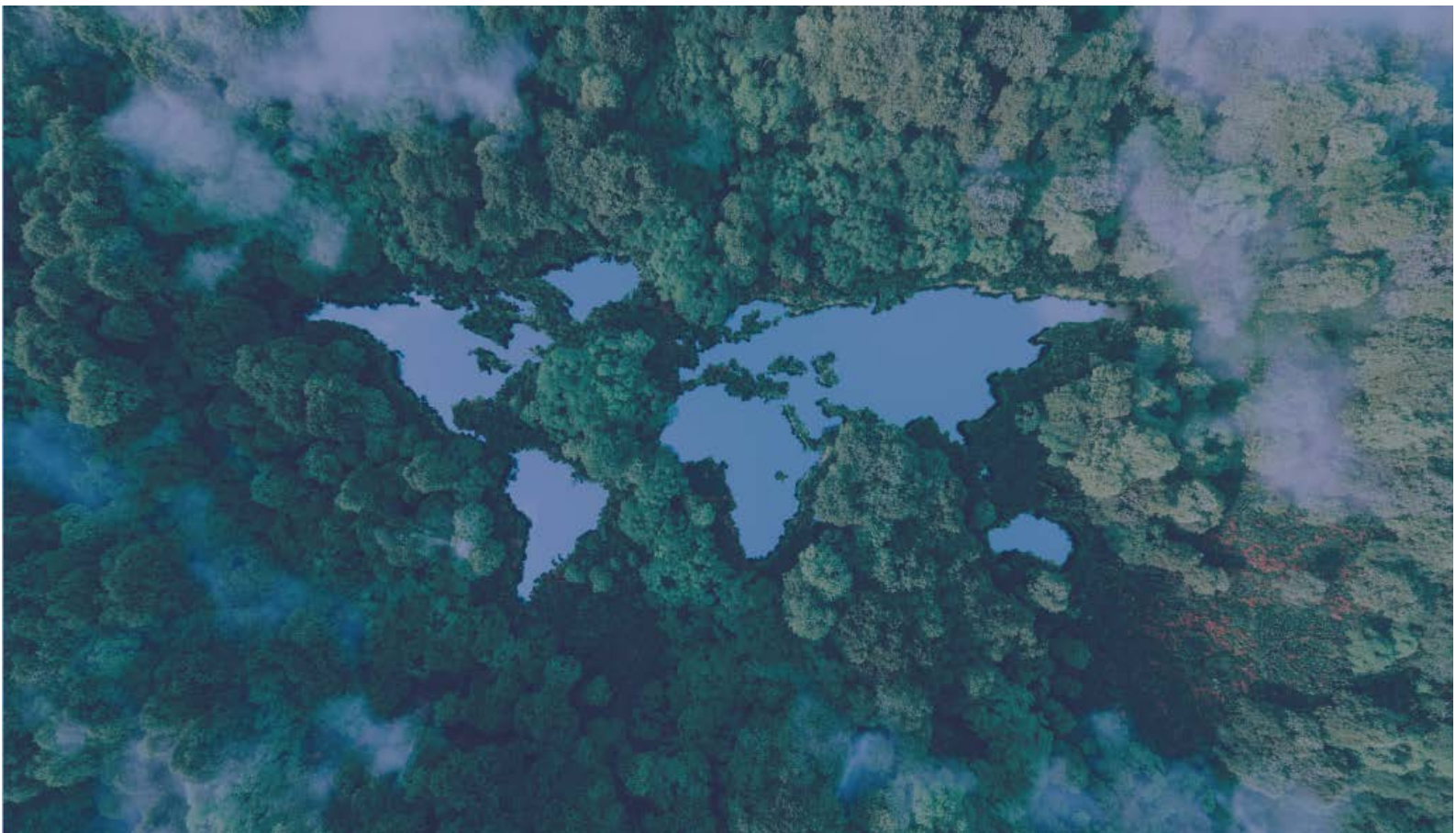




**British Institute of
International and
Comparative Law**

Global Perspectives on Corporate Climate Legal Tactics: Norway National Report

Professor Rosa Manzo





**British Institute of
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Executive Summary

This report provides an overview of corporate climate change litigation in Norway focusing on: (a) relevant causes of action for bringing climate cases; (b) procedural and evidentiary issues; and (c) potential remedies. The structure of the report reflects the questionnaire compiled by the BICL. In the first part of the report, a special focus is given to the Norwegian Constitution with particular reference to paragraph 112, which has been lately amended. The report then goes on to describe the various areas of law where to find relevant causes of action for potential climate cases. The report does not go beyond than presenting the black-letter law. The rapporteur's intention is to provide a presentation of laws in a manner faithful to the doctrine of law and jurisprudence of the country of reference.

The second part of the report is devoted to the discussions around the three climate cases, two of them decided by the Norwegian Supreme Court of Justice and the latest now pending in appeal. The arguments presented by the plaintiffs and defendants have been presented. This is followed by a careful examination of the final decisions by the Norwegian courts. The report points out that two out of three are cases concerning oil activities on the Norwegian continental shelf. This explains why state responsibility remains at the heart of each case: the Norwegian Government acts as the main defendant being the one issuing exploration and production licences in favour to the oil companies.

In general, the procedural and evidentiary issues encountered in corporate climate litigation in Norway concern the tests of causation and the interpretation of the Paris Agreement and the issue of its implementation. About the remedies, it has been interesting to note that the claims for temporary injunction have always been considered to be disproportionate and therefore are rejected by the local courts.

Although the three climate court cases have had a great impact in terms of public debate and academic discussions, the small number of climate court cases makes it difficult to develop a consolidated jurisprudence with regards to climate corporate responsibility in Norway.

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1. Causes of Action

A. Climate Change Law/Environmental Law Statutory Provisions

Norway is a constitutional monarchy. The country is not a State member of the European Union (EU). However, Norway is member of the European Economic Area (EEA).¹ This membership implies that a part of the EU legislation, specifically the EU legislation which has regards to the freedom of movements for persons, products, services, and capital, applies to Norway as well as to the other members of the EU community.² Norway is member of the United Nations (UN) and has signed the totality of UN acts adopted since its constituency.³ The first section of this report will provide an overview of the main national legislation in force in Norway in the field of environment law and its protection. The second part will illustrate the most relevant climate related cases as discussed before the Norwegian Supreme Court. Lastly, it will follow a presentation of feasible remedies which the Norwegian legal system provide in case of detrimental climate change actions.

§ 93, 102, 108, 112 of the Norwegian Constitution

The Norwegian written Constitution- *Grunnloven*- was originally adopted on 17 May 1814.⁴ Four general articles of the Constitution are worth mentioning when it comes to environmental protection.

Paragraph (§) 112 stands out as the most relevant article of the Constitution in the field of environmental protection. § 112 is included in Part E “Human Rights” of the Constitution. This provision was originally adopted as Article 110 b in 1992, at the time when the Rio Conference took place,⁵ and slightly amended and renumbered as § 112 by the 2014 constitutional reform. § 112 is unanimously recognised as establishing the right to the healthy environment.⁶ The text of § 112 reads as it follows:

“Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

¹ LOV-1992-11-27-109, Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS). (EØS-loven)

² Ibid, Art. 1.2.

³ Norway signed the UN Charter on 26 June 1945 and ratified on 16-11-1945 (16-11-1945 kgl.res.) [De Forente Nasjoners Pakt - Lovdata](#)

⁴ Kongeriket Norges Grunnlov, LOV-1814-05-17

⁵ The United Nations Conference on Environment and Development (UNCED), also known as the Rio Conference or the Earth Summit was a major United Nations conference held in Rio de Janeiro from 3 to 14 June 1992.

⁶ Ole Kristian Fauchald and Eivind Smith, Mellom jus og politikk, Grunnloven §112, Fagbokforlaget 2019.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.”

This provision aims to protect both the natural environment as such and the human right to a good environment. § 112 contains sources of substantial and procedural obligations.

Section 1 recognises rights to a natural environment whose productivity and diversity must be preserved beyond the health aspect of it. The second sentence embeds a formal acknowledgment of the principle of intergenerational equity. Section 2 recognises procedural rights for the citizens to information related to the environment, its status as well as its trends in quality.⁷

Section 3 requires the authorities to take action in order to fulfill the above rights. In other words, both the Parliament and the Government must take the necessary actions to ensure that the rights embedded in § 112 are respected and implemented.

