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WRITTEN OBSERVATIONS

TO

THE EFTA COURT

submitted pursuant to Article 90 (1) of the Rules of Procedure of the EFTA Court

represented by
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IN CASE E-18/24

THE NORWEGIAN STATE

v.

GREENPEACE NORDIC, NATURE AND YOUTH NORWAY

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1 INTRODUCTION

1. On 5 July 2024, Borgarting Appeals Court ('the referring court') requested an Advisory Opinion from the EFTA Court ('the Court'). The parties to the case are the Norwegian State ('the appellant') and Greenpeace Nordic and Nature and Youth Norway ('the respondents'). At issue in the main proceedings is the validity of three approvals for plan for development and operation ('PDO approvals') of the petroleum fields Yggdrasil, Tyrving, and Breidablikk ('the projects'). The approvals were granted on 28 June 2023, 5 June 2023 and 29 June 2021, respectively. The decisions for Yggdrasil and Tyrving were upheld on 28 August 2024. The ground for invalidity is the failure to assess the greenhouse gas ('GHG') emissions from combustion in the environmental impact assessments ('EIA') prior to approval. These combustion emissions comprise more than 95% of the GHGs in the oil and gas sought extracted.[1] The Court is asked whether these emissions are effects of the projects under Article 3(1) of Directive 2011/92 ('the EIA Directive') requiring EIAs, and, if confirmed, what the legal consequences of approving PDOs without such EIAs must be.

2 FACTUAL BACKGROUND

2.1 The domestic proceedings

2. On 29 June 2023, the respondents instituted injunction and invalidity proceedings. On 18 January 2024, Oslo District Court ('the district court') quashed all PDO-approvals and granted a temporary injunction banning the appellant from issuing associated permits required for the continued construction and operation until the validity of the approvals had been finally adjudicated.[2] On 20 March 2023, the referring court suspended the injunction.[3] On 14 October 2024, the referring court lifted the injunction.[4] Despite assuming that all approvals, including the subsequent decisions of 28 August 2024, breached the EIA Directive and were invalid, and despite assuming that both conditions for urgency were met, the referring court held that it lay outside the remit of Norwegian courts to issue any injunction concerning petroleum activities on environmental grounds. It thereby abdicated

[1] The Norwegian Supreme Court, HR-2020-2472-P para. 155.

[2] Oslo District Court, judgement and order of 18 January 2024, TOSL-2023-99330, English translation available here; Original Norwegian version available here.

[3] Borgarting Appeals Court, decision of 20 March 2024, LB-2024-36810-1, available here.

[4] Borgarting Appeals Court, order of 14 October 2024, LB-2024-36810-3, available here.

from exercising its exclusive competence under domestic law to weigh competing interests and order an injunction.[5] On 29 October 2024, the respondents appealed to the Supreme Court.

3. The injunction was requested *the day* after the PDO-approval of Yggdrasil, *three weeks* after the PDO-approval of Tyrving and *six months prior* to when production was to begin from Breidablikk. However, while the respondents have pressed for speedy hearings, the appellant has been able to delay the court proceedings for a total of 16 months. Meanwhile, the appellant has permitted the accelerated construction of the fields. Hence, Breidablikk started producing half a year ahead of schedule (Q1 2024), a day before the hearings were initially set to take place in the district court (15 October 2023). Similarly, Tyrving started producing half a year ahead of schedule (Q1 2025), the night before the appeal hearings at the referring court were to begin (3 September 2024). Yggdrasil remains under construction, with production planned from Q1 2027.

2.2 The effects of the projects

4. Emissions from extracted fossil fuels account for up to 91% of anthropogenic CO2 emissions.[6] Fossil fuels also emit short-lived super pollutants such as methane and black carbon. GHGs accumulate in the atmosphere, trap heat and acidify the oceans. The pollutants cause substantial harms and increasingly irreversible losses in terrestrial, cryospheric, freshwater and ocean ecosystems.[7]

5. So far, anthropogenic GHG emissions have increased global average temperatures by 1.3°C.[8] Current levels of warming have resulted in increased mortality and morbidity in all regions of the world, including Norway.[9] It has led to more extreme heatwaves, heavy

[5] See The Dispute Act of 2005, Sections 34-1 and 34-2. Available here.

[6] IPCC, AR6, *The Physical Science Basis*, 2021, p. 676. Available here; See also for 2022, Friedlingstein et al., *Global Carbon Budget 2022*, Earth System Science Data, Vol 14, issue 11, pp. 4811-4900, 2022. Available here.

[7] IPCC, AR6, *Synthesis Report*, Summary for Policy Makers, 2023, para. A.2.3. Available here.

[8] United Nations Environment Programme, *Emissions Gap Report 2024*, p. 33, box 4.3. Available here.

[9] IPCC, AR6, *Synthesis Report*, Summary for Policy Makers, 2023, para. A.2.5; Vicedo-Cabrera et al., *The burden of heat-related mortality attributable to recent human-induced climate change*, Nature Climate Change 11, 492-500 (2021). Available here; Beck et al., *Mortality burden attributed to anthropogenic warming during Europe's 2022 record-breaking summer*, njp Clim Atmos Sci 7, 245 (2024). Available here.

precipitation, droughts, and tropical cyclones.[10] The Intergovernmental Panel on Climate Change ('IPCC') notes that "[e]very tonne of CO2 emissions adds to global warming",[11] and with every increase in global temperatures, "risks and projected adverse impacts and related losses and damages from climate change escalate".[12]

6. If warming exceeds 1.5°C, there is an increased risk of surpassing climate tipping points, triggering irreversible and catastrophic changes that could seriously jeopardise the very existence of present and future generations.[13] Best available science suggests that between 1.5°C and 2°C, the threshold for the collapse of the Greenland ice sheet and West Antarctic ice sheet could be reached, causing sea levels to rise by 10 metres or more.[14] With additional warming, there is also an increased risk of permafrost thaw, which could lead to self-perpetuating warming beyond human control.[15] To limit warming to 1.5°C with 83% likelihood, the remaining global carbon budget is less than 100,000 million tons CO2 (MtCO2).[16]

7. The projects at issue will cause 12, 87 and 365 MtCO2 respectively, or 466 MtCO2 combined. These emissions exhaust even a *per capita* allocation of the remaining global

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[10] IPCC, AR6, *Synthesis Report*, Summary for Policy Makers, 2023, para. A.2.1.

[11] IPCC AR6, *The Physical Science Basis*, Summary for Policy Makers, 2021, para. D.1.1.

[12] IPCC, AR6, *Synthesis Report*, Summary for Policy Makers, 2023, para. B.2.

[13] IPCC 2018, *Special Report: Global Warming of 1.5C*, Table 3.5. Available here; IPCC 2013, AR5, Technical Summary, box TFE.5. Available here; Wunderling et al., *Climate tipping points interactions and cascades: a review*, Earth Syst. Dynam., pp. 15 and 41-74, 2024, available here; The appellant recognises that "[c]limate change represents an existential threat to both present and future generations", see The Norwegian Ministry of Foreign Affairs, Submissions to the International Tribunal of the Law of the Sea, 15 June 2023, p. 2, available here.

[14] Robinson *et al, Multistability and critical thresholds of the Greenland ice sheet, Nature Climate Change, 2012*. Available here; See also Carbon Brief, *Explainer: Nine 'tipping points' that could be triggered by climate change*, 2020. Available here; Morlighem et al. *Deep glacial troughs and stabilizing ridges unveiled beneath the margins of the Antarctic ice sheet.* Nat. Geosci. 13, 132–137 (2020). Available here; Naughten et al., *Unavoidable future increase in West Antarctic ice-shelf melting over the twenty-first century*, Nature Climate Change, 2023. Available here.

[15] Ripple et al., *The 2024 state of the climate report: Perilous times on planet Earth*, BioScience, 2024. Available here.; McKay et al., *Exceeding 1.5C global warming could trigger multiple climate tipping points*, Science, Vol 377, 2022. Available here. This is not disputed by the appellant, see Meld. St. 26 (2022-2023), Section 2.7.

[16] Forster et al., *Indicators of Global Climate Change 2023: annual update of key indicators of the state of the climate system and human influence*, Earth Syst. Sci. Data, 16, 2625-2658 (2024), table 8. To limit warming to 1.5°C with a 67% likelihood, the global budget is less than 150 gigatons CO2 (GtCO2) or 150,000 MtCO2. Available here.

1.5°C carbon budget (67% likelihood) to Norway with a factor of 2.5.[17] Given the near-linear relationship between anthropogenic CO2 emissions and global warming,[18] it is undisputed that these emissions will raise global average temperatures by 0.00023°C, melt about 1400 km^2 of Arctic summer sea ice, reduce snow cover in the Northern hemisphere by about 560 km^2, and increase the intensity and frequency of extreme weather events.[19] It is also undisputed that the emissions will cause about 104 650 heat-attributed deaths by 2100, and expose around 2.7 million children born in 2010-2020 to at least one additional dangerous heatwave over their lifetime.[20] Similarly, the emissions will expose around 83.588 and 29.122 children born in 2010-2020 to one additional extreme drought and wildfire, respectively.[21] Based on undisputed scientific evidence, it is not even ruled out that a temperature increase of 0.00023°C from these emissions could trigger one or more tipping points with likely temperature thresholds above 1.5°C.[22]

2.3 Assessments of the projects

8. Combustion emissions and their potential impacts on life, biodiversity, water and climate, were not assessed in any EIA when the PDO applications for Breidablikk, Tyrving and Yggdrasil were considered for approval. The public were kept in the dark.

   i) *For Breidablikk,* the Ministry of Energy ('the Ministry') exempted the operator from carrying out an EIA under the Petroleum Regulations Section 22c altogether. The latest assessment in the area predates 2014.

   ii) *For Tyrving,* neither the scoping decision from the Ministry nor the EIA assessed combustion emissions. Combustion emissions (not their impacts) were simply

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[17] Scientific expert statement by Prof Helge Drange, University of Bergen, submitted to the referring court on 22 June 2024, p. 28. Prof. Drange's expert opinion submitted to the District Court 9 November 2023 is available here.

[18] IPCC, AR6, *The Physical Science Basis*, SPM, 2021, para. D.1.1, and para. B.2: *"Many changes in the climate system become larger in direct relation to increasing global warming. They include increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation, and, in some regions, agricultural and ecological droughts; an increase in the proportion of intense tropical cyclones; and reductions in Arctic sea ice, snow cover and permafrost."*

[19] Drange, Expert Statement, 2024, p. 40.

[20] Scientific expert statement by Prof Wim Thiery, Vrije Universiteit Brussel, submitted to the referring court on 23 June 2024, pp. 2 and 4. Prof. Thiery's expert opinion submitted to the District Court 30 November 2023 is available here.

[21] Ibid.

[22] Drange, Expert Statement 2024, pp. 24 and 41.

quantified on a spreadsheet online after the Ministry's case-handling had concluded, and briefly mentioned in the PDO-approval itself.

iii) *For Yggdrasil*, neither the scoping decisions from the Ministry nor the EIAs assessed combustion emissions. Combustion emissions (not their impacts) were simply quantified in a subsequent White Paper to parliament after the Ministry's case-handling had concluded, and briefly mentioned in the PDO-approval itself. The White Paper also referenced a net substitution analysis based on a consultancy report that independent expert witnesses characterise as "seriously flawed" and "systematically biased", as well as inconsistent with empirical evidence and theory.[23]

9. On 28 August 2024, a week before the appeal hearing in the injunction case, the Ministry issued two decisions to uphold the PDO-approvals for Tyrving and Yggdrasil. The decisions referenced two assessments on combustion emissions that the operator had carried out on its own volition for reasons of expediency whilst the injunction was suspended, and whilst construction on both fields was ongoing at speed. The assessments were deeply inadequate, and even failed to account for about 100 MtCO2 (Yggdrasil). Since the outcome at this stage was a *fait accomplit*, with the appellant having argued that it would be prohibited from revoking the permits, the respondents considered that participation would be futile.

