
MEMO

To: WWF Norway
From: Wikborg Rein
Date: 8 November 2023
Lawyer in charge: Elise Johansen

LEGAL ASSESSMENT OF A POSSIBLE DECISION**1 SUMMARY**

1. This memorandum provides an assessment of the legal framework pertaining to a possible decision to allow offshore minerals extraction. This summer, the Government presented a White Paper report to the Storting (Meld.St. 25 (2022-2023)) proposing to open an area on the Norwegian continental shelf for exploration. The Storting is currently considering the White Paper.
2. The area under consideration is depicted in the figure in section 3 of this memo, and covers 281,200 square kilometres. The location of the area impacts the determination of the applicable legal obligations. The entire area is located on the Norwegian continental shelf, where the coastal state has sovereign rights to explore and exploit natural resources, cf. article 77 of the United Nations Convention on the Law of the Sea (UNCLOS). However, the northernmost segment of the area appears to fall within Svalbard's Fisheries Protection Zone, prompting questions as to the geographical scope of the Svalbard Treaty. Additionally, two parts of the area include areas where the water column above is part of the high seas, i.e. the so-called Banana Hole,¹ where Norway lacks exclusive rights with regards to the water column, a consideration that must be factored in when considering potential mineral extraction activities.
3. Considering all relevant factors, we are of the opinion that impact assessment requirements under Section 2-2 of the Seabed Minerals Act have not been satisfied. Although – to a large extent – it is within the authorities' discretion to decide whether or not to open an area for exploration, including to balance various conflicting interests, Section 2-2 contains certain minimum legal standards which must be met: The assessment must analyse the environmental effects of the decision, along with the anticipated industrial, economic and social effects. To fulfil these requirements, the impact assessment must be sufficiently detailed in order to serve as a basis for the decision to open an area for exploration. In our opinion, the impact assessment carried out falls short of this latter requirement, particularly because it adopts a far too general and overarching approach to the environmental consequences. This is even more so due to the size of the area in question, and the fact that the White Paper pays insufficient attention to the varying local environmental conditions of the large area under consideration.
4. This stance is reinforced by case law, in particular the majority opinion in the Supreme Court's "Climate Judgment" of 2020, which emphasised the need for solid grounds for decision-making in matters which will have major societal consequences. The judgment highlights the

¹ *Norwegian*: "Smuthavet" or "Bananhullet".

importance of having a thorough decision basis prior to resolving to open an area for exploration drilling. The Court's reasoning is highly pertinent to future seabed mineral extractions, given that the Seabed Minerals Act is modelled substantially on the Petroleum Act, and involves activities with potentially considerable environmental and societal implications. The Supreme Court also remarked on the importance of a decision to open areas for drilling, emphasising that such resolutions require balancing interests in favour of future activities. Consequently, the impact assessment cannot be overly general; it must be sufficiently detailed to allow decision makers and the public to conduct informed evaluations and draw sound conclusions.

5. There is a question as to whether the principles of the Nature Diversity Act, specifically those concerning grounds for decision-making, the precautionary principle, and the overall approach to the impact of the proposal have been sufficiently considered. The significant size of the proposed area to be opened increases the risk of irreversible damage and strengthens the obligation to adopt a precautionary approach.
6. The insufficiencies and limitations of the body of knowledge on which the proposal relies have also been highlighted by the Norwegian Environmental Directorate in their consultative statements. As the highest specialised entity for both environmental assessments within the administration and an authority on environmental issues, the Directorate is expected to be consulted on matters of environmental law. Therefore, it is remarkable that the Directorate's assessments and clear recommendations have been overlooked in a case with such major potential environmental consequences.
7. In light of Norway's obligations under the Kunming-Montreal Global Biodiversity Framework (GBF), the conservation of Norwegian marine areas must be considered. This consideration should be integrated into the assessment of a potential decision to open the area pursuant to the Seabed Minerals Act.
8. Moreover, Norway has a number of obligations under international law. These include obligations to conduct impact assessments, publish environmental information and prevent transboundary harm. The 'principle of presumption' plays a crucial role in interpreting Norwegian law, underscoring the significant impact of Norway's international law obligations. In general, international law also has its own mechanisms related to complaints and rights to appeal.
9. The Espoo Convention and its subsequent SEA Protocol are international legal frameworks mandating member parties to undertake environmental impact assessments (EIA) and strategic environmental impact assessments (SEA) respectively. Norway is a party to both the Espoo Convention and the SEA Protocol. The SEA Protocol sets out certain rules for impact assessments at the pre-project stage of the decision-making process, thus, being of significant relevance to an opening resolution. Non-compliance with the Espoo Convention and the SEA Protocol can be investigated by the Implementation Committee, on the grounds of, for example, a complaint from another member party. Consequently, Norway could be subject to an investigation by this committee.
10. The Aarhus Convention, enacted into Norwegian law through the Environmental Information Act, aims to strengthen the right of individuals to live in an environment that safeguards and upholds their health and general well-being. For the rights under the Convention to be sufficiently effective and not merely illusory, they need to be executed in conjunction with the States' obligations to perform environmental impact assessments. Non-compliance with the Espoo Convention and the SEA Protocol obligations may indicate a concurrent breach of the Aarhus Convention, providing for the possibility of various dispute mechanisms provided by the Aarhus Convention.