Although § 112 is a constitutional provision, the Supreme Court has expressed its view in [Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy](#) that the provision does not grant individual rights to citizens which means that § 112 cannot be invoked on an individual basis.⁸ However, the Supreme Court has expressly recognised § 112 as source of duty upon the State to avoid actions which turn out detrimental to the environment.⁹ § 112 has played a fundamental role in the latest climate court case [Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy](#) which has been so far addressed by the district court.¹⁰ The case has been brought before the court of first instance (Tingrett) in the Oslo district. The case concerns the validity of the Ministry of Petroleum and Energy's decisions to approve plans for development and operation for three petroleum fields. The district court came to the conclusion that the decisions are invalid because the lack of an impact assessment of the combustion emissions released in connection with the development and operation of the three petroleum fields. The district court has argued that the error is serious because the impact assessment regime shall ensure the citizens' right to knowledge about the effects of a planned environmental intervention, and that decisions are made on a sound and informed basis.

§ 93 and § 102 are equally relevant in relation to the environment that has been regarded by the European Court of Human Rights as an important factor for the human

⁷ Hans Christian Bugge, *Environmental Law in Norway*, 4th Ed, Wolters Kluwer, 2022.

⁸ HR-2020-2472-P

⁹ *Ibid*

¹⁰ 23-099330TVI-TOSL/05

well-being.¹¹ The Supreme Court has expressly recognised in *Statnett SF et al. v. Sør-Fosen sijte et al.* § 93 and § 102 as fundamental rights to be ensured through the establishment of a healthy environment.¹²

§ 93 states as it follows:

“Every human being has the right to life. No one may be sentenced to death.”

§ 102 reads as it follows:

“Everyone has the right to the respect of their privacy and family life, their home and their communication.”

Likewise, § 108 establishes a unique role for itself in the field of environmental protection. Its text reads as follows:

“The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”

§ 108 deserves a special consideration due to the context in which it has been developed.

Members of the Sami population exercise their traditional semi-nomadic lifestyle and activities mostly linked to reindeer herding. They have an important role in the management of natural resources and land where they stand and carry out their lives as the Supreme Court has stated in *Statnett SF et al. v. Sør-Fosen sijte et al.*¹³

Climate legislation

The Norwegian legal system is a dualistic one.¹⁴ This means that international and regional legislation, which has been signed by the Government, are required to be adopted by the Norwegian Parliament (hereafter Stortinget) through national legislations.

The Climate Change Act (Act relating to Norway's climate target) is the latest piece of climate legislation, deserving some special attention. The 2017 Climate Change Act (CC Act) as amended in 2021 reviews the precedent acts in light with the Paris Agreement's obligations. The CC Act aims for a reduction of at least 55% of GHG emissions with 1990 as baseline against the emission scenario of 2 degrees C (see Article 3 of CC Act).¹⁵ A more precise climate target is set under Article 4 for a reduction of 90-95% by 2050. This is in line with the overall goal expressed by Article 4 to become a low-emission society by 2050.

In addition to that the CC Act sets forth a system for reviewing national policies. Articles 5 and 6 require the Government to submit updated climate targets to the Storting every

¹¹ *Öneryıldız v Turkey* (2004) and *Budayeva and others. V Russia* (2008)

¹² HR-2021-1975-S

¹³ HR-2021-1975-S

¹⁴ *Oversikt over Norges Rett*, 15th ed, Universitetsforlaget, 2023

¹⁵ LOV-2017-06-16-60

5 years. It is also prescribed that climate targets submitted shall represent a progression from the preceding targets and promote a gradual transformation in the period up to 2050.

Moreover, the Government shall give annually an account of:

- a. how Norway can achieve the climate targets;
- b. the expected effect of the national budget on greenhouse gas emissions.
- c. an account of changes in emissions and removals of greenhouse gases, projections of emissions and removals, and progress towards the climate targets.
- d. an account of how Norway is preparing for and adapting to climate change;
- e. an overview showing sectoral emission trajectories for emissions that are not covered by the EU Emissions Trading System and the types of measures that will be necessary to achieve them;
- f. a status report on Norway's carbon budget, taking into account relevant arrangements within the framework of joint fulfilment with the EU, if agreed.

Through the EEA agreement, Norway already participates in the European emissions trading system (EU Emissions Trading System - EU ETS). The Emissions Trading Act (*Klimakvoteloven*) makes up a relevant part of the climate legislation in Norway. The Emissions Trading Act is a Norwegian law that establishes an emissions trading system for greenhouse gases. The law stipulates that industrial enterprises and other emission sources must have a permit to emit greenhouse gases. The licence is granted through climate quotas awarded by the Ministry of Climate and Environment. The Act applies in Norway, except in Svalbard, and on the Norwegian continental shelf. The Emission Trading Act has been recently amended in order to include aviation and shipping among the sectors under the emission trading scheme.¹⁶

B. Human Rights Law

As it has been previously mentioned in the context of § 93 and § 102 of the Norwegian Constitution, Norway has incorporated some of the human rights directly in its own Constitution. In addition to that, Norway has ratified a number of human rights conventions, and incorporated the most important as part of ordinary legislation.¹⁷ The so called Human Rights Act is a Norwegian law aimed at strengthening the position of human rights in Norwegian law. The Act makes five human rights conventions with additional protocols applicable as Norwegian law, and states that if there is conflict between other Norwegian legislation and these conventions and additional protocols, the conventions and additional protocols shall take precedence. In the field of sustainability it is worth mentioning the European Human Rights Convention (ECHR), in

¹⁶ LOV-2004-12-17-99

¹⁷ Lov 21.mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)

particular its Article 2 and Article 8 have been used as legal ground for one of the most important environmental court-cases as it will be explained in the following of this report. The International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in particular Article 27 ICCPR has been invoked in the recent court case [Statnett SF et al. v. Sør-Fosen sije et al](#) together with Article 5 (d) (v) ICERD.

A lawsuit against Norway is now pending before the ECHR.¹⁸ The lawsuit has been lodged by two environmental organisation backed by six young Norwegians. The case is appealed on the basis of Articles 2 and 8 of the European Convention on Human Rights (ECHR). The articles deal with the right to life and the right to respect for private and family life. The environmental organisations argue that these rights are threatened by climate change caused by Norwegian petroleum policy. The final decision by the Court is expected to be released by the end of 2024.

When it comes to the violation of human rights and climate changes issues, the Norwegian Supreme Court unanimously ruled that the rights of the ECHR had not been violated by the Norwegian Government (see the original climate lawsuit [Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy](#),¹⁹.) According to the Supreme Court the future effects of permits for oil and gas exploration do not pose a "current and proximate risk to life", while the Applicant argued that Norway has failed to take precautionary measures of prevention and protection required of it under ECHR Articles 2 and 8 by disregarding the seriousness and urgency of the climate crisis, and the limited time remaining to avert its most serious and irreversible impacts.

In addition to the ECHR, Norway ratified the UN Convention on the Rights of the Child 1991.²⁰ In light of the Norwegian Supreme Court's jurisprudence it is required that the best interests of the child have been properly assessed and weighed against any conflicting considerations and that the decision states that the best interests of the child have been emphasised as a fundamental consideration.²¹ However, the district court in the recent case [Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy](#), has concluded that there is no legal obligation to consider the best interests of children in connection with each individual decision on a plan for development and operation of petroleum activities.

In the context of human rights treaties and conventions applicable to Norway, it is essential to mention the 1998 Aarhus Convention. In order to implement the 1998 Aarhus Convention, Norway has adopted Act of 9 May 2003 No.31 Relating to the

¹⁸ ECHR, [Greenpeace Nordic and Others v. Norway \(no. 34068/21\)](#), Status of climate application, [Status of climate applications before the European Court \(2\).pdf](#)

¹⁹ HR-2020-2472-P

²⁰ Stortingets samtykke den 8. januar 1991

²¹ HR- 2015-2524-P, paragraph 169.

Right to Environmental information and Public Participation in Decision-making Processes Relating to the Environment. As expressed under Article 1, this Act aims to ensure public access to environmental information in order to make it easier for individuals to contribute to the protection of the environment, to protect themselves against injury to health and environmental damage, and to influence public and private decision-makers in environmental matters. In accordance with Article 2 paragraphs 2 and 3, the definition of environmental information is broad and includes projects and activities that are being planned or have been implemented in the environment; the properties and contents of products, administrative decisions and measures, used in environmental decision-making; human health, safety and living conditions to the extent that they are or may be affected by the state of the environment; archaeological and architectural monuments and sites and cultural environments.