3 APPLICABLE EEA LAW AND DOMESTIC LAW

3.1 The SEA and EIA Directives

10. EEA law requires environmental assessments in two stages. Directive 2001/42 ('the SEA Directive') requires a strategic environmental assessment (SEA) *before* an area can be opened for petroleum activities, cf. Article 4(1). The EIA Directive requires an environmental impact assessment (EIA) *before* consent can be given to a project for the extraction of oil or gas for commercial purposes, cf. Article 2(1). The objective is to ensure the highest possible level of environmental protection through informed public participation in the decision-making process. As such, EIAs are one of the fundamental mechanisms for

[23] Scientific expert statement by Michael Lazarus, Stockholm Environment Institute US, submitted to the referring court on 24 June 2024, p. 7, scientific expert statement by Prof Bård Harstad, University of Stanford, submitted to the referring court on 24 June 2024, scientific expert statement by Senior Researcher Taran Fæhn, Norway's Statistical Bureau (SSB), submitted to the referring court on 24 June 2024. See also, UNEP Emission Gap Report 2019, p. 50, cited by the UK Supreme Court in [2024] UKSC 20 *Finch* para. 2. Available here.

environmental protection, see Case C-261/18 para. 116. The SEA and EIA requirements are concurrent obligations. Consequently, an EIA under the EIA Directive is not capable of calling in question the need to carry out a SEA under the SEA Directive and vice versa, see Case C-617/16 *Inter-Environnement Bruxelles.*

11. The EIA Directive Article 1(2)g defines an EIA as a process at least consisting of i) the preparation of an EIA by the developer, ii) the carrying out of consultations with the public, iii) the examination by the competent authority of the information in the EIA and any relevant information received through the consultations, iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, and v) the integration of the competent authority's reasoned conclusion in the development consent procedure. Article 6(2) sets out detailed rules to "ensure the effective participation of the public concerned […] early in the decision-making procedures". Article 6(4) requires that the public "shall be given early and effective opportunities to participate in the decision-making procedures" and be "entitled to express comments and opinions when all options are open […] before the decision on the request for development consent is taken".

3.2 Relevant domestic law on EIAs

12. Domestic law implements the SEA and EIA Directives through the EIA regulations (FOR-2017-06-21-854) and the Petroleum regulations (FOR-1997-06-27-653). In 2020, the Norwegian Supreme Court – in plenary – clarified that combustion emissions from oil and gas produced on the Norwegian Continental Shelf were environmental effects that would have to be considered in EIAs in connection with applications for PDO approvals. The interpretation was based on the petroleum regulations read in conjunction with Section 112 of the Constitution, and the EIA Directive read in conjunction with Article 5 of the SEA Directive, see paras. 218, 241, 246 (majority) and 263 (minority).

13. The appellant has not complied with this precedent. Rather, it has argued that the Norwegian Supreme Court in plenary erred in law.[24] The respondents have pointed out the error in public consultations on prior EIAs to no avail.[25] Likewise, warnings by the Norwegian

[24] Oslo District Court, judgment of 18 January 2024, p. 19.

[25] See Comments by the respondents and four other environmental organisations in the EIA process for the oil field Wisting, 2 May 2022. Available here.

Institution for Human Rights,[26] and of leading scholars,[27] have been thwarted. Only after the Oslo District Court invalidated the PDO approvals in the case at hand, did the Ministry propose to make EIAs of combustion emissions a *discretionary* option in new PDO applications going forward.[28] It still denies that the public has any right to this kind of environmental information, or that these assessments are *required* in EIAs.

3.3 Relevant domestic law on annulment and suspension

14. In domestic law, a procedural error leads to invalidity if there is "not too remote a possibility" that the error impacted the decision, see Rt-2009-661 para. 71. It is this judge developed principle, not its codification in Section 41 of the Administrative Act of 1969, that governs flawed EIAs.

15. On the respondents' approach, this principle allows for a broader assessment of invalidity than impact alone, where the nature of the infringed right and the purposes pursued by the rule can be taken into account, see Innst. O nr. 2 (1966-1967) p. 16 and HR-2020-2472-P paras. 279-281 (minority). The Supreme Court has noted that given the democratic purpose of the EIA process, the road to invalidity may be short in the case of a lacking or flawed EIA, cf. Rt-2009-661 para. 72. Domestic courts are therefore competent to annul the PDO-approvals *even* if the flaw cannot be shown to have impacted the decision.

16. On the appellant's approach, invalidity requires that the error may have impacted the decision, and, if so, a balance of interests. The appellant bases its view on an *obiter dictum* from the majority in HR-2020-2472-P para. 243, HR-2017-2247-A and Rt-2009-661, where flawed or lacking SEAs or EIAs did not lead to invalidity based on assumptions that the decision-making authorities would have preferred the same outcome, nonetheless. On 4 November 2021, based on these cases, ESA opened an own initiative case to investigate the application of the SEA and EIA Directives in Norway, and the obligation to nullify the

[26] Norwegian National Human Rights Institution, letter to the Ministry of Climate and Environment, 1 October 2021, available here, and NNHRI, report, *Grunnloven § 112 og plan for utbygging og drift av petroleumsforekomster* 18 March 2022, available here.

[27] Prof. Fauchald and Prof. Eskeland Schütz in news article published in VG 29 April 2022. Available here.

[28] See press statement of 2 May 2024, available here.

unlawful consequences of a breach of said directives in domestic law.[29] ESA's concerns align with the respondents' view. On 12 September, ESA informed Norway that it is awaiting the Court's advisory opinion in the present case before taking further steps.[30]

17. In domestic law, courts are empowered to issue temporary injunctions on three cumulative conditions; i) that the main claim (invalidity) is substantiated, ii) that it is necessary to avert considerable loss or inconvenience, or that the defendant's conduct makes it necessary to provisionally secure the claim because the action or execution of the claim would otherwise be considerably impeded, and iii) that the loss or inconvenience to the defendant is not clearly disproportionate to the interests of the claimant.[31] Hence, domestic courts are competent to issue a temporary injunction to suspend the PDO-approvals or, as the district court ordered, prohibit the appellant from issuing new associated permits for the fields.

4 QUESTION 1

4.1 Introduction

18. By its first question, the referring court asks the following:

> *Where a project is listed in Directive 2011/92/EU Annex I point 14, are the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, environmental "effects" of the project under Article 3(1)?*

19. The respondents submit that the question be answered in the affirmative. It is plain from the wording of Article 3(1) that the GHGs embedded in oil and gas are environmental effects of a project that causes their release to the atmosphere. As Justice Bull of the Norwegian Supreme Court notes, this conclusion under Article 5(1) of the SEA Directive is "undoubtful", see para. 263 of HR-2020-2472-P.[32] The context of Article 3(1), the object

[29] Letter from ESA to the Norwegian Ministry for Climate and Environment, 4 November 2021. Available here. See similarly, Venemyr 2023.

[30] Letter from ESA to the Norwegian Ministry for Climate and Environment, 12 September 2024. Available here.

[31] The Disputes Act of 2005 Sections 34-1 and 34-2.

[32] HR-2020-2472-P, para. 263: "Correspondingly, the global climate impact of the combustion of Norwegian petroleum is undoubtedly comprised by the term 'environmental effects' in Article 5 of the SEA Directive, see Annex I (e) and (f).".

and purpose pursued by the Directive of which it forms part, and relevant case law, confirm that this interpretation is correct.

20. For clarity, the respondents emphasise that the question put to the Court regards the *greenhouse gas emissions that will be released from the extracted petroleum and natural gas.* The question thus excludes any derived assessments of market substitution. As the respondents explain below, market substitution analyses relate to a separate causal question,[33] and are, at any rate, too elusive, contingent and speculative to constitute *effects*, let alone *likely* effects, of the projects under Article 3(1).[34]

4.2 Wording of Article 3(1) of the Directive

21. Article 3(1) of the Directive reads (emphasis added):

> *The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:*
>
> *(a) population and human health;*
> *(b) biodiversity, with particular attention to species and habitats protected under Directive 92/42/EEC and Directive 2009/147/EC;*
> *(c) land, soil, water, air and climate;*
> *(d) material assets, cultural heritage and the landscape;*
> *(e) the interaction between the factors referred to in points (a) to (d).*

22. The word *effects* is defined by Merriam Webster as "something that inevitably follows an antecedent (such as a cause or agent)". An effect of a project is thus something that is caused by the project. Effect is the obverse of cause.

23. The release of GHGs inevitably follows the antecedent action of extracting oil and gas. There is an unbreakable chain of causation between the removal of hydrocarbons from a geological reservoir and the release of greenhouse gases embedded in them to the atmosphere. If not for the project, the embedded GHGs would stay below ground. Because

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[33] See e.g., High Court of Justice, King's Bench division, [2024] EWHC 2349 (Admin), *Friends of the Earth and SLACC v. West Cumbria Mining et al.*, 13 September 2024, paras. 105-110, available here, and [2024] UKSC 20 *Finch*, para. 167.

[34] The Irish Supreme Court, [2022] IESC 8, *An Taisce – National Trust for Ireland v. Kilkenny Cheese Ltd.*, paras. 110-111. Available here.

of the project, the embedded GHGs will inevitably reach the atmosphere and trap heat. The UK Supreme Court explains this chain of causation succinctly (emphasis added): [35]

> *Expressed in terms of necessary and sufficient conditions, this is not simply a case in which the "but for" test is satisfied in that, but for the extraction of the oil, the oil would stay in the ground and so would not be burnt as fuel. On the agreed facts, the extraction of the oil is not just a necessary condition of burning it as fuel; it is also sufficient to bring about that result because it is agreed that extracting the oil from the ground guarantees that it will be refined and burnt as fuel. As discussed above, a situation where X is both necessary and sufficient to bring about Y is the strongest possible form of causal connection - much stronger than is required as a test of causation for most legal purposes.*

24. Similar causation applies here. Question 1 can thus be answered in the affirmative based on the wording "effects of a project" alone.

25. This interpretation is supported by Article 3(1) read as a whole, and adjacent provisions.

26. Article 3(1) requires the EIA to assess both the "direct and indirect" effects of a project on a listed set of factors, including climate. The adjective indirect denotes effects that do not occur immediately, but through an intervening medium or agent. The inclusion of the word indirect thus emphasises the wide causal reach of the required assessment. Similarly, Annex IV Point 5 last subparagraph, referenced through Article 5(1) *litra* f, sets out a wide reach of effects (emphasis added):

> *The description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project.*

27. As the UK Supreme Court neatly observes, it "would be hard to devise broader wording than this."[36]

28. Given that Article 3(1) encompasses both direct and indirect effects alike, it is not necessary for this Court to determine whether GHG emissions from combustion are direct or indirect

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[35] The Supreme Court of the United Kingdom, [2024] UKSC 20, *R (Finch) v. Surrey County Council et al.*, judgment 20 June 2024, at paras. 79-80. See also paras. 2, 118,123-125 and 162. Available here.