11. The United Nations Convention on the Law of the Sea (UNCLOS) of 1982 establishes legal framework for all marine areas, delineating maritime zones and corresponding state rights and responsibilities. As a state party to UNCLOS, Norway is bound by its obligations, including the general mandate to protect and preserve the marine environment.
12. Article 206 of the UNCLOS requires states to conduct impact assessments and communicate the results when they have “reasonable grounds to believe that planned activities under their jurisdiction or control may cause significant pollution of or significant and harmful changes to, the marine environment”. Furthermore, the Convention on Biological Diversity (CBD) stipulates that these assessments consider potential adverse impacts on biodiversity, extending beyond adjacent states to any state or areas beyond national jurisdictions that might be affected. This means Norway’s consultations should not be limited to Iceland and Denmark, as has been done, but must include any state potentially impacted by seabed mineral extraction.
13. Article 208(1) of UNCLOS obliges states to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction”. The same article stipulates that “laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedure s” which include the International Seabed Authority’s (ISA) Mining Code. Consequently, if the ISA enforces a stricter code or a moratorium on seabed mineral extraction in international waters, it could have direct consequences for the obligations under Norwegian national law, as per the requirements of Article 208.
14. The connection between Article 77 (affirming a coastal state’s sovereign rights over its own continental shelf resources) and Article 208 (mandating pollution prevention from seabed activities in accordance with international rules) has not been judicially scrutinized, leaving uncertainty as to which of these provisions would take precedence in a case where there is simultaneous conflicting rights and obligations of states. In any case, an ISA temporary moratorium would send a significant message regarding the international legal development and expectations, potentially leading to legal implications, and also major reputational challenges for Norway.
15. The UNCLOS also grants access to various dispute resolution bodies, such as the International Court of Justice, international arbitration, or the International Tribunal for the Law of the Sea.
16. The Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), to which Norway is a party, is considered to be the primary instrument in the North-East Atlantic region for the implementation of the environmental provisions of the Law of the Sea Convention Part XII. Article 2(1)(a) of the OSPAR Convention sets forth obligations to protect the marine environment within and beyond national jurisdiction, requiring the conservation of marine ecosystems and the application of the precautionary principle, cf. Article 2 (2) (a)], therefore appearing more prescriptive than the UNCLOS.
17. Finally, the Svalbard Treaty is highlighted, as parts of the area under consideration for the opening resolution fall within Svalbard’s fishery protection zone. The Supreme Court recently addressed the Svalbard Treaty’s applicability to areas beyond Svalbard’s territorial waters, including the fishery protection zone and continental shelf, in the “Snow Crab” case (HR-2023-491-P), concluding that the Treaty is limited to Svalbard’s land territory, internal waters and territorial sea (12 nm from the baseline).
18. However, there is international and academic disagreement with Norway’s interpretation and application of the Svalbard Treaty, including from and in the United Kingdom and the Netherlands. Proceeding to facilitate activity in this area with an opening resolution in this contentious area risks escalating tensions and drawing increased attention to Norway’s

position, with the potential for the matter being brought before international courts. It is not clear what the outcome would be if the latter were to happen.