Requests must be not too general (Article 10). However, an exemption to this rule is made in a specific number of cases where the public shall always have access to information (Article 12). This exemption covers cases of pollution that is harmful to health or that may cause serious environmental damage, of measures to prevent or reduce damage and of unlawful intervention in or damage to the environment.

The Act furthermore obliges administrative agencies to make provision for participation by the public in the preparation of legislation, plans and programs relating to the environment (Article 20).

In June 2018 the Norwegian Parliament adopted a new Local Government Act. The Act obligates all local and regional authorities to establish three organs to ensure involvement of youth, older persons and persons with disabilities.

C. Tort Law

There have been no cases specifically brought under tort law and climate change issues in Norway to date. However, this section provides an overview of the rules of tort law that could potentially be used in Norway in the event of climate-related events of various kinds.

Unlike other countries, the public trust doctrine does not apply in Norway. The Outdoor Activities Act – Friluftsloven- is a Norwegian law that regulates the rights and obligations of persons for staying in and using nature in Norway.²² The Act contains the most important rules on common law, which consists of the right of movement, the right of residence and the right to harvest. The law deals with the right to travel freely in nature and, within certain limits, to use nature's resources. The most important function of the

²² Lov om friluftslivet (friluftsloven), 1957-06-28-16

Outdoor Activities Act is to ensure the right to stay and travel in nature, regardless of who owns the area.²³

In Norway the general rule of tort law is that a person or company can only be liable for financial loss if the injury has been caused by irresponsible conduct on the part of the tort, and the act or omission is done with intent or negligence (*culpa*). There are also rules on strict liability for special areas in a number of acts, such as the Pollution Control Act and the Product Liability which will be discussed later in this report Act. According to section 3-5 of the Injury Compensation Act, compensation may be awarded also for non-economic damage.²⁴ The condition for such compensation is that the tort has caused the injury through gross negligence or intent, or by contravention of a number of penal provisions. The award shall be a lump sum as the court deems reasonable and may be awarded to the injured party or the survivors. These rules are likely to be applied in case of negligent failure to mitigate or adapt to climate change.

The Natural Perils Insurance Act is a law that regulates insurance programs related to natural perils.²⁵ Natural damage means damage caused by natural accidents such as landslides, landslides or volcanic eruptions. The purpose of this act is to ensure financial compensation to persons and organisations that suffer losses as a result of natural disasters and extreme weather events. The Natural Damage Insurance Act extends insurance against fire damage to also apply to natural damage. However, this only applies if damage to the item in question is not covered by other insurance. The Natural Perils Insurance Act lays down rules for how the insurance programs are to be administered, the types of damage covered and how compensation payments are to be handled. A specific set of rules is set forth for environmental damages under the Nature Damage Compensation Act which provides compensation from the State following a natural disaster.²⁶ However this Act does not cover the petroleum sector.²⁷ It is the Norwegian Agriculture Agency which shall decide applications for natural damage compensation pursuant to this Act.²⁸ The claimant may direct an appeal against decisions pursuant to this Act to the Natural Damage Claim Appeals Board. The deadline for an appeal is three weeks after receipt of the compensation decision.²⁹

A very relevant piece of Norwegian legislation concerning tort law and environment is the Act on legal disputes between neighbours, also known as the Neighbour Act or

²³ Oversikt over Norges Rett (2019), page 218, 15th ed, Universitetsforlaget

²⁴ Lov om skadeserstatning, 1969-06-13-26

²⁵ Lov om naturskadeforsikring, 1989-06-16-70

²⁶ LOV-2014-08-15-59

²⁷ Section 2 LOV-2014-08-15-59

²⁸ Section 11 LOV-2014-08-15-59

²⁹ Section 20 LOV-2014-08-15-59

Naboloven.³⁰ This is a Norwegian law that regulates the relationship between neighbours. Paragraph 1 reads as it follows:

“No one must have, do or implement anything that is unreasonable or unreasonable to the detriment or inconvenience of neighbouring property. Disadvantage also includes the fact that something must be considered dangerous.

In deciding whether something is unreasonable or unreasonable, emphasis must be placed on what is technically and economically possible to do to prevent or limit the damage or disadvantage. Of course, consideration must be given to the natural diversity in the town.”

The Neighbourhood Act is important for maintaining good neighbourly relations and also for helping to protect biodiversity in town.

D. Company and Financial Laws

The Accounting Act³¹ under Article 3-3a paragraph 10, States that the annual report of a company or society must give information on those aspect of the activities, including the issue of raw material and its products, which may have an appreciable- not insignificant-effect on the environment. Detailed information must be given regarding the possible effects of the various activities, and measures taken or planned to prevent or reduce adverse environmental effects.

The Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions has been adopted in 2021.³² Article 1 of the Transparency Act stipulates that the act must "promote businesses' respect for basic human rights". Section 3b) of the Act defines the term and refers to several international human rights conventions. But the list is not exhaustive. By extension of this, companies' greenhouse gas emissions will affect "fundamental human rights" also according to Section 3. 1 b) of the Transparency Act. The Norwegian Human Rights institute together with the Norwegian Consumer Agency therefore assume that companies will have to report on how greenhouse gas emissions under their effective control affect, among other things, the right to life, physical integrity and property. In the preparations for the Transparency Act, the Ministry of Children and Families precisely assumed that a company's impact on the environment is covered by the Transparency Act "if the environmental impact results in a negative impact on human rights."³³

Norway has been a member of the European Economic Area since 1994.³⁴ Article 73 of the EEA Agreement reads as it follows:

³⁰ Lov om rettshøve mellom grannar (grannelova), 1961-06-16-15

³¹ Act of 17 July 1998 No. 56

³² Act of 18 June 2021 no. 99

³³ See [Climate, environment and human rights - Forbrukertilsynet \[last view: 11.02.2024\]](#)

³⁴ Official Journal J. 1994, L 1/3

1. Action by the Contracting Parties relating to the environment shall have the following objectives:
 - a) to preserve, protect and improve the quality of the environment;
 - b) to contribute towards protecting human health;
 - c) to ensure a prudent and rational utilization of natural resources.
2. Action by the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Contracting Parties' other policies.

As such, a copious number of EU directives applies in Norway. In the field of sustainability, it is fundamental to mention two recent EU directives: the Corporate Sustainability Due Diligence Directive (CSDDD)³⁵ and the Corporate Sustainability Reporting Directive (CSRD). While the CSDDD has not been approved yet at EU level, the CSRD Directive has been incorporated through the amendment to the Accounting Act section-3-3c. EU rules will require large companies in Norway to publish regular reports on the social and environmental risks they face, and on how their activities impact people and the environment.

The EU Sustainable Finance Disclosure Regulation (SFDR)³⁶ - in Norwegian called "Offentliggjøringsforordningen" - has been incorporated into Norwegian law.³⁷ The Act regulation requires all financial advisers in Norway to publish an account of how sustainability is integrated. Pursuant to the EU's Disclosure Regulation "SFDR", incorporated into the Norwegian Act on sustainable finance, financial market participants and financial advisers must integrate all relevant financial risks into their investment advice, as well as all relevant sustainability risks that may have a relevant significant negative impact on the return on an investment or a piece of advice and must regularly assess them.

E. Consumer Protection Laws

The Act on Control of Products and Consumer Services (Act of 11 June 1976 No.79) contains important rules about information about products that may be harmful to health or the environment. In addition to that the Act is to prevent products from causing environmental disturbance (for example in the form of disturbance of ecosystems, pollution, waste, noise),³⁸ and environmental disturbance by promoting effective energy use in products. The Act established a duty of care upon any person that produces,

³⁵ The CSDDD is still under negotiations. See [Corporate Sustainability Due Diligence in the EU: Latest Updates and What to Expect Next | Paul Hastings LLP](#)

³⁶ Regulation (EU) 2019/2088

³⁷ LOV-2021-12-22-161

³⁸ Act 11 June 1976 No.79, Section 1 b

imports, places on the market, processes, uses or handles products.³⁹ The Act sets forth the right to information from public authorities (Art.9), as well as from the producer, importer, vendor or user of products (Article 10). In case of non-compliance, the wrongdoer is criminally liable in accordance with Section 12 of the Act. The consumer-based rules have been enriched with the adoption of the Labelling of Consumer Good Act (Act of 18 December 1981 No. 90). This Act provides the government the authority to issue regulations on the marking and labelling of productions (article 3 and 4). This may include information on energy and resources use of the product, and its environmental effects. The Consumer Authority represents a guidance on sustainability claims used for marketing purpose. The Authority is in charge for the Nordic ecolabelling system, named Swan (Svane in Scandinavian language). Producers have the right to use the label if their product meet a number of criteria. The label, if has been obtained, is valid for 3 years, after that the producers must apply again for a licence.