[36] [2024] UKSC 20 *Finch*, para. 83.

effects of the projects in question. On analysis, however, it is instructive to note that GHG emissions from combustion qualify as direct effects. It is so, because their release is almost entirely independent of any intermediate variables. One need not know when or where the oil or gas be combusted to identify, describe and assess this effect in an EIA before extraction. Since GHGs trap heat once they are released regardless of where, the effect can be quantified and assessed based on the volume of hydrocarbons sought extracted alone.

29. In the alternative, if the Court places weight on the fact that combustion emissions are not necessarily an immediate outcome but interceded by one or several intervening steps, the GHG emissions must still be considered indirect effects. The European Commission's *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions* defines indirect effects as "[e]ffects/impacts that occur away from the immediate location or timing of the proposed action".[37]

30. When considering the effects of an extraction project, it is thus irrelevant that combustion emissions take place farther removed in distance and time from the project *itself*. The appellant's emphasis on the word "project" overlooks the causality inherent to the word *effect*. It also overlooks all adjectives explicitly used in the Directive to qualify effects far beyond a project's location or time frame. On the appellant's approach, the adjective "indirect" in Article 3(1), and the adjectives "indirect", "secondary", "transboundary", and "long-term" in Annex IV Point 5 last subparagraph, would be devoid of meaning.

4.3 Context of Article 3(1) of the Directive

31. The Directive's definition of the word "project" does not assist the appellant's case. On the contrary, Article 1(2) defines oil and gas extraction projects as "other interventions in the natural surroundings and landscapes including those involving the extraction of mineral resources". As explained above, GHG emissions are inevitable effects of extracting hydrocarbons from geological reservoirs. Once extracted, the question is no longer *whether* the GHGs will end up in the atmosphere, but *when.*

[37] European Commission: Directorate-General for Environment, *Guidance on integrating climate change and biodiversity into environmental impact assessment*, Publications Office, 2013, p. 7. Available here.

32. As is apparent from the Directive's definition of the projects at hand, the whole purpose is to make the hydrocarbons available for commercial use above the ground, which inevitably leads to GHG emissions. Indeed, it is this commercial purpose, and the amount to be extracted, that triggers the EIA obligation. Article 4(1) makes EIAs mandatory for any project encompassed by the following definition in Annex I Point 14:

> *14. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.*

33. Accordingly, the wording of the Directive does not tie the meaning of "effect" to consequences with close temporal or geographical proximity to the installation or scheme. Rather, effects of Annex I, point 14 projects, are defined by the extraction that causes them. If the intention was to only include emissions from the production phase in the scope of the EIA obligation, it would have been natural to define the EIA obligation based on the *size or energy use of the project*, not the *volume of the extracted resources themselves.*

34. GHG emissions from combustion are thus an inevitable and even intentional effect of the project.[38] Since Article 3(1) read in conjunction with Article 5(1) requires EIAs of all significant environmental effects that pass the threshold of being likely, it follows *a fortiori* that GHG emissions that are inevitable, must be covered in the EIA.

4.4 Objectives and purpose of the Directive

35. An affirmative answer to Question 1 is supported by the objectives and purpose pursued by the EIA Directive.

36. This Court has already noted that "combating climate change is an objective of fundamental importance given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights".[39]

37. The objective of the EIA Directive is to "ensure a high level of protection of the environment and of human health, through the establishment of minimum requirements for

[38] Oslo District Court, judgment of 18 January 2024, pp. 53-54; cited in [2024] UKSC 20 *Finch*, at para. 172.

[39] Case E-12/23 *Norwegian Air Shuttle ASA*, para. 35.

the environmental impact assessment of projects", see recitals 41, 22 and 1 of the preamble of Directive 2014/52/EU amending Directive 2011/92/EU. The CJEU Grand Chamber has noted that the "objective of protecting the environment constitutes one of the essential objectives of the European Union", with EIAs being "one of the fundamental environmental protection mechanisms" to achieve this objective (Case C-261/18, *Commission v. Ireland,* paras. 115 and 116). An EIA that ignores more than 95% of the GHG emissions that will inevitably ensue from a project, and its irreversible effects for the environment and human health, cannot serve as a mechanism for a high level of environmental or human health protection.

38. Furthermore, recital 2 of the preamble of the EIA Directive recalls Article 191(2) TFEU, emphasising that environmental damage should "be rectified at source" with effects of the environment "taken into account at the earliest possible stage in all the technical planning and decision-making processes". This principle of prevention is correlated with the obligation to undertake EIAs *prior* to the implementation of a project. Both are recognised as customary rules of international law.[40] Since the effects on climate and other listed factors in Article 3(1) of the Directive can no longer be prevented once the hydrocarbons have been irreversibly extracted from the ground, these effects must be considered in SEAs and at the very latest through EIAs. Otherwise, the preventive objective and purpose of both Directives are negated.

39. Recital 2 of the preamble also recalls the precautionary principle, enshrined in Article 191(2) TFEU.[41] The CJEU has noted that the precautionary principle means that "where there is uncertainty as to the existence or extent of risks, including risks to the environment, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent" (Case C-499/17 P, *Bayer CropScience AG*, para.

[40] See e.g., ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010, paras. 101, 204 and 205.

[41] The precautionary principle is increasingly recognised as part of customary international law, see e.g., ITLOS, *Advisory Opinion (No. 31) Climate change and international law,* para. 213; ITLOS, *Advisory Opinion (No.17*) *Responsibilities and obligations of States with respect to activities in the Area*, 2011, para. 135; ICJ, Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports 1997 p. 7, para. 140; Rio Declaration Article 15. See further, Sands and Peel, *Principles of International Environmental Law*, 4th ed., Oxford University Press 2018 pp. 239-240.

80).[42] Expert scientific statements before the referring court confirm that the GHGs embedded in the projects at issue, in and of themselves, could exceed Norway's equal per capita emission budget in line with the 1.5°C limit.[43] Overshooting the 1.5°C limit could trigger one or several irreversible and catastrophic *tipping points*,[44] including the collapse of ice sheets of Greenland and West Antarctica, which would cause multi-meter sea level rise this century and over thousands of years.[45] Ignoring these emissions and their potential impact on the factors listed in Article 3(1) runs contrary to any notion of precaution.

40. Finally, recital 16 of the preamble highlights the core democratic purpose of the Directive. It reads (emphasis added):

> *Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.*

41. Public participation in the decision-making process can only be effective if it takes place on a fully informed basis while all options are still available, see Articles 2(1) and 6(4) of the Directive. On the appellant's approach, neither the SEAs nor the EIAs on fossil fuel exploration and extraction would identify, describe and assess combustion emissions, comprising more than 95% of the greenhouse gases embedded in the reserves sought extracted. Considering that up to 91% of all anthropogenic CO2 emissions stem from fossil fuels, it is difficult to see how the public can participate effectively in the context of climate at all, if the brunt of GHG emissions can be ignored in decision-making processes while they can still be avoided.

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[42] The rationale for the precautionary principle is explained in Case T-77/20 *Ascenza v Commission*, para 347: "Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are insufficient, inconclusive on imprecise, but the likelihood of real harm to human health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.".

[43] Drange, Expert Statement 2024, p. 41.

[44] Drange, Expert Statement 2024, p. 41; see also IPCC 1.5 SR, 2018 Table 3.5; IPCC AR5, TS, 2013, box. TFE.5; see also McSweeney, R. Explainer: Nine 'tipping points' that could be triggered by climate change, Carbon Brief, 2020. Available here.

[45] IPCC, 1.5 SR, SPM, 2018, para. B.2.2; Morlighem et al. *Deep glacial troughs and stabilising ridges unveiled beneath the margins of the Antarctic ice sheet*. Nat. Geosci. 13, 2020. Available here.; Robinson et al., *Multistability and critical thresholds of the Greenland ice sheet*, Nature Climate Change, 2012. Available here.

42. The failure to assess these emissions in the EIAs deprives the public of their right to information and effective participation. Moreover, it impairs public awareness of climate change, diluting accountability and transparency. As the UK Supreme Court puts it: "You can only care about what you know about."[46]

43. Based on the above, an affirmative answer to question 1 furthers the objectives and purpose of the EIA Directive.

4.5 The 2014 amendments to the Directive

44. This legislative intent is further highlighted by the amendments made to the EIA Directive in 2014 through Directive 2014/52/EU ('the 2014 amendments'). Recital 7 of the preamble to the 2014 amendments highlights the evolutive nature of the EIA obligations.[47] It states:

> *Over the last decade, environmental issues, such as resource efficiency and sustainability, biodiversity protection, climate change, and risks of accidents and disasters, have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes.*

45. Recital 13 notes that:

> *Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change.*

46. Further, recitals 22 and 23 show the intention of the EU legislator that EIAs "should take account of the impact of the whole project in question" and have a "view to reaching a complete assessment of the direct and indirect effects of a project on the environment".

47. The 2014 amendments introduced the following wording in Annex III no. 1, litra f:

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[46] [2024] UKSC 20 *Finch*, at para. 21.

[47] See similarly ICJ, *Gabcíkovo-Nagymaros Project*, para. 140: *"Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."*

> […] *the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;*

48. The 2014 amendments also added a new Annex IV. Its point no. 4 states that the EIA should include (emphasis added):

> *A description of the factors specified in Article 3(1) likely to be significantly affected by the project: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.*

49. Annex IV, no. 5 litra f, which was also introduced by the 2014 amendments, states that the EIA shall assess, *inter alia*:

> […] *the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change*

50. These changes confirm the intent of the EU legislator to include the real impact on climate in the scope of the Directive's EIA requirement.

4.6 The general scheme of the Directive

51. The appellant has argued that an affirmative answer to Question 1 is precluded because the oil and gas extracted would need to undergo an intermediate process of refinement before combustion. This argument is misguided.

52. First, the existence of one or several intermediate processes before combustion "does not alter the basic nature and intended use of the commodity" in question, see *Finch* para. 118. Once extracted, the GHG emissions embedded in the oil and gas will sooner or later reach the atmosphere and trap heat. Intermediate steps can delay, but not fundamentally change, this unbreakable chain of causation.

53. Second, whether a refinement project requires development consent and an EIA, cannot affect the prior obligation to carry out an EIA at the extraction stage. To state the obvious,

there is no guarantee that oil and gas extracted from these projects will end up in refineries in Europe which will or have required an EIA under the Directive. Oil is a global commodity. Moreover, "there is no rule that the same effect on the environment cannot result from more than one activity, or that, if particular effects have been or will be assessed in the context of one project, this dispenses with the need to assess them as part of an EIA required for another project".[48]

54. Third, it flows from recital 2 of the preamble that the objective of the Directive is to assess effects on the environment at the earliest possible stage in decision-making. This objective would be thwarted if combustion emissions were only assessed in EIAs further down the line. This is because EIAs prior to extraction are the very *last* point at which the public can decide whether these emissions should reach the atmosphere or be avoided. Any subsequent EIAs can only assess the ways in which these emissions ultimately end up in the atmosphere.

55. Fourth, and relatedly, the unbreakable chain of causation sets end-use emissions from fossil fuels apart from other commodities encompassed by the Directive. An affirmative answer to Question 1 does not, therefore, open any floodgates to other downstream or upstream emissions from other projects or industries, as thoroughly explained in *Finch* paras. 121-124.[49] The sky is not the limit on this approach. The appellant presents a false choice.