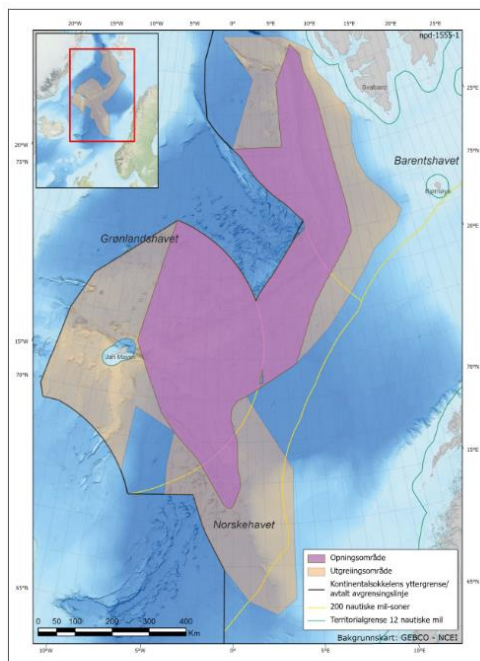
2 INTRODUCTION

19. Wikborg Rein has been assigned to prepare a legal assessment of the consequences of a potential opening resolution for mineral extraction on the seabed. The process, initiated by the Ministry of Petroleum and Energy (MPE) in 2020, consists of two main parts: an impact assessment process and a resource assessment. The proposed impact assessment programme was submitted for a public hearing on 12 January 2021 with a three-month consultation deadline. In total, 53 responses were received. The MPE approved the programme on 10 September 2021. Pursuant to the approved programme, an impact assessment was prepared and submitted for hearing on 27 October 2022, also with a three-month consultation deadline. More than 1,100 responses were received, with 70 originating from agencies, organisations and companies, while the rest were submitted by private individuals.
20. The Government proposed the plan in a cabinet meeting on 20 June 2023, referencing Meld.St 25 (2022-2023) – a White Paper report to the Storting - which states that the Government's intention to open the area on the Norwegian Continental shelf that has been subject to consultation, with the exception of a smaller southern area.² On Thursday 26 October 2023, an open hearing was held in the Storting, and the matter is set to be considered by the Energy and Environmental Committee, with a recommendation submission due by 19 December 2023. The preliminary date for consideration by the Storting has been set for 9 January 2024.
21. This memo discusses legal requirements related to the process and a potential decision to open the area for exploration. Section 4 discusses requirements under Norwegian law and whether the requirements for implementation and the content of the impact assessment have been met, including the Norwegian implementation of relevant EU directives. Section 5 analyses Norway's obligations under international law and the repercussions of non-compliance. Section 6 considers the geopolitical consequences of the opening proposal, focusing on the Svalbard Treaty.

3 THE PROPOSED AREA TO BE OPENED

22. Below is a brief overview of the proposed area to be opened. The location of the area is important for determining the applicable legal obligations, as both international and national laws and agreements often have a geographically defined scope. Additionally, the zonal system set out in the UNCLOS applies different regulations to different marine areas. The entirety of the proposed area is situated on the Norwegian continental shelf, including those parts of the shelf that have been approved and established following an application to the Commission on the Limits of the Continental Shelf (CSLS). This process is required for outlining those parts of the continental shelf's outer borders that extend beyond 200 nautical miles (NM) from the baseline.
23. The proposed area to be opened is shown in figure 5.1 in Meld.St 25 (2022-2023) and constitutes 281,200 square kilometres:

² Meld.St 25 (2022-2023) – Report to the Storting – mineral activities on the seabed – opening of area and strategy for administration of the resources. Recommendation from the MPE on 20 June 2023, approved by the Council of State in a cabinet meeting on the same day.



Figur 5.1 Opningsområde markert i fiolett.
Kilde: Oljedirektoratet

24. There is a legal distinction between the shelf (seabed) that lies within and those that lie beyond the jurisdiction of states. The areas within state jurisdiction are regulated by the provisions of Part VI of the UNCLOS. Specifically, the coastal state has sovereign rights over its continental shelf for the purpose of exploration and exploitation of natural resources cf. Article 77 of the UNCLOS. Given that the entire proposed area is located on the Norwegian continental shelf, and consequently subject to Norwegian jurisdiction, Norway essentially has the exclusive right to manage living and non-living resources on the seabed and in the subsoil in the manner it desires, subject to obligations outlined in the UNCLOS and other provisions of international law in general.
25. Although utilisation of the resources in the proposed area is, in principle, under Norwegian jurisdiction, the location of the area may however trigger other rights and obligations. The northernmost part of the proposed area is situated within Svalbard's Fisheries Protection Zone, which could prompt interpretive challenges regarding the geographical scope of the Svalbard Treaty (Section 6). Furthermore, two parts of the proposed area include regions where the water column above does not fall under Norwegian jurisdiction but is part of the high seas. This applies to the area called the Banana Hole. In this area, Norway does not hold exclusive rights over the sea column, meaning that there may be other parties with conflicting interests that must be taken into consideration if activity on the shelf have an impact on those areas.