In this context it is worth to mention the Product Liability Act of 23 December 1988. Product liability is the legal liability a manufacturer has for damage caused by products that have been manufactured or placed on the market as part of his profession, commercial activity or similar.

The Product Liability Act has been adapted to Council Directive 92/49/EEC (Third General Insurance Directive), which has been made part of the EEA Agreement. All manufacturers have an objective liability for personal injury and property damage caused to the product in consumer relations. The rules apply to all kinds of goods and movable property, but not real property.

F. Fraud Laws

§ 240, § 241 and § 242 of the Penal Code set forth a general provision for environmental crime. One should keep in mind that these articles punish the agent who cause “very serious” consequences to the environment. This means that the threshold is set rather high.

§ 240, 241, 242 of the Penal Code

Article 240. Serious environmental crime

A penalty of imprisonment for a term not exceeding 15 years shall be applied to any person who with intent or gross negligence

- a. pollutes the air, water or ground in such a way that the living environment in an area becomes significantly harmed or is threatened by such harm, or

³⁹ Ibid, Section 3

- b. stores, abandons or empties waste or other substances presenting an obvious risk of consequences specified in a).

A penalty of imprisonment for a term not exceeding six years shall be applied to any person who with intent or gross negligence

- a. reduces a natural population of protected organisms that are threatened by extinction nationally or internationally, or
- b. causes significant harm to an area that is protected by an administrative decision adopted pursuant to chapter V of the Nature Diversity Act or an older protective administrative decision specified in section 77 of the Nature Diversity Act, chapter III of the Svalbard Environmental Protection Act, section 2 of the Act relating to Jan Mayen or section 2 of the Act relating to the Bouvet Island, Peter I's Island and Queen Maud Land, etc.

Article 241. Conspiracy to engage in dissemination of infectious matter or poisoning hazardous to public health or serious environmental crime

“A penalty of imprisonment for a term not exceeding six years shall be applied to any person who enters into a conspiracy to commit a criminal act as specified in section 240 first paragraph.”

Article 242. Cultural heritage crime

“A penalty of imprisonment for a term not exceeding six years shall be applied to any person who with intent or gross negligence causes significant harm to cultural heritage sites or cultural environments of particular national or international significance”.

A penalty of imprisonment for a term not exceeding two years shall be applied to any person who in an armed conflict with intent or gross negligence uses a cultural heritage site or cultural environment of particular national or international significance to support military action and thereby creates a risk of harm to the cultural heritage site or cultural environment. However, no penalty applies if taking such action was of imperative military necessity.

Article 240 has been applied by the Supreme Court in [a case concerning the protection of wolves](#).⁴⁰ Four men were sentenced for attempting to illegally kill wolves. They had been hunting wolves in a protected area for wolves, with the aim of killing three wolves. They were sentenced to sentences ranging from 120 days to six months in prison and denied the right to hunt and trap for three years. The judgment is significant for the interpretation of the Penal Code's general provisions on wildlife crime and is indicative of the level of punishment in cases concerning illegal wolf hunting in wolf zones.

An important general rule in the Norwegian legal system is the criminal liability for companies and other institutions. Articles 27 and 29 of the Penal Code punish

⁴⁰ HR-2016-1857-A

enterprises with a fine which in the case of environmental crimes could lead to imprisonment.⁴¹

G. Contractual Obligations

The rules of Law on the Termination of Agreements are laid down in the (Contract Act) Avtaleloven.⁴² The rules do not explicitly refer to “green termination clauses”. However, special rules have been set by in case of consumer contracts, under Chapter 4. Special provisions for consumer contracts.⁴³ Section 38(b) lists a set of information requirements in consumer contracts:

Before entering into an agreement, the trader shall provide the consumer with the following information in a clear and understandable manner, provided that the information is not already clear from the context:

1. the essential characteristics of the good or service, to the extent that the mode of communication and the good or service are suitable for this;

These rules could provide a legal basis that could be used in climate corporate litigation.

H. Planning and Permitting Laws

The Planning and Building Act (PBA) establishes a system for land-use and building control.⁴⁴ This Act is often referred as the “most important environmental act” in Norway. According to Article 1.1, the overall objective of the PBA is to “promote sustainable development for the benefits of individuals, society and future generations”. The PBA Act contains certain rules directly aimed at the protection of the environment. Article 3.1 lists a number of factors which shall be taken in consideration for the planning. Letter g) of Article 3.1 reads as it follows: “take climate consideration by reducing emissions of greenhouse gases and adapting to expected climate change inter alia through solution for energy land use and transport.” According to the PBA, State regulations and policy guidelines provide an important basis for the regional and municipal planning. This explains why the Act is the basis for extensive regional planning and municipal spatial/land use planning. Such planning is very important in a climate change perspective – both to reduce emissions (mitigation) and prepare for effects of climate change (adaptation). The Act applies to the whole mainland territory, including watercourses and the underground (Article 1-2). It also applies to coastal waters inside 1 nautical mile from the baseline. According to the PBA, state regulations and policy guidelines provide an important basis for the regional and municipal planning.

⁴¹ LOV-2005-05-20-28

⁴² Act of 03 July 1918

⁴³ The chapter was added by Act No. 20 of 2014 June 27

⁴⁴ Act of 27 June 2008 No. 71

The construction of roads must follow the PBA rules. Besides planning, the PBA contains rules concerning the building. The constructions of a new building must follow a set of rules. Article 28-1 demands that the site for the construction must be safe as regards environmental and natural risks, such as flood, landslide, and avalanches. Based on the decision in the Nissegården case,⁴⁵ the Supreme Court has the view that a public authority must not be considered liable as long as it has exercised sufficient caution and diligence when approving the request for construction. However, the Supreme Court has made clear in HR 2020-1353-A that the PBA shall be read in light of § 112 of the Norwegian Constitution.⁴⁶ The case in question concerned the violation of the general prohibition to build less than 100 meters from the sea. This rule is set forth under Article 1.8 of the PBA. According to this provision, all types of constructions and buildings are prohibited in this zone. It also regulates local pollution. The owner of a property located in the 100-metre belt along the sea had applied for and received approval for the construction of a new cottage with basement. After the application was approved, a larger basement was blasted and excavated, an underground passage between the cottage and an annex was constructed without application and approval, an embankment was built against the adjacent dirt road, a road was constructed and a barrier erected. The Supreme Court further says - in the same paragraph - that the meaning of "protect the environment is reflected in Section 112 of the Constitution", and that reactions to breaches of the Planning and Building Act "must be carried out in light" of this. Following this ruling, the question is open to whether a stricter interpretation of the PBA rules in light of § 112 would increase the chance for further actions in climate-related cases connected to property rights.

Public participation is ensured through the establishment of a system of exchange of information. The planning authorities have a duty to actively inform the public about the planning activities. Planning proposals have to be published in a way to be available to all citizens. Everybody has a right to raise questions and express their view.⁴⁷

I Others

Mining and Petroleum Industries

Mining industry is a fundamental sector for the Norwegian economy. The Acquisition and Extraction of Mineral Resources (the Minerals Act) is the main legislation covering the extraction of minerals. Article 1 makes clear that these rules aim to promote and ensure socially responsible management and use of mineral resources in accordance with the principle of sustainable development. In addition to that Article 2 sets as goals the safeguarding of the Sami culture, their commercial activities and their social life

⁴⁵ Rt-2015-257

⁴⁶ Katrine Hauge et al..

⁴⁷ Bugge, p 440.

together with the environmental consequences of extraction. Sami rights and interests must be taken into special consideration as stated explicitly in Article 6 of the Act which asks for the application of the rules of international law relating to indigenous people and minorities.