56. Finally, assessing combustion emissions from oil and gas extraction projects does not make the EIA process unduly onerous and unworkable. It is virtually certain that all GHG emissions embedded in the oil or gas sought extracted will end up in the atmosphere. These emissions can be quantified with certainty and unambiguity. The effects on life, health, biodiversity, air, waters, and climate, in accordance with Article 3(1) *litra* a – e can be assessed based on well-established scientific methods, authoritatively compiled by the IPCC and endorsed by all EU/EFTA States. Hence, there is no element of speculation or conjecture about the quantification of GHG emissions or their impacts on the listed factors in Article 3(1).

[48] [2024] UKSC 20 *Finch*, para. 125.

[49] [2024] UKSC 20 *Finch*, paras. 121-124.

57. This sets assessments of all GHG embedded in the oil and gas apart from speculations about market substitution (so-called net effects). Market substitution raises separate questions on causality that "should not be muddled up" with the unbreakable chain of causation at issue here.[50] As a matter of principle, the respondents submit that such net effects are too elusive, contingency-dependent and speculative to constitute effects, let alone *likely* effects, for the purposes of Article 3(1).[51]

4.7 Case law of the CJEU

58. Extensive CJEU case-law on the SEA and EIA Directives aligns with an affirmative answer to question 1.

59. *First,* the CJEU has consistently held that the scope of the EIA Directive is wide, and its purpose very broad, see *inter alia* Case C-2/07, *Abraham*, para. 42, Case C-567/10, *Inter-Environnement Bruxelles,* para. 37 and Case C-329/17 *Prenninger*, para. 36. Given the objective of the SEA and EIA directives, "which consists in providing for a high level of protection of the environment", the CJEU has held that "the provisions which delimit the directive's scope […] must be interpreted broadly", and any "exceptions to or limitations of those provisions must, consequently, be interpreted strictly", see Case C-473/14 *Attikis,* para. 50.

60. The appellant's reliance on Case C-275/09, *Brussels Hoofdstedelijk Gewest,* para. 29, is beside the point. As shown above, the "clearly expressed intention of the legislature of the European Union" is entirely aligned with the respondents' interpretation of Article 3(1) of the Directive.

61. *Second,* the CJEU has reiterated that the EIA Directive adopts an overall assessment that can only be realised by taking the environmental impact liable to result from the use and

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[50] See e.g., High Court of Justice, King's Bench division, [2024] EWHC 2349 (Admin), *Friends of the Earth and SLACC v. West Cumbria Mining et al.*, 13 September 2024, paras. 105-110, available here, and [2024] UKSC 20 *Finch*, para. 167.

[51] See similarly, Supreme Court of Ireland, *An Taisce v. An board pleanala (Kilkenny Cheese Ltd)* [2022] IESC 8, paras. 110-111. Available here; Oslo District Court, judgment of 18 January 2024, p. 81*; Gloucester Resources* [2019] NSWLEC 7, para. 545. Available here; *Waratah Coal Pty Ltd v. Youth Verdict Otd & Ors,* paras. 869-1027, 1393-1409, 1789-1792. Available here; see also ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, § 442, 9 April 2024.

exploitation of the end-product into account, see *inter alia* Case C-142/07, *Ecologistas en Acción-CODA*, para. 39.[52] Such an assessment is also irrespective of whether the project might be transboundary in nature, see C-205/08, *Umweltanwalt von Kärnten*, para. 51. In C-2/07 *Abraham*, paras. 42-43, the CJEU explained that the wide scope and purpose of the Directive beget an overall assessment of the impacts (emphasis added):

> *[T]he Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad. In addition, although the second subparagraph of Article 4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. In that regard, Directive 85/337 seeks an overall assessment of the environmental impact of projects or of their modification.*
>
> *It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.*

62. The appellant has argued that *Abraham*, as well as Case C-227/01 *Commission*, and C-142/07 *Ecologistas*, imply that only production emissions from extracting oil and gas must be assessed. That is wrong. It overlooks that the CJEU's assessments in Abraham concerned the interpretation of the word "construction" in a definition of infrastructure projects that is narrower than the definition of extractive projects at issue here, compare Article 1(2) litra a first and second alternative. Whilst infrastructure projects are defined as the "execution of construction works", extraction projects are defined as other interventions including "the extraction of mineral resources". The use and exploitation of the end product of extraction projects, can only mean the use and exploitation of the extracted hydrocarbons themselves.

63. Accordingly, it would be simplistic and contrary to the wide scope and broad purpose of the Directive to take account only of the production emissions (less than 5%) and not the inevitable end use emissions (more than 95%) from extracting oil and gas for commercial purposes.

[52] See also the EU Commission Notice on the application of the Directive (2021/C 486/01), available here.

4.8 Comparative law

64. The respondents' case is also in line with persuasive authorities in comparative law in, *inter alia*, Norway, the United Kingdom, Ireland, the United States and Australia.

65. *The Norwegian Supreme Court* in plenary has implied that combustion emissions from petroleum production are environmental effects under Article 5(1) of the SEA Directive, see HR-2020-2472-P, paras. 210-211. The majority noted that "[t]he standpoint of the European Court of Justice suggests that the provisions in the SEA Directive will be interpreted according to purpose, and that there is no basis for interpreting the wording strictly", see para. 211. The minority, comprising of four justices including former EFTA Court Justice Henrik Bull, concluded that the combustion emissions from Norwegian petroleum production are:

> *"*[…] *undoubtedly comprised by the term 'environmental effects' in Article 5 of the SEA Directive, see Annex I (e) and (f). I also refer to the footnote in the Annex* […]*, stating that this includes secondary, cumulative and long-term environmental effects."*

66. The point of contention between the majority and the minority was whether the assessment could be postponed to the PDO stage. The majority held that the assessment could be postponed from the SEA to the EIA stage under Article 5(2) of the SEA Directive, see paras. 213-225, 241 and 246. The minority argued – in the respondents' view correctly – that Article 11 of the SEA Directive precludes such postponement. For our purposes, however, the Court was unanimous in requiring combustion emissions to be assessed at the very latest in EIAs in connection with PDO applications, see e.g., paras. 241, 246 and 275.

67. *The Oslo District Court* has held in the case at hand that combustion emissions are environmental effects of the projects at issue under Article 3(1) of the EIA Directive. The court's interpretation of the EIA directive has been endorsed by the UK Supreme Court in *Finch*, para. 173 (see below).

68. *The UK Supreme Court* interprets Article 3(1) of the EIA Directive in the same way as the respondents. In [2024] UKSC 20, *Finch*, it held that combustion emissions are environmental effects of a project to extract fossil fuels. The UK Supreme Court noted that combustion emissions are effects of the project, whether one sees them as direct or indirect

effects. In para. 85, the UK Supreme Court reasoned that the emissions qualify as direct effects based on definitions grounded in natural sciences:

> […] *combustion emissions are direct effects of the extraction of oil because they are almost entirely independent of any intermediate variables. To know that combustion emissions will occur and quantify them, there is no need to know anything about where the oil will go after it is extracted or what the oil will be used for or when or where it will be burnt. It is sufficient to know - as is known with virtual certainty - that the oil will be refined and ultimately used as fuel. There are no variables in the intervening events which will significantly alter the fact or amount of the combustion emissions or their impact on climate. So, on this definition the combustion emissions are a direct effect of the activity of extracting the oil.*

69. In para. 90, the UK Supreme Court reasoned that the emissions qualify as indirect effects based on definitions in the EIA Directive Guidelines of the European Commission:

> […] *combustion emissions are indirect effects of the project, as they will occur, probably far away from the project site, at sources owned or controlled by entities other than the developer / site operator.*

70. The Government of the United Kingdom now concedes that PDO approvals granted without EIAs of the combustion emissions are unlawful under the EIA Directive. Two planning permits for oil and coal fields have with the Government's consent been quashed in the England and Wales High Court of Justice.[53] The UK Government has also withdrawn its defence for two pending cases on oil and gas development in the North Sea, admitting that those approvals were unlawful.[54]

71. Similarly, case law from the *Irish Supreme Court* is consistent with the respondent's case. In *Kilkenny Cheese* paras. 110-111, the Irish Supreme Court held that potential upstream net increases in greenhouse gases from milk production based on a market substitution analysis were too "elusive, contingent, and speculative" to constitute effects for the purposes of Article 3(1) of the EIA Directive.[55] That holding aligns with the respondents' rejection of market substitution analysis in the case at hand. At the same time, the Irish

[53] See High Court of Justice, AC-2023-LON-003737, 4 July 2024, *SOS Biscathorpe v. Secretary of State*. Available here.; [2024] EWHC 2349 (Admin), *Cumbria*.

[54] See letter from the Attorney General of Scotland, *Jackdaw and Rosebank*, 28.08.2024.

[55] The Irish Supreme Court, [2022] IESC 8, *An Taisce – National Trust for Ireland v. Kilkenny Cheese Ltd.*, paras. 110-111. Available here.

Supreme Court did not reject effects on off-site activities altogether. It made a caveat for off-site effects where the causal chain between the project and the effect is demonstrably strong and unbreakable, such as here. Para. 102 reads (emphasis added):

> *There may well, however, be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable. In those special and particular cases, the significant indirect environmental effects of these off-site activities would fall to be identified and assessed* […]

72. As has been shown, the causal connection between oil and gas extraction and all GHGs emitted from them *is* demonstrably strong and unbreakable. On the reasoning of the Irish Supreme Court, combustion emissions are therefore effects of projects listed in Annex I, point 14. Conversely, speculations and conjectures about market substitution – or net effects – are not. The appellant's reading of *Kilkenny Cheese* is wrong, see *Finch* para. 166.

73. *Beyond Europe*, similar interpretations have been reached by courts and lawmakers on multiple continents.[56]

74. In *Australia*, courts have confirmed that exported combustion emissions of coal are indirect effects of projects to extract the coal that must be assessed in EIAs.[57]

75. In *the United States*, Federal law requires EIAs of combustion emissions from fossil fuel exploration and extraction projects. The National Environmental Policy Act (NEPA), Section 1508.1 *litra* g (2) requires environmental assessments of "indirect effects" which are "caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable".[58] This includes "end-use of the fossil fuel being extracted, including combustion".[59] Federal U.S. courts have interpreted this wording in the same

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[56] See Gloucester Resources v Minister for Planning [2019] NSWLEC 7, paras. 486-513; Waratah Coal Pty Ltd v Youth Verdict Ltd & Others (No 6) [2022] QLC 21, paras. 25 – 28; *Vereinigung Milieudefensie and others v Royal Dutch Shell PLC* C/09/571932 para. 4.4.19. Available here.

[57] *Gloucester Resources v. Minister for Planning* [2019] NSWLEC 7, paras. 486-513; *Waratah Coal Pty v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21, paras. 25-28.

[58] National Environmental Policy Act Section 1508.1 *litra* g (2). Available here.

[59] See *NEPA Guidance*, 2023, p. 1204. "Indirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action.

way.[60] Given that European EIA law was historically modelled on the NEPA provisions, and the wording of Article 3(1) of the EIA Directive and Section 1508.1 *litra* g is close to identical, this is significant.