4 LEGAL REQUIREMENTS UNDER NORWEGIAN LAW

4.1 Requirement for an impact assessment

4.1.1 Introduction

26. Section 2-2 of Act No. 7 of 2019 on mineral activities on the continental shelf (the "**Seabed Mineral Act**") requires that an impact assessment must be carried out before an area is opened for mineral activities.³ The impact assessment must elucidate the various interests

³ Act on mineral activities on the continental shelf (Seabed Minerals Act of 27 march 2019 no. 7).

that apply in the area concerned to form the basis for deciding whether and, if so, on what terms the area can be opened for mineral activities. The impact assessment must also analyze the effects that a potential opening resolution may have on the environment, as well as the presumed industrial, economic and social effects.

27. The Seabed Mineral Act entered into force in 2019 and there is currently no case law that is directly related to the interpretation of the Act. The wording and preparatory works of section 2-2 of the Seabed Minerals Act however, sets out, to some extent, the applicable requirements for the material content of the impact assessment. We will however also illustrate the content of the requirements based on other relevant legal sources as well.

4.1.2 *Requirements in the Seabed Minerals Act*

28. Section 2-2 of the Seabed Minerals Act sets a framework for the impact assessment, which the Ministry is responsible for undertaking. The specific rules for the assessment can be specified in the form of regulations (forskrifter), cf. Section 2-2 third paragraph of the Seabed Minerals Act. Such regulations have not been adopted to date.
29. In comparison, equivalent regulations have been passed and adopted for petroleum activities, regulations on which the Seabed Minerals Act is based. Chapter 2a) of the petroleum regulation prescribes the procedure and framework for the impact assessment and clarifies what is required.⁴ As an example, section 6c) of the petroleum regulations states that the scope and level of detail of the impact assessment must be adapted in accordance with the specific case. Applied to seabed minerals, this is a guideline that would make it clear that significantly thorough assessments are required in this case, particularly as the area proposed to be opened is unusually large and the body of knowledge which the proposition essentially is based on is severely limited. It can therefore be argued that if the authorities decide to carry out an impact assessment without utilizing the opportunity to adopt a clearer framework, in the form of regulations, they should be particularly attentive. As a minimum, the requirements for impact assessments for comparable activities (petroleum) should be fulfilled, and it must be taken into consideration that mineral extraction on the seabed is a new industry with unknown impacts.
30. Furthermore, Section 2-2 of the Seabed Minerals Act states that the impact assessment must, among other things, elucidate “the effects that a potential opening may have on the environment”. There is however little mention of what this entails in the preparatory works of the Seabed Minerals Act, (Prop. 106 L (2017-2018) and Innst. 150 L (2018-2019)). However, it nevertheless stated in the former proposition - Prop. 106 L (2017-2018) - on page 35 regarding impact assessments, that “[t]ypical elements will be to elucidate the various interests that apply in the area concerned, a certain overview of which mineral resources may be relevant and where they are located, the environmental conditions, possible pollution risks, as well as presumed commercial, economic and social effects”.
31. Section 2-2 of the Seabed Minerals Act further states that “[t]he impact assessment shall contribute to elucidate the various interest that apply in the area concerned, so that this can form the basis for deciding whether, and if so on what terms, the area can be opened for mineral activities”. In other words, an impact assessment must be sufficiently detailed in order to be appropriately suitable to apply as a basis for an opening resolution. In our view, the present impact assessment does not fulfil this requirement, as it has a too overarching and general approach to the environmental consequences. This is particularly related to the size of the area in question. The assessment has taken too little account of local environmental conditions that will vary over the large area proposed to be opened.

