 112, the Government also put a certain emphasis before the District Court on showing the broader political and societal context which the decision on the 23rd Licensing Round is part of. This is included both as a legally relevant policy consideration in the interpretation of Article 112 and as an argument in the assessment of how far the courts may and should go in reviewing the assessments made by the Storting and by the responsible authorities and technical bodies.

In connection with this, the Government pointed out that even though the decision on the 23rd Round has been taken by the King in Council, it has been up for parliamentary consideration several times, both directly and indirectly. Firstly, the decision follows up on decisions and instructions which a broad majority in the Storting has put in place for petroleum policy in general and the development of the Barents Sea in particular. Secondly, the Storting has voted directly three times on proposals to halt the 23rd Round – in 2014, 2015 and 2016. Furthermore, the Storting on several occasions after the June 2016 decision has also considered matters which are directly relevant for the issues this case raises.

These processes are in progress continuously, and they have also continued after the District Court's judgment. The most recent example in the series is the Storting's consideration of a parliamentary motion to halt the ongoing process of awarding licences in the 24th Licensing Round, which was defeated by 100 votes to 1 on 27 February 2018. Simultaneously, a motion to halt the awarding of new licences in predefined areas (Norwegian acronym: TFO) was defeated by 93 votes to 8, and a motion to ask the Government to submit a new petroleum white paper on Norwegian oil and gas policy in light of the climate challenges and the new market situation was defeated by 53 votes to 48.

Exhibit 3. Recommendation to the Storting No. 130 (2017–2018) of 15 February 2018, and minutes from the debate of 27 February 2018.

The Government will note that the ongoing process with the 24th Licensing Round is of entirely the same nature as the 23rd Licensing Round, which has been challenged in this case. The most important difference is that the 24th Round is somewhat larger, with a total of 102 blocks announced, of which 93 are in the Barents Sea and 9 in deepwater areas in the Norwegian Sea. The parliamentary motion to stop the process was justified with the same type of climate policy considerations that have been argued in this case, and after extensive debate. When the Storting voted on the matter, the result

was 100 votes to 1. This is illustrative of the view of the majority in the Storting on the difficult questions the lawsuit raises. This is democratically rooted policy – and it is the result of broad, deep, lengthy, consistent, well-informed and representative processes.

Newspaper articles from law professors Hans Peter Graver, Jan Frithjof Bernt and Inge Lorange Backer, plus research fellow Gøril Bjerkan, have been submitted as exhibits for the Notice of Appeal. The justification for the submission is that these university jurists disagree with the District Court's reasoning. As possible evidence of juridical disagreement, these exhibits are debatable, and in the Government's opinion they also to a marked degree express legal policy viewpoints, rather than legal interpretation based on the relevant sources of law and the facts in the case.

However, the submissions are interesting as expressions of the public interest and debate this legal case has prompted, and in the Government's opinion this has a certain relevance, because it illustrates the point that the questions this case raises are precisely what is being debated continuously in public, as part of the democratic debate on where the boundaries should run between law and politics. In such a context, however, the four attached submissions are not necessarily representative.
This case has so far prompted great public debate, both in Norway and abroad, and there have been a series of interesting submissions in favour of both the Government and the Environmental Organisations. Among established commentators and in editorials, the opinions have also been divided, but there are many here who have supported the Government's view that the relationship between petroleum policy and climate policy is a question which must be resolved though democratic and technical processes, and not be juridified.

8 DIRECT APPEAL TO THE SUPREME COURT?

Leave is requested in the Notice of Appeal to bring the case directly to the Supreme Court under Section 30-2 of the Dispute Act. Under this provision, such leave may only be granted if each of three conditions is met:

1. The case must raise “particularly important issues of principle”

2. It must be “important to ascertain promptly the position of the Supreme Court” on the case

3. Regard “for proper handling of the case” must not weigh against direct appeal

As the Government sees it, the second of these three conditions has not been met in this case. There are no special considerations indicating that it is necessary to have the Supreme Court's position “promptly”, quite the opposite, when this case is compared with many other cases before the courts which involve far more pressing situations. In this instance, the matter involves a decision which was made in the summer of 2016 and which started a continuous process that still continues, and which in all likelihood will continue for many years into the future. Currently there is no exploratory drilling, but this is planned into the spring and summer of 2018. There is no particular risk or acute environmental effects related to this exploratory drilling. The arguments regarding greenhouse gas emissions will not become relevant until development and production occurs from these fields, and this is possibly many years into the future.