4.9 International law on EIAs

76. The obligation to carry out EIAs prior to projects with significant likely environmental effects is generally recognised to be a principle of customary international law,[61] expressed in numerous international treaties[62] to which all or most EU/EFTA States are parties.[63]

77. For instance, Article 206 of the UN Convention on the Law of the Sea requires environmental impact assessments of the potential effects of planned activities under the State's jurisdiction or control that may cause substantial pollution of or significant changes to the marine environment. In its Advisory Opinion on climate change and international law, the International Tribunal for the Law of the Sea (ITLOS) has clarified that GHG emissions are "pollution of the marine environment" within the meaning of Article 1 UNCLOS.[64] Accordingly, "anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment".[65] The Tribunal has emphasised that given the severity of exceeding 1.5°C global warming, Convention States are under a stringent due diligence obligation to reduce greenhouse gas emissions and prevent further foreseeable damage to the marine environment.[66]

[…] The reasonably foreseeable indirect effects of such an action likely would include […] end-use of the fossil fuel being extracted, including combustion of the resource to produce energy."

[60] See District Court of Alaska, Center for Biological Diversity v. Bernhardt, no. 18-73400 (9th Cir. 2020). Available here; District Court of Alaska Sovereign Inupiat for a Living Arctic v. Bureau of Land Management, (9th Cir. 2021). Available here; District Court of Colombia, Friends of the Earth v. Debra A. Haaland et al. Civil Action, No. 21-2317 (RC), 27.01-2022. Available here.

[61] See e.g. ICJ, *Pulp Mills*, paras. 101, 204 and 205.

[62] See e.g., the *UN Convention on the Law of the Sea* (UNCLOS) (10 December 1982), Art. 206, the *Espoo Convention* (25 february 1991), Art. 2 and Appendix II, *Helsinki Convention* (17 March 1992), Art. 3 no. 1, the *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), Art. 14, the *Rio Declaration on Environment and Development* (12 August 1992), Principle 17 and *Aarhus Convention* (25 June 1998), Art. 6.

[63] All EU Member States and the EU have ratified *UNCLOS*, the *Espoo Convention* and the *Aarhus Convention*. All EEA States have signed these conventions. However, Iceland has not yet ratified the *Espoo Convention*, and Liechtenstein has not yet ratified UNCLOS and the Aarhus Convention.

[64] ITLOS *Advisory Opinion (No. 31)*, para. 179.

[65] ITLOS *Advisory Opinion (No. 31)*, para. 367.

[66] ITLOS *Advisory Opinion (No. 31)*, para. 241

78. Similarly, Article 8 of the European Convention on Human Rights (ECHR) requires Contracting States to carry out "appropriate investigations and studies" whereby "the effects of activities that might harm the environment and thus infringe the rights of individuals under the Convention may be predicted and evaluated in advance".[67] Crucially, the public "must have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed" and "have an opportunity to protect their interests in the environmental decision-making process".[68]

79. These procedural obligations apply to fossil fuel extraction projects. Article 8 of the ECHR affords individuals the right to "protection by State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change".[69] This encompasses GHG emissions from exported fossil fuels. The ECtHR has noted that it would be "difficult, if not impossible, to discuss" a Contracting State's "responsibility for the effects of its GHG emissions on the applicants' rights without taking into account the emissions generated through the import of goods and their consumption, or, as the applicants labelled them, "embedded emissions"".[70] The same reasoning applies, *a fortiori,* to exported fossil fuels. Contrary to many sources of imported emissions, a licensing state has complete formal and practical control of whether the emissions from fossil fuels extracted from its territory reach the atmosphere. The ECtHR has recognised this unbreakable chain of causation in *Duarte et al.,* [GC] (emphasis added):

> *More fossil fuels being extracted or burnt anywhere in the world will <u>inevitably</u>* […] *lead to higher GHG concentrations in the atmosphere and therefore to worsening the effects of climate change globally.*[71]

80. Clearly, an EIA that leaves out more than 95% of all GHG emissions from a fossil fuel project, and the potential harm caused to the environment, life and health by these emissions, violates Article 8 of the ECHR.

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[67] ECtHR [GC] 2024 *KlimaSeniorinnen*, § 539, with further references.

[68] Ibid.

[69] ECtHR [GC] 2024 *KlimaSeniorinnen*, § 544.

[70] ECtHR [GC] 2024 *KlimaSeniorinnen*, §§ 280-283 and 287.

[71] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Other States* [GC], no. 39371/20, § 194, 9 April 2024.

81. An affirmative answer would thus align with international law instruments requiring EIAs of projects of this kind.

4.10 International climate law

82. An affirmative answer to Question 1 would also align with international climate law. The appellant has sought to argue that the respondents' case runs counter to the international climate regime. It is argued that the technical accounting rules under the Paris Agreement (PA) somehow precludes assessments of combustion emissions in EIAs, under other international law instruments. That is wrong, for several reasons.

83. First, the appellant's case rests on a flawed interpretation of the climate treaties. The UN Framework Convention on Climate Change (UNFCC) recognises in its preamble the no harm-principle in international law, whereby States owe a customary duty to carry out environmental impact assessments for transboundary environmental harm. The PA is governed by the UNFCCC and cannot be read to negate this principle of international law. Moreover, the UNFCCC and the PA must be interpreted in good faith and according to their purpose, see e.g., the Vienna Convention on the Law of the Treaties, Article 31.1. The purpose of these climate treaties is to stabilise GHG emissions "at a level that would prevent dangerous anthropogenic interference with the climate system", see the UNFCCC Article 2. This level is now defined in the PA Article 2.1a, read in conjunction with the 2021 Glasgow Climate Pact, as limiting warming to 1.5C.[72] On the appellant's interpretation, States could disregard this purpose for up to 91% of anthropogenic CO2 emissions from fossil fuels.[73]

84. Second, even if the PA were to be strictly limited to territorial emissions, it cannot limit or modify the respondent's obligations under the EIA Directive, or any other international treaty for that matter. As clarified by ITLOS, the PA is "not *lex specialis* to the Convention" and can at any rate not be applied to "frustrate the very goal of the Convention", see paras. 223 and 224. Similarly, the ECtHR holds it obvious that compliance with aims in the PA

[72] Decision -/CMA.3 Glasgow Climate Pact, 13.11.2021, paras. 20-22.

[73] Fossil fuels cause up to 91% of anthropogenic CO2 emissions, with estimated future emissions from existing and planned fossil fuel projects exhausting even a 2 degrees budget. The appellant's position is contradicted by subsequent state practice which mention exported fossil fuel emissions in nationally determined contributions (NDCs) and unanimous decisions of the Parties to the Paris Agreement on fossil fuels.

"cannot of themselves suffice as a criterion for any assessment of Convention compliance of individual Contracting Parties to the Convention".[74] The argument that a territorial principle the PA somehow limits State obligations under other instruments has thus been firmly rejected.[75] It should also be rejected here.

4.11 EU climate legislation

85. For the sake of completeness, the respondents submit that an affirmative answer to Question 1 would be consistent with European climate legislation and corporate expectations.

86. For instance, oil and gas companies are increasingly required to report on end-use combustion emissions, or so-called Scope 3 emissions. Article 22 of Directive EU 2024/176 (Corporate Sustainability Due Diligence Directive) will require large companies to design and implement transition plans for climate change mitigation that must contain (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for scope 1, scope 2 and scope 3 GHGs. Similarly, Article 29a of Directive EU 2022/2464 (Corporate Sustainability Reporting Directive) require in-scope companies to: (a) specify the information that undertakings are to disclose about the following environmental factors: (i) climate change mitigation, including as regards scope 1, scope 2 and, where relevant, scope 3 GHG emissions.[76]

87. Globally, 79% of oil and gas companies voluntarily report on end-use emissions (Scope 3).[77] There are established and internationally agreed standards available for how such emissions should be assessed and reported. This is set out in the GHG Protocol, which is the result of negotiations between governments, non-governmental organisations and companies. It provides a recipe for quantifying the downstream effects of oil and gas

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[74] ECtHR [GC] 2024 *KlimaSeniorinnen*, para. 547

[75] See e.g., the Norwegian State's third-party submissions in ECtHR [GC] 2024 *KlimaSeniorinnen*, quoted at para. 372, rejected through the ECtHR's assessment of jurisdiction in para. 287, see also para. 280.

[76] Similar obligations apply under the Sustainable Finance Disclosure Regulation (SFDR), Regulation (EU) 2016/1011 (Benchmark Regulation), and Regulation (EU) No 575/2013 (Capital Requirements Regulation). The EU Environmental Footprint Methods for Organisations and for Products also require all direct and indirect environmental impacts to be included in the calculation of the environmental footprint, including impacts in the distribution, use and end of life stages.

[77] Numbers provided by World Resources Institute, available here.

extraction and has been widely adopted by the industry.[78] When such methodology is available and suitable for clarifying the environmental effects of extraction, the Directive requires it to be used.

4.12 Conclusion

88. For the reasons stated above, the respondents submit that Question 1 should be answered in the affirmative. For projects listed in Directive 2011/92/EU Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas are environmental effects of the project under Article 3(1) of the Directive.

5 QUESTION 2

5.1 Introduction

89. By its second question, the referring court asks the following:

> *If Question 1 is answered in the affirmative, is a national court required under Article 3 EEA, to the extent possible under national law, to eliminate the unlawful consequences of a development consent granted without a prior EIA of said effects?*

90. The respondents submit that Question 2 should be answered in the affirmative. Consistent case law from the CJEU and EFTA Court clarifies that the referring court is required by the duty of loyal cooperation in Article 3 of EEA Agreement ('EEA'), corresponding to Article 4(3) of the Treaty on European Union ('TEU'), to nullify the unlawful consequences of a breach of this kind. Since annulment cannot eliminate the unlawful consequences under Norwegian law, the referring court must also order suspension.

5.2 The projects come within the scope of the EEA Agreement

91. Implicit in Question 2, is whether Article 3 EEA applies to projects defined in Annex I point 14 of the EIA Directive on the Norwegian Continental Shelf. The appellant argues that these projects fall outside the EEA, and that Article 3 EEA only applies to the case at hand by virtue of Norway's *voluntary* transposition of the EIA Directive in the petroleum regulations. The appellant's position, if upheld, allows for selective compliance with the SEA and EIA Directives at the Member State's discretion. For instance, the appellant asserts

[78] GHG Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard*. Available here.

that it need not comply with the SEA and EIA Directives on the continental shelf for deep sea mining or other industries, as opposed to petroleum activities. That is arbitrary and untenable.

92. The Court should thus clarify that the projects at hand, listed in Annex I point 14 of the EIA Directive, come within the scope of the EEA Agreement. This follows from a functional interpretation of the word "territory" in Article 126(1) EEA, in accordance with well-established CJEU case law (see e.g., Case C-347/10, *Salemik* [2012] [GC] para. 35, with further references). In *Salemik,* the Grand Chamber reiterated that since a Member State has functional and limited sovereignty over the continental shelf, "work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State". In Case C-6/04, *Commission v. United Kingdom* [2005], para. 117, it was common ground that Directive 92/43/EEC ('the Habitats Directive') applied to the continental shelf in the North Sea. The principle of homogeneity, and the aims of reciprocity and balance expressed recital 4 of the EEA, imply the same result here. The European Surveillance Authority (ESA), the Commission,[79] and leading scholars[80] have taken a similar view.