The Act lays down a set of provisions related to environmental aspects. According to Article 41 operations shall be carried out in accordance with good mining. Article 48 demands that operations shall be performed with caution so that they do not result in unnecessary pollution or unnecessary damage to the environment.

A specific act regulates petroleum activities. Section 3-1 of the Petroleum Act requires the competent authorities to produce an assessment with regard to “the impact of petroleum activities on trade, industry and the environment and of possible risks of pollution, as well as the economic and social effects that may result from petroleum activities”⁴⁸. Before a licence may be granted in a certain area, Parliament must take a decision to open that general area for petroleum activities.⁴⁹ Distinction must first be drawn between the two types of licences: ordinary bi-annual licence rounds for “new” areas or yearly Awards in Predefined Areas (APA-licences) for mature areas. The Supreme Court has made clear in the court-case [Greenpeace Nordic Ass’n v. Ministry of Petroleum and Energy](#) that that the Environmental Impact Assessment (hereafter EIA) in connection with an exploration licence should assess the climate effects of the future emissions from the production of the petroleum. The exploration licence according to section 3-3, 3rd para gives the right to exploration and exploitation, and ownership rights over the oil found. The exploitation licence gives a right and a duty to explore the licence area, through a further defined exploration program in the licence, but it does not give a right to produce. In other words, the exploration licence does not give a definite right to develop a potential discovery into a producing field.⁵⁰ This again requires a new decision from the Ministry in the form of an approval of the so called Plan for development and Operation, which is prepared by the licence group and is again subject to further procedural requirements. According to Section 4.2 of the Petroleum Act, the EIA must take into account both the economic and the environmental consequences of granting a production licence in a certain area. The Petroleum Regulation, Section 6c (e) refers to “the climate” as one of several consequences that shall be considered in the impact assessment before the first decision to open new areas is taken. According to Alvik “it is fairly clear that this cannot be interpreted to encompass an obligation to assess overall consequences for the world’s climate resulting from increased Norwegian production of oil and gas as a result of opening new areas”. In

⁴⁸ Petroleum Act of 29 November 2017

⁴⁹ See the specific requirements in the Petroleum Regulation, Section 6a-6d, available in unofficial English translation at <http://www.npd.no/en/Regulations/Regulations/Petroleum-activities/>

⁵⁰ Ålvik, I. (2018) The First Climate Change Litigation, *Journal of World Energy Law and Business*. 11 (6), 541-545

other words, the text in the provision tends towards exclusively considering the consequences of further emissions in relation to production in Norway, e.g. through flaring, and burning of gas to power the installations).⁵¹

The rules laid down under Chapter 7 make the licensee strictly liable in case of damage or loss due to pollution caused by the discharge –whether accidental or intentional- of petroleum. Chapter 8 of the Petroleum Act rules in case of damage suffered by fishermen due to pollution and waste from petroleum activities.

Pollution Control Act

The Pollution Control Act (PCA, of 13 Marc 1981 No. 6), pertains to pollution from stationary sources as well as waste management. This Act covers regular emissions from petroleum installations on the continental shelf,⁵² incineration of waste and combustion for heating. Article 11 establishes a system of permits which can be granted upon the condition of preventing emissions into the air. The overall purpose of this legislation made explicit under Article 1 is “to protect the outdoor environment against pollution and to reduce existing pollution, to reduce the quantity of waste and to promote better waste management. The Act shall ensure that the quality of the environment is satisfactory, so that pollution and waste do not harm human health or adversely affect welfare, or damage the productivity of the natural environment and its reproductive capacity”. This implies that whoever wants to carry out a polluting activity will need an individual permit and must comply with the regulations set by the PCA.

Pollution is defined very broadly under Article 6. By stating so, the Act relies on a very low threshold for damages as well as for nuisance. The Supreme Court has the view that even minor damage to the micro-flora in the soil on the polluter’s own property must be regarded as pollution according to the definition of Section 6 paragraph 2.

Svalbard Treaty

The treaty concerning the Archipelago of Spitsbergen (hereafter: Svalbard Treaty) was adopted on 9 February 1920 in Paris. The Treaty recognises Norway’s “full and absolute” sovereignty over the Svalbard archipelago – all islands, islets and reefs between 74° and 81° N and 10° and 35° E (Art.1).

Article 2 reads:

Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters [...].

⁵¹ Ibid, Alvik

⁵² The Pollution Control Act, section 4

According to its interpretation widely accepted,⁵³ Norway shall use its sovereignty to take active measures to protect the environment of Svalbard.

⁵³ Øystein Jensen, *Arctic Review on Law and Politics*, Vol. 11, 2020, pp. 82–107

2. Procedures and Evidence

A. Actors Involved

The present section will explain both the rule of procedure as well as the standard for evidence in courts in light of the two most important climate cases decided in the Norwegian jurisdiction, namely *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* and *Statnett SF et al. v. Sør-Fosen sijte et al.* which concerned the establishment of wind parks for production of renewable energy (a climate-friendly activity). Before delving into the analysis of the two court-cases it is fundamental to sketch a brief overview of the Norwegian judicial system.

i. Who brings climate actions against corporations in Norway?

In the context of Norwegian climate litigation, it is possible to distinguish two types of actors. On one hand, environmental organisations or/and single individuals play as main actors in court cases. Examples in this regards can be drawn by *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* where two of the most known environmental organisations in Norway, namely Greenpeace Nordic and Nature and Youth, sued the Ministry of Petroleum in regards to the legitimacy of new petroleum licences issued by the Ministry itself. However, corporations can also be sued by informal association, as in the case of *Statnett SF et al. v. Sør-Fosen sijte et al.* The corporations were the permit holders and the case concerned at the outset the judicial assessment of compensation for compulsory purchase. The two corporations - Fosen Vind DA and Statnett SF- were sued by two groups of local citizens (reindeer herders) - Reinbeitedistrikt and Sørgruppen- triggering a question of legitimacy of the permits issued by the public authority for the establishment of wind farms in the area of Fosen. Individuals can also play a role of actor as in the latest case where a reindeer owner has acted as a rightholder under the Reindeer Act, whose rights were subject to compulsory purchase following the permit granted to the energy developer.⁵⁴

ii. Against whom has climate action been brought?

The two afore-mentioned court-cases show that climate related actions have been brought directly against public authorities, specifically the Norwegian Ministry of Petroleum and Energy as in the case *People v Artic Oil*, or against corporations as in the Fosen case. This has mostly been read in the context of Norwegian environmental legislation which has set a copious number of requirements upon commercial companies for carrying out sustainable business. The lack of an upfront permit/licence prevents commercial companies from pursuing any activity which has not been pre-assessed as suitable by public administration. Once the permit or licence is

⁵⁴ Case no.: 14-136323 SKJ-INTR

awarded, environmental organisations and individuals may also choose to sue the private developer instead of or in addition to the public authorities that have run an upfront environmental assessment of the activity in question.

iii. Who are/might be the third-party intervenors?

In the two main Norwegian environmental court cases third parties have been asked to intervene during the course of proceedings. In the *People v Artic Oil case*, the Norwegian Grandparents Climate Campaign Association gained its right to stand in the proceeding as third-party intervenors. In the case of Fosen, the Norwegian Ministry of Petroleum and Energy requested permission to intervene, supporting the corporation claims. The rules of third parties intervention are laid down under Section 15-7 of the Dispute Act, and also section 15-8 on written interventions as "*amicus curiae*".

iv. Others not mentioned above

The concept of "real need" is the key criterion for *locus standi* in Norwegian civil court cases in accordance to Section 1. 3 of the Dispute Act.

The text of this section has been gone under a change which has brought to substitute the original expression "legal interest" with the more understandable expression of "a genuine need". Briefly one can say that court shall evaluate a real need for adoption of a judicial decision on the case.⁵⁵ Three conditions must be met before the case can be accepted: the need must be actual and must be related to the protection of a specific right.⁵⁶ In case of administrative decisions, the concept of "interest of the appeal" is the key criterion for *locus standi*. It has been noted that the concept of interest of the appeal must be read on the same line with the "a genuine need" as required in the civil proceedings.⁵⁷ In both cases an ideal interest in a decision will be refused on high probability.