⁴ [Regulation to act pertaining to petroleum activities](#)

32. In the said preparatory works the Ministry also emphasizes that an impact assessment program gradually may grow to show the need for “further scientific studies in the area that must initiated before the impact assessment can be completed and an opening resolution enacted”, cf. Prop. 106 L (2017-2018) p. 35. A natural inference from this is that if, after following the assessment program, the level of knowledge is still deemed as being too low, further investigations must be undertaken before the assessment can be completed and before an opening resolution may be passed. The need for further investigations should have been assessed and considered in the present case.
33. Section 2-2 of the Seabed Minerals Act must also be interpreted in light of the Act’s statutory object and purpose, pursuant to section 1-1 of the act, which refers to, among other things, the overall purpose of safeguarding the environment. It is indisputable that mineral activities on the seabed can have significant negative consequences for the environment. This is also stated in the preparatory works (Prop. 106 page 27). The preparatory works refers, as an example, to the fact that such activities can lead to the destruction of habitats for marine organisms, including rare habitats with special organisms and species that have adapted to a unique living environment. Furthermore, mineral extraction on the seabed may result in the emissions of waste materials, which can lead to siltation of vulnerable benthic fauna. In addition, ocean currents may transport extraction residues across ecosystems. Drilling and chemical use can also have harmful effects on the marine environment. These are just some of the challenges that will become evident as a consequence of potential mineral extraction activities, and which emphasizes the need for a sound knowledge basis in regards to the environmental consequences.
34. Requirements for impact assessments is otherwise also present in a number of other acts and regulations, such as the Impact Assessment Regulations (konsekvensutredningsforskriften) pursuant to the Planning and Building Act, as well as the said Petroleum Regulation. The content of the requirements under these and other legal rules may have transferable value for mineral extraction on the seabed, in that a general standard, to some extent, can be derived in connection with the content of the requirement. The principle that environmental impacts and consequences must be assessed is also stated in section 112 of the Norwegian Constitution. This strengthens the argument that such impact assessment are of significant importance to the basis for decision making, and that they subsequently must maintain a sound and qualitative character.
- 4.1.3 *Impact assessment requirements in EU Community law*
35. The Norwegian regulation on impact assessments has a statutory basis in law in accordance with the Planning and Building Act,⁵ and implements two EU directives on impact assessments, in addition to containing other rules on impact assessments. The two directives are Directive 2014/52/EC (called the EIA Directive) and Directive 2001/42/EEC (called the SEA Directive). The EIA Directive sets out minimum requirements for impact assessments for individual programs and projects, while the SEA Directive regulates the more strategic processes and the planning phase.
36. The scope of the Planning and Building Act is set out in Section 1-2 of the act. In principle, the Planning and Building Act does not apply beyond one nautical mile measured from the sea boundary, cf. Section 1-2 second paragraph. However, the Government may stipulate that Chapter 14 on impact assessments shall apply to “specifically determined projects” beyond one nautical mile, cf. Section 1-2 third paragraph. As previously mentioned, regulations has not yet been adopted that clarifies the requirements for impact assessments when opening areas under the scope of the Seabed Minerals Act. Nor do the preparatory works of the Act provide an answer to whether the provisions of the Planning and Building Act on impact assessments are to be applied. In regards to the Petroleum Act, the Ministry has stated that

⁵ [Regulation on impact assessments, 21 June 2017 no. 854.](#)

the opening of new areas is to be assumed to fall under the scope of the SEA Directive, as the opening of the area is considered to set the framework for future development.⁶ We believe that there is a presumption that Section 2-2 of the Seabed Minerals Act must also be interpreted in line with the requirements of the EU directives to the extent appropriate.