93. In the alternative, the Court should clarify that the EIA Directive is at any rate "sufficiently closely linked to the EEA" for the purposes of projects in Annex I point 14 on the continental shelf, see Case E-8/19 *Scanteam,* para. 69, E-9/20 *ESA v. Norway*, para. 105, and E-11/20 *Sverrisson*, paras. 63-64. Several factors indicate such a link: i) the petroleum activities have environmental effects on the territory of Norway and other EEA States through emissions to air[81], water[82] and climate[83], ii) the oil and gas sought extracted are sold

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[79] See annexes to Ot.prp. nr. 99 (2005-2006) and Report for the hearing in Case E-8/19 *Scanteam*, para. 129.

[80] See Fredriksen and Skodvin, *Gjelder EØS-avtalen på kontinentalsokkelen?*, in Konow, Marthinussen and Skodvin (eds.) *Fakultetsbyggjar, vestlending og verdsborgar,* Cappelen Damm, 2023, pp. 489-510; Bekkedal and Andenæs, *EØS-avtalen og kontinentalsoklene*, Lov og Rett, 2024, no. 1, pp. 7-33, available here and Arnesen, *Kontinentalsoklene og EØS – replikk til Andenæs og Bekkedal,* Lov og Rett, 2024, no. 7, pp. 503-512, available here.

[81] HR-2020-2472-P, para. 218 and Massachusetts v. EPA, 549 U.S. 497 (2007).

[82] ITLOS, *Advisory Opinion (No. 31)*, para. 179.

[83] IPCC, AR6, *The Physical Science Basis*, 2021, p. 676. Available here

on the EEA internal market,[84] iii) the companies that carry out EIAs when seeking development consent are established on Norwegian territory, and iv) the EIA process and the contested decisions were approved by the Norwegian Ministry of Energy, situated in Oslo.[85]

94. Hence, projects listed in Annex I point 14 of the EIA Directive come within the scope of the EEA Agreement. The appellant has at any rate accepted that the EIA Directive and Article 3 EEA apply to the case at hand.

5.3 Article 3 EEA requires elimination of the unlawful consequences

95. The CJEU has held that under "the principle of sincere cooperation provided for in Article 4(3) of the TEU, Member States […] are required to eliminate the unlawful consequences" of a breach of the Directive, see Case C-411/17, *Inter-Environnement Wallonie* [GC], para. 170. The same duty applies under Article 3 EEA.

96. Article 3 EEA corresponds to Article 4(3) TEU. It says that the Contracting States shall "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement". Under the principle of homogeneity, there is "a presumption that provisions framed in the same way in the EEA Agreement and [EU] law are to be construed in the same way", see Cases E-9/07 and E-10/07 *L'Oréal.* Since the Directive at issue has been made part of the EEA Agreement, there are no "differences in scope and purpose" that could lead to a different interpretation here, cf. Cases E-9/07 and E-10/07, para. 27.[86] Put differently, a duty to eliminate the unlawful consequences here would not give rise to any issue of direct effect or transfer of legislative powers as precluded by Protocol 35 EEA.

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[84] See e.g., Bjørnebye, *Spørsmålet om mangelfull utredning av klimavirkninger i HR-2020-2472-P,* Lov og Rett 2021/3, pp. 159-178, Section 2.1, available here, and Arnesen et al. *Oversikt over EØS-retten,* 2018, p. 952–953.

[85] See also Opinion of Attorney General Cruz Villalón in Case C-347/10 *Salemnik*, para. 55, who took the approach that the scope of EU law is determined by "the extent of the competences lawfully exercised by the Member States within the framework of international law". See also the CJEU's judgement in *Salemnik*, para. 36.

[86] Arnesen et al. *Oversikt over EØS-retten*, 2022, pp. 528-529; Venemyr, *Den EØS-rettslige reparasjonsplikten som en del av norsk rett – illustrert ved Høyesteretts avgjørelse i HR-2020-2472-P (Klimadommen),* Lov og rett, 2021 Section 3, available here; Venemyr, *Om EØS-rettens krav til forvaltningsrettslige følger av feil*, 2023, Chapter 4.1.

97. On this basis, the minority of the Norwegian Supreme Court concluded in HR-2020-2472-P para. 286 that Article 3 EEA "implies a duty for courts to remedy violations" of the SEA Directive's provisions on environmental assessments "to the extent possible under national law". The majority did not need to rule on the issue, see para. 245. Accordingly, the minority opinion, to which four Supreme Court Justices agreed, carries weight. The holding is equally applicable to a breach of the EIA Directive at issue here.

98. While the Court has not yet had occasion to confirm this requirement for substantive breaches of the EIA Directive's provisions on environmental assessments, Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz* strongly suggests that there is such a duty under EEA law.[87] The case concerned an alleged procedural infringement of Article 11 of the Directive, which regulates access to judicial review subject to wide national discretion. The Court noted that one "appropriate remedy in such a situation could be to annul the contested decision and refer it back to the Government for renewed consideration", with the caveat that the procedural rules governing remedies in domestic law must "satisfy the principles of equivalence and effectiveness", see. paras. 83 and 85. The Court's answer implies, *a fortiori*, that domestic courts must remedy substantive breaches of the same Directive. A breach of a substantive requirement of the EIA Directive to carry out environmental impact assessments – ignoring more than 95% of all GHG emissions caused by the project and their irreversible impact on all listed factors in Article 3(1) – must be remedied in full.

99. The appellant has sought to argue, however, that a duty to eliminate the unlawful effects only arises where an EIA is lacking completely. The position is untenable. It would allow for widespread circumvention of the right to environmental information. There is nothing in the wording, purpose or context of the EIA Directive, nor case law, that suggests a distinction between EIAs that are lacking and EIAs that are substantively deficient. As the CJEU points out, Article 2(1) entails that "the examination of a project's direct and indirect effects on the factors referred to in Article 3 […] be fully carried out before consent is given**",** see Case C-50/09, *Commission v. Ireland,* para. 76 (emphasis added)**.** Accordingly, this Court has required remedies where an EIA process has not been "properly carried out

[87] Venemyr, *Om EØS-rettens krav til forvaltningsrettslige følger av feil*, 2023, Chapter 4.1.

or has been incomplete", see Case E-3/15 *Liechtensteinische Gesellschaft,* para. 83. Similarly, the CJEU has built on its case law on lacking EIAs in a case concerning a deficient EIA, see Case C-278/21 *AquaPri* para. 38 *et seq.* The Norwegian Supreme Court has also dealt with lacking and deficient EIAs alike, see Rt-2009-661 para. 72, HR-2017-2247-A para. 98, and HR-2020-2472-P. Similarly, the UK Supreme Court does not distinguish between the two, see *Berkeley* and *Finch*.[88] Two of these cases even concerned the same flaw – no assessment of combustion emissions from oil and gas extraction projects – at issue here. The appellant's argument is thus unfounded.

5.4 Suspension of the projects is necessary

100. The remedial duty under Article 3 EEA is to eliminate the unlawful *consequences* of the breach, not merely the breach itself. Hence, it does not suffice to simply carry out a supplementary EIA of the combustion emissions *ex post*, without annulling and suspending the permits to construct and operate the projects that were unlawfully approved.

101. The CJEU has noted that the duty to eliminate the unlawful consequences of breach of the EIA Directive includes "the revocation or suspension of a consent already granted, in order to carry out an assessment of the project in question", see Case C-201/02 *Wells* para. 65. The CJEU has reiterated this in numerous cases on both the SEA and EIA Directives.

102. For instance, in Case C-261/18 *Commission v. Ireland* [GC] para. 75, the Grand Chamber noted that national authorities "have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment". In Case C-41/11 *Inter-Environnement Wallonie* [GC] para. 46, the Grand Chamber noted that courts "must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment". Similarly, in Case C-24/19, [GC] para. 83, the Grand Chamber requested "measures to suspend or annul that plan or program" or "revoking or suspending consent already granted, in order to carry out such an assessment". It specified that this rule applies notwithstanding that the installation of the ensuing project "has commenced, or is even completed", see para. 89.

[88] UK House of Lords, *Berkeley*, sections 8-9 and [2024] UKSC 20 *Finch*, para. 154.

103. As the Grand Chamber of the CJEU explains in Case C-24/19, para. 47 (emphasis added):

> *The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment.*

104. The EIA Directive pursues the same fundamental objective as the SEA Directive. It shall ensure the highest possible level of environmental protection through informed public participation based on lawful EIAs before consent is given, cf. Article 2(1). The EIA process can only fulfil this purpose if it is carried out "when all options are open to the competent authority or authorities before the decision on the request for development consent is taken", cf. Article 6(4). When a project has been constructed, all options are, as a rule, no longer open. Hence, the fundamental objective of the EIA Directive would be disregarded if national courts did not adopt all measures available to them to prevent a project approved in breach of the EIA obligation from being realised and put in production. Suspension is therefore a necessary measure.

105. As Advocate General Kokott explained in Cases C-196/16 and C-197/16 *Comune di Corridonia*, para. 33 (emphasis added):

> *That conclusion underlines, moreover, the necessity of effective interim relief in the case of disputes concerning the assessment of the effects of a project on the environment. If interim relief is denied, success in the action does not ensure an effective remedy. It would therefore be particularly regrettable if […] the competent courts did in fact refuse a suspension of the consent and thus facilitated the premature construction of the plants.*

106. Under domestic law, annulment merely gives the authorities a duty to consider whether the decision should be reversed.[89] Moreover, a final judgment on annulment is expected as late as Spring 2026, almost three years after the proceedings were instituted. At that point,

[89] Supreme Court of Norway, Rt-2015-641, para. 39.

even Yggdrasil might be fully constructed, with much of the GHGs embedded in the oil reserves of Tyrving and Breidablikk irretrievably extracted. It is obvious that annulment under those circumstances cannot nullify the unlawful consequences. Effective interim relief is also required.

5.5 Assessments during construction or production cannot suffice

107. The appellant has sought to argue that any breach of the Directive has been remedied for Tyrving and Yggdrasil through the subsequent assessments carried out by the operator whilst both projects were under construction. It is argued that the Ministry's decisions of 28 August 2024, which was issued for Tyrving only days before production begun, nullified the unlawful consequences of the breach. That is wrong, for several reasons.

108. To be clear, the assessments were carried out long after the development consents were granted, contrary to Article 2(1), and *while* the enforceability of the injunction was suspended with construction ongoing at an accelerated pace. Tellingly, the assessments satisfied neither the legal requirements for EIAs in Article 1(2) *litra* g, nor the substantive requirements to assess the emissions on the listed factors in Article 3(1). Crucially, the assessments failed to provide the public with an *early and effective* opportunity to participate in the decision-making process while *all doors were open*, see Articles 6(2) and 6(4). Indeed, the operator acknowledged that the assessments were only carried out at its own volition for reasons of expediency.[90] Hence, the public was never meant to participate in the decision-making process in an effective manner with the possibility of a different outcome. The assessments were only intended to safeguard an unlawful *fait accomplit.* That is contrary to the democratic function of the EIA Directive, and its objective of ensuring the highest possible level of environmental protection.

109. To avoid such circumvention of the EIA Directive, the conditions for *ex post* regularisation are exceptionally stringent. The CJEU has clarified that national rules permitting regularisation cannot "offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application" and "should remain the exception", see Case C-261/18 *Commission* para. 76, Cases C-196/16 and 197/16 *Commune di*

[90] See e.g., Aker BPs preface to the proposed assessment program for Tyrving of 13 May 2024, p. 3. Available here.