B. How the Courts in Norway have addressed issues of:

i. Standing

In Norway the two most important environmental cases took place before Norwegian civil courts. Norway's administrative courts are not separate from ordinary courts, nor from constitutional courts. Norwegian courts deal with criminal and civil cases, including the environmental ones. According to Section 4-4 of the Dispute Act, an action may be filed with the court of the ordinary venue of the defendant. Exemptions to the general rule of the ordinary venue lies under Section 4- 5 of the Dispute Act for a set of claims concerning property rights, questions of inheritance, consumer rights, maritime

⁵⁵ Anne Robberstad, *Sivilprosess*, 4.utgave, Fagbokforlaget.

⁵⁶ *Ibid*

⁵⁷ Bugge, *Environmental Law in Norway*, pp. 393.394

relations, employment arrangement, damages in contracts, damages in tort, action against insurance company or against the State.

The Norwegian judiciary consists of three levels: the local court (Tingrett), the regional court of appeal (Lagmannsrett) and the Supreme Court (Høyesterett). According to § 89 of the Norwegian Constitution, courts have the right to deal with constitutional questions. The rules of procedure for the civil courts are laid down in the Dispute Act (Tvisteloven)⁵⁸.

When it comes to the capacity to sue, the rules are laid down in the Dispute Act, section 2-1. Capacity to sue and be sued.⁵⁹

“(1) The following have the capacity to sue and be sued:

- a. “any physical person”
- b. the State, municipalities, county authorities and inter-municipal cooperations
- c. companies, including limited liability companies, general partnerships and limited partnerships
- d. cooperative societies, savings banks and foundations
- e. estates in bankruptcy and estates of deceased persons under public administration”

Organisations, including environmental organisations, have a general right to stand whether specifically provided by their own statute in accordance to Section 2-1. of the Dispute Act. This section reads as it follows.

Section 2-1. Capacity to sue and be sued

The following have the capacity to sue and be sued:

- f. other organisations and independent public enterprises if specifically provided by statute.

(2) Other organisations than those mentioned in subsection (1) have the capacity to sue and be sued to the extent justified by an overall assessment, whereby the court shall place particular emphasis on:

- whether the organisation has a permanent organisational structure,
- whether the organisation is represented externally by an executive committee or other body,
- whether the organisation has a formalised membership arrangement,
- whether the organisation has funds of its own, and
- the purpose of the organisation and the subject matter of the action.

In addition to that, the right to sue for organisations, including environmental organisations, further extends to any organisation in relation to matters that fall within its purpose and normal scope. This right was recognised by the Supreme Court in the so-called [Alta case](#).⁶⁰ The Supreme Court accepted that the Norwegian Association for

⁵⁸ Act of 17 June 2005 no. 90

⁵⁹ Ibid

⁶⁰ Alta case 1. Rt 1980 s. 569

Locals could sue the Government in respect to the validity of the decision to build a hydropower station nearby the Alta River.⁶¹

Section 1-4. Right of action for organisations

“An organisation or foundation may bring an action in its own name in relation to matters that fall within its purpose and normal scope.”

The Dispute Act also regulates the right to stand for corporations.

Section 2-1. Capacity to sue and be sued under letter c reads as it follows:

“The following have the capacity to sue and be sued:

- c. companies, including limited liability companies, general partnerships and limited partnerships”.

ii. Jurisdiction

The rules of jurisdiction are embedded in the Dispute Act. As general rule, Norwegian courts have the right to hear cases when the defendant has the right to stand in front of a Norwegian court. (see Section 4-4. Ordinary venue Dispute Act).

iii. Justiciability

When it comes to the issue of standing, Section 1-3 of the Dispute Act requires the claimant to prove a “genuine” need for the claim. The section in object reads as it follows:

Section 1-3. Dispute Act (Tvisteloven)

“(2) The claimant must demonstrate a genuine need to have the claim decided against the defendant. This shall be determined based on an overall assessment of the relevance of the claim and the parties' connection to the claim.”

This provision should be read in the context of the overall intent of the Norwegian legislation to avoid litigation in courts over the possibility of alternative dispute resolution assessment.

iv. Group Litigation

A special type of procedure is laid out for group litigation. Under Part VIII of the Dispute Act, section 35-2 sets forth **prerequisites for class action**.

⁶¹ Retstidende 1980, 569

- (1) A class action can only be brought if:
 - a. several legal persons have claims or obligations for which the factual or legal basis is identical or substantially similar,
 - b. the claims can be heard by a court with the same composition and principally in accordance with the same procedural rules,
 - c. class procedure is the most appropriate method of hearing the claims, and
 - d. it is possible to nominate a class representative pursuant to Section 35-9.
- (2) Only persons who could have brought or joined an ordinary action before the Norwegian courts may be class members.

In light of the above overview about the procedural rules for civil court cases it is possible to answer to a set of questions.

v. Apportionment

In Norwegian tort law, the doctrine of causation has had as its basic principle that the alleged tortfeasor is responsible for everything or nothing.⁶² This means that there will not be a *pro rata* distribution of the loss according to the amount of causal contribution in the relationship between several tortfeasors. The principle of proportional responsibility has not been heard at any point in Norwegian legal practice.

C. Arguments and Defences

The case- study points to a number of hurdles/barriers which have defeated the case outcome. Hurdles and barriers in *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* could be summed up in two main arguments; one concerning the causal link between action and damage, the second concerning the nature of the obligations upon the Government.

With regards to the first set of arguments, the claimant assumed a "causal" and "direct" link between the awarding of production licences and the problem of climate change without further proving it. The claimant's argument and assumption do not provide sufficient evidence with regards to the "direct" link between the cause (awarding production licences) and the effects (contribution to the overall amount of dangerous emissions).

The appeal to the Norwegian Supreme Court was partly based on the comment in the Court of Appeal's decision that the reduction of Norwegian oil and gas could lead to increased use of more environmentally destructive energy sources elsewhere. Thus, the global emissions could still not be met, even if Norway completed its reductions. The

⁶² Anne Marie Frøseth og Bjarte Askeland, Proporsjonalt ansvar i norsk rett?, Tidsskrift for erstatningsrett, forsikringsrett og trygderett Vol.13, Iss.1, 2016

claimant thus argued that there is never a discharge of responsibility for one country if other countries do not do what they are required to do.

The Norwegian cause of action is clearly influenced by the fact that Norway is an 'oil nation'. It was the claimant's perspective that Norway's responsibility must be assessed based on Norway's status as a large oil exporter with resources to restructure. In light of this view, Norway must take a proportionately larger share of the climate cuts, both because Norway has produced oil and gas resulting in major emissions, and because Norway has the economic capacity to do so. (HR-2020-2472-P, 2020, para. 26). The specific use of a licensing round as the grounds for litigation was thus an attempt to force the Government to reduce its most environmentally destructive practice. Additionally, this argument portrays the view that Norway as a successful oil and gas nation, with the corresponding resources, has even more responsibility to do its part in combating climate change.

The case might have turned out in a different outcome whether the claimant had provided more compelling evidence of the "direct" link between the damaged occurred and the action endeavoured by the State. It is indeed fundamental to take into account that civil liability is built on the principle of direct causality with exemptions made for objective responsibilities in case of breach of the contract.⁶³

With regards to the Artic Oil case, a second barrier raises in connection with the nature of the obligations upon the Government. The question which the Supreme Court had to face was the following: Does Article 112 Norwegian Constitution creates an obligation of conduct or obligation of result?

The Norwegian Supreme Court expresses its view by stating that "The basic intent behind rules [referring to § 112 Grunnloven] is to ensure that the environmental effects are adequately clarified and assessed before possible implementation" (HR-2020-2472-P, 2020, para. 246), and the climate effects are politically assessed on a regular basis" (HR-2020-2472-P, 2020, para. 241).