As a basis for asserting the matter is urgent, the Appellants have stated two arguments. The first is consideration for the oil companies which “are currently investing billions” in exploration. The response to that is that these companies are doing that willingly and they are well acquainted with the pending legal process, and they are themselves best situated to assess the risk related to their investments.

Secondly, it is alleged that “the exploration phase, with test drilling, is a particularly hazardous phase in the context of petroleum activities”. In response to this, it will be noted that exploratory drilling has taken place on the Norwegian continental shelf ever since the beginning of Norwegian petroleum

activities, and that it also is currently going on continuously on a long series of blocks, in part under considerably more demanding conditions than on the blocks included in the 23rd Round. There is nothing special about these blocks, as the exploratory drilling is regulated, which means that there is greater risk here than other places. And it has been a great many years since there was major environmental harm as a result of exploratory drilling on the Norwegian continental shelf.

To this it can be added that the conditions for a direct appeal are normally interpreted stringently and that a great deal is required. As regards the requirement for “promptly”, Schei mentions as an example in his commentary edition on the Dispute Act, page 1073, that several cases have been brought before the courts which are all dependent on and awaiting the Supreme Court's decision. That is not the case here. This case is the only one of its kind. It is also mentioned as an example that the case may involve a payment (or, performance) where it must be taken into account that parties might die before a decision if it is drawn out. This is very far from the circumstances in this case. In this case, there is no risk that the final decision will not have any significance for the parties, even if the process follows the usual course.

Based on this, it is the Government's view that the Act's requirement for urgency in order to grant leave for a direct appeal has not been met.

It is therefore of less interest to discuss whether the two other conditions have been met. Regarding the requirement that the case must raise “particularly fundamental issues” (sic), the Government will nevertheless briefly note that this obviously applies for the question of interpretation of Article 112 of the Constitution, which is a question which by its nature should be decided by the Supreme Court, perhaps even with an expanded panel or in plenary session. On the other hand, it does not apply to the extensive allegations of procedural errors, which in the Government's opinion cannot succeed, and which under any circumstance are not of such a nature that they weigh in favour of direct appeal.

Regarding the question of what “regard for proper handling of the case” indicates, the Government is of the opinion that this is hardly a determinative consideration regarding direct appeal. It is correct as stated by the Appellants that the presentation of evidence could be done in writing without impairing the proceedings. On the other hand, the case will presumably benefit from a round at the Court of Appeal before it is possibly brought entirely or partially before the Supreme Court. This applies primarily to the facts and arguments regarding procedural errors, but it also applies to the arguments regarding interpretation of Article 112 of the Constitution, which were considerably developed during the proceedings before the District Court and which presumably will be further clarified and refined through a proceeding at the Court of Appeal.

If the Appeal Committee needs to become better acquainted with the case before it decides on a direct appeal, the Government for its part will refer to its detailed presentation in the Notice of Defence of 14 December 2016, as well as the closing statement of 6 November 2017. The Government's comprehensive arguments concerning the question of the interpretation of Article 112 are not precisely stated in these documents, but in the detailed outline submitted to the District Court during the Government's main address on 20 November 2017.

9 PROCEDURAL MATTERS

The Government will mainly submit the same evidence and make the same arguments to the appellate court as before the District Court. The right to supplement the evidence is reserved. The Government did not present any witnesses before the District Court but reserves the right to return to this before the appellate court.

Otherwise, the Government assumes that the additional preparation of the case will depend on whether the Supreme Court allows the case in for a direct appeal and will await this. From the

Government's side, the case is nevertheless ready to be set down for a hearing. Eight courts days were set aside at the District Court, but it turned out that 7 were enough, by quite a good margin. If the case is to be considered by the Court of Appeal, the Government presumes that the same time frames should be adequate. If the case is to be considered directly before the Supreme Court, the time spent will depend on how it is divided up, but for its part the Government will indicate that the time should be divided equally, and that in any event we on this side will need two court days to illuminate the interpretation and application of Article 112 of the Constitution.

10 PRAYER FOR RELIEF

On behalf of the Government of Norway through the Ministry of Petroleum and Energy, the following prayer for relief is submitted:

1. The appeal is to be dismissed.
2. The Government of Norway through the Ministry of Petroleum and Energy is awarded legal costs for the Court of Appeal.

Oslo, 9 March 2018.

Fredrik Sejersted
Attorney General

OFFICE OF THE ATTORNEY GENERAL