Corridonia paras. 37 and 38, Case C-215/06 *Commission* para. 57, Case C-416/10 *Krizan et al.*, para. 87, Case C-348/15, *Stadt WienerNeustadt,* para. 36, and Case C-411/17, *Inter-Environnement Wallonie,* para. 174. None of these criteria are satisfied here.

110. First, the operator and the appellant would be offered the chance to *circumvent the EIA Directive or dispense with its application* altogether. If these assessments suffice, no operator will have any incentive to carry out lawful EIAs on significant and indeed controversial environmental effects whilst applying for a development consent. If major and substantive effects that could negatively affect communities and therefore stir opposition could be assessed *after* approval without affecting construction or operation of the project, operators would be incentivised to delay their evaluation. Operators could even assume that breaches of this kind would face few challenges in courts (given that affected interests in environmental matters are regularly not in a position to seek enforcement). And in the unlikely event that a case is brought, with the approval quashed, the operator could simply produce a new assessment during appeal, safe in the knowledge that prolonged periods for public comment only meant more time to finalise construction or extract the resources. The outcome would be settled in advance. Put differently, if these assessments suffice, EIAs would cease to be a fundamental mechanism for environmental protection and a vehicle for democratic participation in the decision-making process.

111. Second, *no exceptional circumstances are proven.* It follows from the French authoritative version of Case C-261/18 *Commission v. Ireland* para. 78 that proven circumstances must be "exceptionelles" and "particulières".[91] According to the appellant, however, no exceptional or particular circumstances set the present cases apart from other PDO-approvals. Accordingly, if the unlawful consequences of the EEA breach can be remedied through assessments of this kind, that would be the rule for all PDO-approvals in Norway. That would obliviate the requirements of the EIA Directive. That is, for good reason, precluded, see Case C-261/18 *Commission v. Ireland* para. 78 (emphasis added):

> *By contrast, Directive 85/337 precludes national legislation which allows the national authorities, <u>where no exceptional circumstances are proved</u>, to issue regularisation permission which has the same effects as those attached to a prior consent granted after*

[91] See also the German version, requiring „Nachweis außergewöhnlicher Umstände" and „Vorliegen besonderer außergewöhnlicher Umstände".

> *an environmental impact assessment carried out in accordance with Article 2(1) and Article 4(1) and (2) of that directive (see, to that effect, judgments of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 61; of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 37; and of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 39).*

112. In addition, and contrary to Cases C-196/16 and C-197/16, the consents have not been revoked or suspended, and the operations of the projects have not been halted. In the two months that the district court's prohibition against new permits was enforceable, the construction and operation of the fields continued regardless. Since 20 March 2024, the order was put on hold and since lifted. This sets our case apart from Cases C-196/16 and C-197/16, para. 42, where the CJEU noted that the fact "that the activities of the plants concerned were suspended appear rather to indicate that the regularisations" did not attempt to circumvent rules of EU law.

113. The rationale is explained in the Opinion of Advocate General Kokott, see para. 41 (emphasis added):

> *Where a consent is revoked or suspended, it will, as a rule, in addition, be appropriate, as is the case in the main proceedings, to halt the operations of the plant concerned. Namely, according to Article 1(2)(c) and Article 2(1) of Directive 2011/92, that consent is a requirement to proceed with the project, in other words, to operate the plant. In addition, that approach is consistent with the precautionary principle and the principle that preventive action should be taken. If an environmental impact assessment had been necessary, it is, in fact, doubtful whether, in the absence of that assessment, the consent has taken account of all the applicable environmental protection standards. Moreover, the risk of operations being halted provides a strong incentive when applying for a consent for a project of that kind to ensure that the requirements of Directive 2011/92 are observed.*

114. What is more, neither the appellant nor the operators admit a breach of the EIA Directive. Indeed, the appellant even asserts that if there is a breach of the EIA Directive, the consents must nonetheless be upheld based on a balance of interests. This points to a clear attempt to circumvent the EIA Directive. Consequently, the subsequent assessments cannot nullify the unlawful consequences on their own.

5.6 National law must be interpreted as far as possible in conformity with EEA law

115. The duty to nullify the unlawful consequences is limited by the principle of procedural autonomy. Yet, the referring court must interpret domestic law as far as possible in conformity with EEA law. Question 2 invites the Court to give guidance on this principle.

116. In Case E-1/07, *Liechtenstein v. A.*¸para. 39, the Court said (emphasis added):

> *"* […] *it is inherent in the objectives of the EEA Agreement* […] *as well as in Article 3 EEA that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule."*

117. In Case E-3/15, *Liechtensteinische Gesellschaft,* paras. 74-75 and point 3, the Court reiterated this principle regarding breaches of the EIA Directive:

> *"* […] *it follows from EEA law that when interpreting national rules, the national court is bound to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by Directive 2011/92/EU".*

118. The referring court's express abdication from even interpreting and applying domestic law on temporary injunctions, disregards the principle of conformity entirely.[92] Whilst assuming that the development consents and subsequent decisions were invalid and in breach the EIA Directive, and that all conditions for urgency were met, the referring court alleged that HR-2020-2472-P precluded it from even considering injunctions in cases involving petroleum production at all.

119. While the referring court's interpretation of HR-2020-2472-P is wrong on its merits,[93] the Court should nonetheless clarify that the requirement to interpret national law in

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[92] See Borgarting Court of Appeals, LB-2024-36810-1, p. 17.

[93] Paras. 141, 142, 148, 157-159 and 161-162 in HR-2020-2472-P, which the referring court cites, regard judicial scrutiny in the case of alleged invalidity of a parliamentary decision measured against a material limit in Section 112 paras. 1 and 3 of the Norwegian Constitution. These provisions are not invoked here. The respondents have merely invoked the case handling requirements in Section 112 para. 2, as a factor in the interpretation of the statutory duty to carry out EIAs in Section 4-2 of the Petroleum Act, cf. Section 22a of the Petroleum Regulations. In HR-2020-2472-P paras. 182-184, the Supreme Court emphasised that "judicial restraint is less

conformity with EEA law entails an obligation for national courts to *change* its established case-law, if it is based on an interpretation of national law that is incompatible with the objectives of a Directive that is part of the EEA Agreement. The CJEU made this point in Case C-371/02, *Björnekulla* para. 13 and Case C-441/14, *Dansk Industri*, paras. 33 and 34 (emphasis added):

> *It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgement in Centrosteel, C-456/98, EU:C:2000:402, paragraph 17).*
>
> *Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.*

120. It would be wholly incompatible with the objectives of the EIA Directive if national courts were precluded *per se* from ordering injunctions to remedy a substantial breach of the environmental assessment requirements for petroleum activities. Indeed, such a rule would conflict with the CJEU's settled case law in Case C-213/89 *Factortame* para. 20, as clarified through Case C-432/05 *Unibet* [GC]. Since the Directive is part of the EEA Agreement, the principle of homogeneity begets that the obligation to change established case-law that is incompatible with the objectives of the Directive, applies equally here.

121. Similarly, the requirement to interpret national law in conformity with EEA law requires that the referring court makes full use of its discretionary competence under the principle

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required when it comes to assessing the procedure" and that judicial scrutiny of procedural flaws must be "more thorough" in cases concerning petroleum activities.

Hence, considerations for democracy, which implied a wide margin of appreciation for Parliament when considering whether a decision substantively breaches a constitutional provision, cannot bar injunctions sought to protect the status quo where the administrative approval is invalid. The Supreme Court in HR-2020-2472-P para. 145 did not pronounce on judicial scrutiny for administrative decisions. It is nonetheless clear that when the referring court assumes that the decisions are invalid - meaning that they breached democratically adopted statutory law and that the error may have affected the outcome, cf. the principle expressed in Section 41 of the Administrative Act - considerations for democracy cannot suggest that the effects of the decisions be maintained.

The referring court's abdication from even interpreting and applying Sections 34-1 and 34-2 cf. 34-3 of the Dispute Act also runs counter to the exclusive competence vested in it by the legislature to weigh competing interests where a temporary injunction is sought. Moreover, it negates the duty under international law to ensure effective injunctions in environmental matters, see e.g., the Aarhus Convention Article 9.4, implemented in e.g., Sections 34-2 para. 3 and 32-11 para. 1, cf. Section 1-2, of the Dispute Act.

expressed in Section 41 of the Administrative Act to annul the decisions reached in breach of the EIA Directive. As HR-2020-2472-P para. 286 (minority) makes clear, annulment in these circumstances is *possible* under national law. Annulment is thereby *required* under EEA law.

5.7 The principles of effectiveness and effective judicial protection

122. The principle of procedural autonomy is at any rate limited by the principles of effectiveness and effective judicial protection. The principle of effectiveness is rooted in the duty of loyalty, cf. Article 4(3) TEU and Article 3 EEA. If national rules preclude suspension and annulment in the case at hand, it would be "impossible or excessively difficult" to exercise rights under EEA law, cf. C- 199/82 *San Giorgi*, para. 14, joined cases C-6/90 and C-9/90 *Frankovich*, para., and C-432/05 *Unibet*, para. 43.

123. The respondents are also protected by the principle of effective judicial protection. This principle is codified in Article 19(1) TEU and in Article 47 of the Charter of the Fundamental Rights of the European Union. It derives from the constitutional tradition of the Member States and Articles 6 and 13 of the European Convention on Human Rights.[94] It is thus fully applicable in the context of these proceedings.[95]

124. The principle of effective judicial protection requires that national courts must guarantee real and effective protection of the rights of individuals derived from EU law, cf. C-14/83 *Von Colson*, paragraph 23 and Article 19(1) TEU. The CJEU has clarified that the EIA Directive grants individuals and environmental organisations a right to environmental information corresponding to the obligation to carry out environmental impact assessments, cf. C-201/02 *Wells*, para. 61, and C-420/11 *Leth*, para. 32. If annulment and suspension of a development consent granted in breach of this right cannot be granted by national courts, the real and effective protection of this right would not be guaranteed.

[94] Case C-93/12 *Agroconsulting*, para. 59; Article 6 ECHR applies to climate harm, see ECtHR [GC] 2024 *KlimaSeniorinnen*, §§ 609-610.

[95] Article 6 ECHR consumes Article 13, see ECtHR [GC] 2024 *KlimaSeniorinnen*, § 644.

5.8 The appellant cannot rely on legal certainty or legitimate expectations

125. For the sake of completeness, the respondents submit that the appellant cannot rely on the principles of legal certainty or the protection of legitimate expectations either. None of the PDO-approvals are final. There is no time limit for challenging them under domestic law. Whilst the PDO-approvals for Tyrving and Yggdrasil were challenged immediately, the legality of all PDO-approvals has been contested publicly for years. The non-compliance with the EIA Directive has been known to all actors, at least since HR-2020-2472-P in 2020. As the operator of Breidablikk – Equinor – is controlled by Norway (72% shareholder), it must at any rate be considered an emanation of the State on which the obligations arising from EEA directives are binding, see Case C-261/18 para. 91 and Case C-6/05, *Medipac*, para. 43. Consequently, the appellant cannot plead legal certainty or legitimate expectations.

5.9 Conclusion

126. Based on the above, the respondents submit that Question 2 should be answered in the affirmative. If a development consent has been granted without a prior EIA of the GHG emissions from the extracted petroleum and natural gas, a national court is required under Article 3 EEA to eliminate the unlawful consequences, to the extent possible under national law, through suspension and annulment. That applies notwithstanding any contrary interpretation which may arise from national case-law for the national rule.