The Supreme Court concludes that subsection 3 of § 112 clearly states, "The authorities as a starting point decide which measures to implement [...]. § 112 may nonetheless be asserted directly in court when it concerns an environmental issue that the legislature has not considered" (HR-2020-2472-P, 2020, para. 139). Their interpretation [reference is made to the measures] is thus that the assessments made by the authorities hold a standard that sufficiently considers the protection of the provisions of Article 112. Ultimately, this means that claims of violations of the first subsection are only valid if the Court deems the assessments of the Government amount to a lack of assessment. The Supreme Court seems to consider § 112 Norwegian Constitution as a source of

⁶³ Bugge, *Environmental Law in Norway*, 4th Ed, Wolters Kluwer, pp 375-376

obligations of conduct. By arguing so, the Court precludes a factual assessment about the merits of the measures adopted by the Government. The Supreme Court's decision has kicked off an ongoing debate on the nature of § 112 of the Norwegian Constitution. On one hand, it is almost unanimous that for the first time, there is an interpretation of the Constitution § 112 in itself, which is the main issue in the Supreme Court. On the other hand, discussion is still controversial among scholars with regards to how the Supreme Court formulates the threshold for review of administrative decisions.

Katrine Broch Hauge og Ingunn Myklebust have noted how the court is of the opinion that this needs to be "one size fits all".⁶⁴ In the case at stake, the Supreme Court considers that there may be several ways to achieve the climate goals and that one does not necessarily achieve a better result for the climate. The Court seems to be thus simultaneously open for the assessments of the threshold to be different in other matters such as decisions that will destroy groundwater, wetlands, where perhaps it is easier to measure the local and more direct consequences of the decision, while the assessments of "sum effects" of emissions will not be considered by the Supreme Court. For the time being, this task in Norway is fully left to the politicians because the courts are deemed unable to assess the environmental consequences of such actions. The Supreme Court is very cautious about reviewing the administration, where the Parliament has carried out professional and political assessments of priorities between various useful goals, and there it is difficult to trace a clear causal connection between Norwegian administrative practices and difficulties in reaching the climate goals in question. The Supreme Court will be careful to check the very specific assessments that the administration has made.

With regard to the *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil, Norwegian Supreme Court)* it is interesting to deepen the understanding around the arguments deployed by the claimants and the defendants in the course of the proceedings. Ivar Alvik has summed up the claims in three main points exposed as follows:⁶⁵ first, that the awarding of the licences was invalid for being in direct violation of § 112 of the Constitution, second, that it was invalid for being in violation of the Petroleum Act as interpreted in light of § 112, and third, that it was invalid due to violation of several procedural requirements interpreted in light of § 112: specifically, that it was based on insufficient impact assessments and factual mistakes, and that the reasons for the decision were not sufficiently stated.

⁶⁴ Katrine Broch Hauge og Ingunn Myklebust, Nye saker frå Høgsterett om Grl. § 112 som tolkingsfaktor og grense i klima-, naturressurs- og arealforvaltning, TIDSSKRIFT FOR EIENDOMSRETT, ÅRGANG 17, nr. 1-2021, s. 3-7, 2021, UNIVERSITETSFORLAGET

⁶⁵ Ålvik, I. (2018) The First Climate Change Litigation, *Journal of World Energy Law and Business*. 11 (6), 541-545

The Claimant's arguments points to § 112 Norwegian Constitution. In the claimant's view § 112 must be read as establishing an individual right to an environment that is conducive to health. It follows that the provision entails in part a prohibition against certain official measures that may lead to negative effects for the environment and nature above a certain threshold. In this view, there are two principal arguments why the State Decision is not consistent with § 112: the first (the climate-argument) being that the world is experiencing serious anthropogenic global warming that requires drastic and immediate measures. The Decision means the opposite. It will lead to enormous emissions. Secondly, the Decision involves areas close to and partially in the movable ice edge and the polar front, i.e. in an area with a very special ecological system (the vulnerability argument). According to the claimant, environmental effects have not been sufficiently assessed and therefore the decision is not sufficiently justified with respect to these circumstances. In addition, there is also a failure to investigate associated with the socio-economic assessments prior to the opening. According to the claimant, the Court of Appeal interpreted the Norwegian Petroleum Act inaccurately by not distinguishing between licences for production and licences for exploration which resulted in an inaccurate assessment of the damages resulting from the activities in the area.

On the contrary, the Defendant's arguments (the Government) points to the first paragraph of § 112. In the defendant's view, § 112 bears the mark of being declarative in nature, i.e. the provision expresses a political manifesto. The Government has cited the fact that the Climate Change Act of June 2017 does not grant private rights. The Government has also cited the prior history of § 112 as support for its view. The Government has maintained that (former) § 110 b could not be understood to be a rights provision. However, the Government comes to argue that § 112 is a rights provision but it does not grant individual rights which can be activated in court. Following this set of arguments, the Government argues to have fulfilled the legal procedures to grant production licences by carrying out the environmental impact assessment of activities, in accordance to the Petroleum Act.

[Statnett SF et al. v. Sør-Fosen sijte et al.](#)

Norwegian Supreme Court HR-2021-1975-S, (case no. 20-143891SIV-HRET)

The case- study points to a number of hurdles/barriers which have defeats the case outcome. The hurdles and barriers in [Fosen](#) case could be summed up as in the following.

The power companies Fosen Vind and Statnett argues that the building of windfarm with related infrastructure would not limit the Sami people's possibility to practice reindeer husbandry to such an extent that it amounted to a violation of Article 27 ICCPR. The companies argue that there has been an overestimation of the negative consequences by taking into account late winter pastures as so-called "minimum factor"

for reindeer husbandry in the district rather than the right factor, namely the availability of summer pastures that dictates how many animals the herders can have.

The power companies maintained that the threshold for violation under Article 27 ICCPR is high, see the term “denial”. The use of “threaten” in case law from the UN Human Rights Committee does not mean that merely a threat against a minority’s culture is sufficient; the interference must be so intrusive that it equals a total denial. Significant weight must be placed on consultations and involvement in the decision-making process. The States Parties may not exercise a margin of appreciation, but a balance should be struck against other interests of society. The wind power development does not violate the reindeer herders’ rights under Article 27 ICCPR. The consequences are not so serious that they deprive the Sami of their right to enjoy their own culture on Fosen. The Ministry of Petroleum and Energy’s assessments and forecasts are thorough and adequate in every way. The reindeer herders have been consulted in the process, while a balancing against other interests of society suggests that no violation has taken place. The significance of “the green shift” is massive and it cannot be interpreted in a restrictive way. The development of wind installations also does not violate Article 5 (d) (v) ICERD.

According to the companies, the measure of damages in the reappraisal is based on an error in law. There has been a failure to link the damages to the reindeer herders’ financial loss. Article 27 ICCPR does not give a basis for derogating from general principles of measuring damages in expropriation law. Secondly, the duty to adapt has not been considered. Fosen Vind and Statnett are not liable for the consequences of the windfarms.

On the contrary, the reindeer herders claim that the development of the windfarms was incompatible with Article 27 ICCPR, Article 1 Protocol 1 of the European Convention on Human Rights (ECHR), and Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It has also been argued in the alternative that the decision by the Ministry of Petroleum and Energy be ruled invalid for procedural errors, as it was based on false premises and poorly prepared. It has been argued that Article 27 ICCPR confers rights on individuals to enjoy their own culture, and the question is thus whether the individual reindeer herder’s rights have been violated. However, since reindeer husbandry is practiced collectively, locals may also invoke rights under the Convention. In any case, the locals must be able to act as a party to the expropriation appraisal and assert a violation on behalf of its members.

According to Article 27 ICCPR, a violation occurs not only when an interference entails a total denial of the right to cultural enjoyment, but also when it has a considerable impact. When the cultural practice is vulnerable to begin with, a violation occurs already when the interference has a “certain limited impact”. Article 27 is violated if the possibility of benefiting from the practice is lost. It is sufficient that the practice is threatened, and the provision does not allow for a margin of appreciation or a

proportionality assessment. Consultation with the minority is an important factor, but cannot in itself prevent violation if the negative effects are substantive. Indigenous peoples' connection to the land must be included in the assessment.

The development of windfarms amounts to a violation of Article 27 CCR. The interference has the effect that Sør-Fosen area loses a crucial late winter pasture. The loss will over time give a dramatic reduction of the herd and make it impossible to operate with a viable profit. One must take into account the particularly vulnerable South Sami culture. Damages for winter feeding costs do not prevent a violation.

Article 108 of the Norwegian Constitution has the same content as Article 27 ICCPR, and applies independently if it is concluded that the locals cannot assert a violation of the latter on behalf of the herders. The licence decision also violates the reindeer herders' rights under Article 5 (d) (v) ICERD. Loss of land threatens the preservation and existence of the Sami culture. Such a loss cannot be compensated financially, as is the case for interference with the rights of others. If the Sami reindeer herders' right to pastures are dealt with in same manner as other people's rights to property, this is in practice not equality, but discrimination.

Court responses

The Court response in *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil)* can be structured in 3 main points.

First, the Court has concluded that § 112 is a rights provision. § 112 is a new provision which cannot be read in line with the (former) 110 b and the preparatory works must be accorded substantial weight. This implies that a right is infringed under § 112 if the duty under the third paragraph "to take appropriate measure" has not been fulfilled. The Government has taken the "appropriate measure" by carrying out the environmental impact assessment prior to the opening of the Barents Sea for production licences.

Second, the Court cannot see that the decision on awarding exploration licences involves the right to life in a manner that is protected by ECHR Article 2. The relationship between the exploration licences in the 23rd Licensing Round and loss of human life does not clearly fulfil the requirement for a "real and immediate" risk in light with the jurisprudence of the ECHR (reference is made to *Öneryildiz v. Turkey*).

Third, the Court cannot see that there are deficiencies in the investigation of local environmental effects that can lead to the decision being invalid – entirely or partially – or that the decision is insufficiently justified on this point. Section 6c, first paragraph, letter e of the Norwegian Petroleum Regulations states that the impact assessment in connection with opening a new area shall also describe the effects on the climate. The Court retains that impact assessment of the area of the Barents Sea includes a calculation of emissions of CO₂ regarding the relationship to the climate obligations

which is sufficient to fulfill the obligation to take appropriate measure in order to protect the environment and the climate.

However, the Court underlines that an additional impact assessment must be carried out if commercially exploitable discoveries are made, in accordance to Section 4-2 of the Petroleum Act.

The Court's response in *Statnett SF et al. v. Sør-Fosen sijte et al.* can be summed up in three main points.

First, the Court concludes the windfarms threatened the very existence of reindeer husbandry on Fosen. The construction of the two wind farms on the Fosen peninsula conflict with the rights of the reindeer herders of Nord-Fosen siida and Sør-Fosen sijte under the UN Convention on Civil and Political Rights (SP) Article. 27. Thus, the licence to develop, given in 2013 by the Norwegian Water Resources and Energy Directorate (NVE4), are deemed invalid.

It was undisputed before the Supreme Court that reindeer husbandry is a protected cultural practice. The Supreme Court relied on the Court of Appeal's finding that the winter pastures near Storheia and Roan had in practice been lost to reindeer husbandry, and that the wind power plants in question are a threat to the reindeer industry's existence on Fosen peninsula absent remedial measures.

Second, the turbines are placed on the high wind-blown mountain ridges, where the reindeer have been winter grazing for hundreds of years. A prerequisite for the reindeers winter grazing area is the access to lichens, which are mostly accessible in these bare rock areas with high wind-blown ridges Furthermore, the maximum number of reindeers allowed for the Fovsen Njaarke Sijte is 2100, divided equally between the two sijtes. The development of Fosen wind farms challenges the already scarce number of reindeers allowed in the district and it threatens their livelihood and culture.

Third, the Supreme Court, relying on the work of the UN Human Rights Committee, held that the total effect of the development in question determines whether a violation of the ICCPR rights has taken place. Although there is no room for a proportionality assessment, a balance must be struck if the rights under Article 27 ICCPR conflict with other fundamental rights. The Supreme Court established that the right to a healthy environment might constitute such a conflicting right.

D. Sources of Evidence and Proof of Causation

Part V of the dispute act contains specific rules concerning the evidence. Section 21.1-21.2 define the evidence in terms of factual basis which are freely evaluated by the court. Written and oral evidence are allowed as long as they meet the essential requirement of being correctly and completely explained.⁶⁶ A number of restrictions are laid down under Part V. The courts have the right to request for taking evidence in accordance with Section 27- 2 of the Dispute Act, which reads as it follows:

(1) The court before which the case is being heard may decide that evidence shall be taken on request from a party or at its own initiative in cases where, pursuant to Section 21-3 (2), the court has a duty to ensure a sound factual basis for ruling on the case.

The climate cases discussed so far have relied largely on the IPCC reports and on additional expert-submissions as source of evidence. Expert submissions has played a role on the case *People v Artic Oil*. Three expert submissions have supported the actors' claims in order to prove the causal link between oil extraction and production and climate change. The expert submissions have been provided by three international associations, namely the Environmental Law Alliance Worldwide (ELAW), the Allard K. Lowenstein International Human Rights Clinic, and the Center for International Environmental Law (CIEL).

It is worth nothing that the claimants have not provided evidence of a "direct" link between the climate change adverse effects as connected to the activities put in place by the State or by the corporations. The Courts have not exercised the right to request further evidence.

E. Limitation Periods

The Norwegian legal system has so far maintained the general prescription period of three years in accordance to the Act of limitations on claims (statute of limitations).⁶⁷ Claims for damages follow the rule under section 9 which states:

1. Claims for damages or damages expire 3 years after the date on which the injured party received or should have acquired the necessary knowledge of the injury and the person responsible. [...]
2. However, the claim shall expire no later than 20 years after the termination of the tortious act or other basis of liability.

It raises special issues the fact that climate change causes a continuous harm.

⁶⁶ Section 21-4 Dispute Act

⁶⁷ LOV-1979-05-18-18

3. Remedies

A. Pecuniary Remedies

When a claim stands in the court, a request can be made for compensation. The main rule is that the winning party shall have all cost covered by the losing party, including the costs for the legal assistance.

Dispute Act Section 20-2. Award of costs to the successful party

A party who is successful in an action is entitled to full compensation for his/her legal costs from the opposite party

This rule makes it risky and often costly for organisations to go to court in environmental cases in Norway.

Section 20-5. Assessment of compensation for costs

(1) Full compensation for costs shall cover all necessary costs incurred by the party in relation to the action, unless there is cause to exclude the costs pursuant to special provisions. In assessing whether costs have been necessary, the court shall take into consideration whether it was reasonable to incur these in view of the importance of the case. The party may claim reasonable compensation for his/her own work on the case if the work has been particularly extensive or would otherwise have had to be undertaken by counsel or other qualified assistant.

In some cases, a party may be awarded legal costs in whole or in part irrespective of the outcome of the case. A number of criteria must be met in accordance to Section 20-4:

- a. if the action has been brought without good reason and the party accepts the claim at the earliest opportunity,
- b. if the action is dismissed for reasons beyond the control of the party and there is no doubt that the party would otherwise have succeeded, or
- c. to the extent the costs have arisen due to the opposite party's omission.

The Damage Act contains the rules concerning compensation for damages occurred to physical persons, to properties and to corporations. Apportionment comes into place in case of several possible causes. The main rule in Norwegian tort law is the joint and several liability as set forth by Section 5.3 of the Damage Act which reads: "Several who are obliged to pay compensation for the same injury answer one for all and all for one." This means that each possible cause is regarded as the cause of the damage in case where the damage is the result of multiple causes, so called contributory causes or cumulative causes.⁶⁸

⁶⁸ Bugge H.B, (2022) Environmental Law in Norway, 4th ed., Wolters Kluwers.

B. Non-Pecuniary Remedies

Individuals as well as environmental organisations and corporations have a right to stand in courts in accordance to the Dispute Act as discussed in the previous sections.

In addition to the court system, the Public Administrative Act gives the right to appeal administrative decisions against a superior authority to the authority that made the decision in question. In a case like that, it is common to request to cancel or to modify the decision.

An additional remedy in the hands of citizens is to present a case to the Parliamentary Ombud for Scrutiny of the Public Administration.⁶⁹ The main purpose of the Ombud is to “ensure that every citizen is treated properly and reasonably by the public administration, and that the authorities respect and ensure human rights”. The Ombud is independent from the Government and elected by the Parliament for four years as set forth by Section 2 of the Ombud Act. However, the Ombud does not have the authorities to make a decision in a case. Often the public authorities align themselves with the Ombud’s point of view which is expressed through the annual report issued by the Ombud and discussed by the Parliament on annual basis. The Parliament and the Government are not obliged to comply with the Ombud’s recommendation on the matter in question. According to Section 4 f) the Ombud may also initiate inquiries and investigations by its own for the interests of due process of law or for other special reasons.

⁶⁹ LOV-2021-06-18-121

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