6 QUESTION 3

6.1 Introduction

127. By its third question, the referring court asks the following:

> *If Question 2 is answered in the affirmative and national law allows for the annulation and/or suspension of the unlawful consent, can a national court retroactively dispense with the obligation to assess these effects under Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process?*

128. The respondents submit that question 3 should be answered in the negative.

6.2 The failure impacted the outcome of the decision-making process

129. As a preliminary remark, the respondents submit that ignoring more than 95% of the GHG emissions from the projects was a fundamental and material defect that impacted the

outcome of the decisions. The serious defect deprived the public of their rights to information and participation in the decision-making process such that it cannot be said that the decisions would not have been different without the error.

130. The UK Government has conceded this point in several cases, e.g., *Cumbria*:[96]

> *The First Defendant accepts that on the facts of this case there was a serious defect and the public were deprived of their rights under the EIA Regs 2011 such that it cannot be said that the Decision would not have been different without the procedural error. In light of what was said by Lord Leggatt in Finch about the purpose of EIA (at inter alia paras. 3, 18, 60-61, 105, 152 and 154) it is accepted that the public, including the Claimants, did not enjoy in substance the rights conferred by the EIA Regs 2011 and suffered substantial prejudice. The public were to a significant extent deprived of access to information and participation which would have informed the decision. […] The assessment of GHG emissions should also have been undertaken early on in the process to allow the public to comment on it at an early stage. It would also have allowed the sufficiency of information provided for the EIA to have been challenged.*

131. The High Court agreed to this reasoning, noting that "I cannot be satisfied that the decision would not have been different if that procedural defect had not occurred", see *Cumbria,* para. 187. The District Court in the case at hand rightly held that the flaw may have impacted the outcome of the decisions.[97]

132. The following submissions do not in any way prejudice this view.

6.3 The purpose of the EIA

133. Properly understood, the purpose of the EIA process is to ensure that the environmental impact of a project is exposed to public debate and considered in the decision-making process, see Article 2(1) and recitals 16 and 17 of the preamble. The EIA process does not prevent consent from being given, but aims to ensure that, if consent is given, it is given with full knowledge of the environmental consequences. Concisely stated, the purpose is to ensure that decisions whether to give development consent for projects which may affect the environment are made on the basis of *full* information, see *Finch* para. 61. Hence, an

[96] [2024] EWHC 2349 (Admin), Cumbria, para. 52.

[97] Oslo District Court, judgment of 18 January 2024 (unofficial translation), p. 94: "The Court has nevertheless, after an overall assessment, come to the conclusion that there is not an entirely remote possibility that the inadequate impact assessment of combustion emissions may have affected the content of the decisions". (On p. 86 in the Norwegian original).

omission to identify, describe and assess more than 95% of the GHGs and their inevitable impact on all factors listed in Article 3(1) prior to development consent, has unlawful consequences *even if* it could be shown that the decision would have been the same without the error.

6.4 CJEU case law

134. The respondent's case is supported by CJEU case law.

135. The CJEU has not made the duty to eliminate the unlawful consequences of a substantive breach of Article 3(1) of the EIA Directive, contingent upon the failure having impacted the outcome of the decision-making process. On the contrary, in Case C-201/02 *Wells,* the CJEU simply required the domestic court to annul or suspend the decision. Similarly, in Case C-24/19 *A et al.*, the CJEU required that the domestic court annul or suspend the decision, with one permissible exception: if annulment of the consent would be likely to have "significant implications for the electricity supply of the whole of the Member State", see para. 95.

136. Antithetically, while the CJEU has listed exemptions to the duty to eliminate the unlawful consequences of a substantive breach of the EIA Directive, it has not mentioned a requirement that the breach impacted the outcome among those exceptions.

137. The appellant relies instead on CJEU case law from another area of law, namely the right to defence. In that area, the CJEU notes that an error can only lead to annulment if it may have impacted the outcome of the procedure, see e.g., Cases C-129/13 and C-130/3, *Kamino,* para. 79. The appellant overlooks two crucial points. First, the CJEU's mention of such an exception in cases on the right to defence only serves to underline its absence from case law pertaining to the EIA Directive. Second, there are significant differences between the serious defect to comply with the specific, detailed and binding rules in our case, and infringements of the right to defence.

138. Indeed, the omission to comply with the specific, detailed rules in Articles 2(1), 3(1), 5(1), 6(2), 6(4) and Annex IV point 5 under the Directive in the case at hand, is analogous to a failure to carry out an interview in accordance with the Procedures Directive. Notably in those cases, the CJEU has refused to apply its case law on the right to defence and the

requirement therein that an infringement may have impacted the outcome. See Case C-517/17 *Addis*, para. 70 (emphasis added):

> *That case-law cannot, however, be applied to an infringement of Articles 14, 15 and 34 of the Procedures Directive. First, those provisions set out, in binding terms, the obligation on the Member States to give the applicant the opportunity of a personal interview as well as specific, detailed rules on how that interview is to be conducted. Second, those rules seek to ensure that the applicant has been invited to provide, in cooperation with the authority responsible for the interview, all information that is relevant to the assessment of the admissibility and, as the case may be, the substance of the application for international protection, which gives that interview, as stated in the preceding paragraph of this judgement, paramount importance in the procedure for examination of that application* […]

139. Similar considerations apply here. The rules governing EIAs are binding, specific and detailed. They seek to ensure an objective that goes beyond the individual decision itself, namely democratic participation, increased awareness of environmental risks and, thereby, the highest possible level of environmental protection.

140. The appellant's arguments under Article 11 of the EIA Directive are not capable of altering this conclusion. The appellant points to two cases, C-535/18 *Land Nordrhein-Westfalen* para. 59 and C-72/12 *Gemeinde Altrip* para. 49, on the right to standing under Article 11 of the EIA Directive. In these cases, the CJEU allowed a statutory requirement that denied individual standing if shown that it was conceivable that the decision would not have been different. The appellant argues that if the CJEU could accept national rules that made standing conditional on impact, it follows *a fortiori* that invalidity and suspension can be made conditional on impact. The argument conflates different rules.

141. The cases cited concerned the interpretation of Article 11(1)b of the EIA Directive on *standing* for *individuals.* This provision requires Member States to ensure, "in accordance with the relevant national legal system" that members of the public concerned "maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition" have access to a review procedure before a court of law. The CJEU held, in "view of the significant discretion" that Article 11 leaves the Member States, that it was permissible for national law not to recognise an impairment of a right if it is established that it is conceivable that the contested decision would not have been different,

see Case C-535/18, *Land Nordrhein-Westfalen,* para. 59. None of the specific provisions in Article 2(1), 3(1), 5(1) and Annex IV point 5 afford Member States such discretion.

142. Further, Articles 11(3) cf. 11(1)a of the EIA Directive clarify that any non-governmental organisation meeting the requirements in Article 1(2) have standing *per se*. Hence, it is clear, from Article 11 itself, that the deference afforded States to limit *individual standing* is not meant to affect the assessment of whether a breach of Article 3(1) of the EIA Directive has unlawful consequences that must be nullified. It merely allows Member States to limit access to judicial review for individuals, as opposed to representative organisations.

6.5 ECtHR case law

143. This conclusion is not altered by the ECtHR admissibility decision in *Büttner and Krebbs,* cited by the appellant.[98] The case, which concerned a procedural infringement concerning flight noise, is distinguishable on several grounds. First, the ECtHR left it open whether Article 8 of the ECHR even applied, see para. 71. Noise pollution must be severe to trigger the applicability of Article 8,[99] and the applicants did not argue that it did. Second, "qualitatively and quantitatively similar" noise effects had been considered in the EIA for other areas, see para. 76. The alleged breach of Article 8 was that the applicants did not have occasion to challenge the decisions based on knowledge that the noise would impact *them*, as opposed to their neighbours. That neatly illustrates the difference between individual complaints, and a case brought by environmental organisations in defence of representative interests.[100] It has no bearing on the case at hand.

144. Conversely, in the context of major and intergenerational environmental risks, the ECtHR has held that the right to information would be depleted if the information provided was "insincere, inexacte ou même insuffisante".[101] In the case at hand, the information about the GHG emissions and their impacts on the factors listed in Article 3(1) of the EIA Directive, including life, health, biodiversity, and the risk of climate tipping points, was not given at all. This serious defect deprived the public and the respondents of their right to

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[98] ECtHR, *Büttner and Krebs v. Germany* (dec.), no. 27547/18.

[99] See e.g., ECtHR, *Fägerskiöld v. Sweden* (dec.) no. 37664/04.

[100] ECtHR, *Verein KlimaSeniorinnen et al.,* [GC], no. 53600/20, paras. 478-488, 489-503, 521-526 and 527-535.

[101] ECtHR, *Association Burestop 55*, no. 56176/18, §§ 108 and 109; see also ECtHR, *Verein KlimaSeniorinnen et al.,* [GC], no. 53600/20, paras. 554 and 539.

information and participation. That is true, regardless of whether it be shown that the decision-maker would have preferred the same outcome.

6.6 Comparative law

145. The minority of the Norwegian Supreme Court in HR-2020-2472-P reasoned in the same way. While it did not "rule out that the political debate in society in general and within the Government and the Storting, could have been different if the impact assessment had included the effects of the combustion emissions", it considered this approach to be too narrow, see para. 279 *et seq.* The minority reasoned that the procedural rules governing EIAs "must be strictly enforced" because they ensure a right to information with "value beyond the individual decision made", see para. 281.

146. The same point is succinctly made by the UK Supreme Court in *Finch,* paras. 152-154 (emphasis added):

> *The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences.*
>
> *Looking at the matter more broadly, it needs to be recognised that the process of EIA takes place in a political context and that the information generated by an EIA will be considered within a political decision-making arena. It is therefore inevitable that economic, social and other policy factors will outweigh environmental factors in many instances. But this does not avoid or reduce the need for comprehensive and high-quality information about the likely significant environmental effects of a project. If anything, it enhances the importance of such information. Nowhere is this more so than where issues arise relating to climate change.* […]
>
> *The effect should have been properly assessed so that public debate could take place on an informed basis. That is a key democratic function of the EIA process. It was not fulfilled here.*

147. The House of Lords explained this rationale thoroughly in *Berkeley*, Section 8 (emphasis added):[102]

[102] Appellate Committee of the UK House of Lords, *Berkeley v. Secretary of State for the Environment and Others*, Section 8, available here.

The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. […]

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded it views may be, is given an opportunity to express its opinion on the environmental issues. […]

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

6.7 Conclusion

148. Based on the above, the respondents submit that Question 3 should be answered in the negative. A national court cannot retroactively dispense with the obligation to assess the effects (GHG from the extracted hydrocarbons) on the factors listed in Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process.

7 PROPOSED ANSWERS TO THE REFERRING COURT'S QUESTIONS

149. The respondents invite the Court to answer the referring court as follows:

Question 1:

For projects listed in Directive 2011/92/EU Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas are environmental effects of the project under Article 3(1) of the Directive.

Question 2:

If a development consent has been granted without a prior EIA of the GHG emissions from the extracted petroleum and natural gas, a national court is required under Article 3 EEA to eliminate the unlawful consequences, to the extent possible under national law, through suspension and annulment. That applies notwithstanding any contrary interpretation which may arise from national case-law for the national rule.

Question 3:

A national court cannot retroactively dispense with the obligation to assess these effects on the factors listed in Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process.

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Oslo, 5 November 2024
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