4.1.4 *The significance of the climate judgment (HR-2020-2472-P)*

37. One of the questions in the Norwegian climate lawsuit from 2020 were which guidelines Section 112 of the Norwegian Constitution provides in terms of requirements for a sound and justifiable case processing and impact assessments. The case concerned the validity of a royal decree from 2016 which granted production and extraction licenses under the Petroleum Act to 40 blocks in the Barents Sea. Since the Seabed Minerals Act is largely based on the Petroleum Act, the Supreme Court's rationale and arguments in the climate lawsuit will be of significance for the interpretation of the requirements for an impact assessment under the scope of the Seabed Minerals Act.
38. In the climate lawsuit the Supreme Court stated that the case processing when opening new areas must "thoroughly clarify the advantages and disadvantages of the opening", cf. paragraph 184, and that "the greater the consequences of a decision, the more stringent the requirements for clarifying the consequences must be", cf. paragraph 182. This must be understood to mean that the knowledge basis must be more comprehensive where the effects of an opening may be significant and where there is uncertainty regarding the extent of the impacts. This is substantially evident in regards to mineral extraction on the seabed.
39. The majority faction of the Supreme Court further commented that it is the Ministry that determines the procedure for the individual opening processes and that the Ministry, in principle, is granted judicial discretion in this regard. Despite this, the Supreme Court emphasized that the "purpose of the impact assessment" must be taken into account, so that the basis for an opening decision in turn becomes "solid", cf. paragraph 187. The assessment of the consequences at the opening stage must, in the Supreme Court's view, include "all stages" of the activity - not just the consequences of the opening decision itself. The case processing was considered to be more extensive in opening processes regarding petroleum activities on the basis of the Petroleum Act "than it would be in the case of other resolutions", cf. paragraph 186 and 187, which in the Supreme Court's view is related to the major societal consequences of petroleum activities. Also here the Court's rationale and reasoning has transferable value to mineral extraction on the seabed. This is a new industry with potentially significant consequences for both the environment and society as a whole.
40. It is also of importance that Norway is a country that has come a long way in the process of opening up for seabed mineral activities on its own continental shelf, thus being in a position where it can influence how other countries, where applicable, decides to approach the issue on their own. This indicates more stringent requirements for impact assessments in connection with mineral extraction on the seabed. The fact that mineral extraction on the seabed is a new industrial activity in our part of the world, with which there is limited experience, similarity indicates more stringent requirements for impact assessments. The uncertainty regarding the consequences of the activity is also a risk that argues in favor of a need for the requirements for the impact assessments to be comprehensive – already at the opening stage, cf. both the aforementioned statements of the Supreme Court in the climate judgment, the precautionary principle and the principle of cumulative impact in the Nature Diversity Act.
41. In the climate lawsuit the Supreme Court also emphasized that at the opening stage, the impact assessment must "take into consideration the natural consequence of the opening resolution - that a extraction license will be granted", cf. paragraph 190. This is also the case for mineral extraction on the seabed. An opening resolution will create clear and obvious

⁶ Regulation of 20 January 2006 no. 49 point 3.

expectations for extraction. An opening decision is based on the premise of a balancing of interests in favor of future activity. The impact assessment can therefore not be general and overarching, but needs to be sufficiently detailed in order to give decision makers and the general public a real opportunity to make good trade-offs.

42. The Supreme Court also emphasized certain material requirements for the content of impact assessments on a more concrete level, cf. the majority factions opinion in paragraphs 208 – 223 and the minority factions opinion in paragraphs 259 – 275. How thorough the consequences is to be analyzed was a question that was discussed by both factions. The Supreme Courts final verdict ended in a dissent on the question of whether there had been made a procedural error as a result of an inadequate assessment of the climate consequences of opening Barents Sea South-East. The impact assessment had assessed the national greenhouse gas emissions as a result of the petroleum activities, but not the emissions that would result from the combustion of exported oil and gas, cf. paragraph 208.
43. In paragraph 210 the first-voting judge states that the starting point under both Directive 2001/42/EEC and Section 6c)(1)(e) of the Petroleum Regulations is clear - an impact assessment in connection with the opening of a new area “shall describe the effects on the climate”. With reference to the aforementioned Directive, as well as Section 21(2) of the regulation on impact assessments, it is further stated in the same paragraph that the information on environmental consequences of such impact assessment “should include secondary, cumulative, synergic, short, medium and long-term, permanent and temporary, positive and negative effects”.
44. Reference is also made to the preparatory works of the Petroleum Act, Proposition to the Storting No. 43 (1995-1996), pages 33-34 (Ot.prp.nr.43 (1995–1996)). In the opinion of the first-voting judge these preparatory works must be interpreted as meaning that “the assessment of any global climate emissions shall first and foremost be made when approving the plan for development and operation (PDO)”, cf. paragraph 212.
45. The minority faction in the climate judgment however adopted a generally more rigid and strict approach with regard to the procedural requirements pursuant to section 112 of the Norwegian Constitution and the Petroleum Act and Petroleum Regulation. In paragraph 264 of the climate lawsuit, the dissenting judge stated, with reference to Section 6c) letter e of the Petroleum Regulation, that the starting point is that “all climate impacts [shall] be described” and that the duty to assess is thus not limited to only the “significant factors”. Furthermore, an “isolated assessment of the environmental effects shall not be made - the contribution to the cumulative effects shall also be analyzed”, cf. paragraph 265.
46. This illustrates how thorough the Supreme Court was in its verdict when making their judgement on the degree of knowledge that has to be in place prior to a decision to open. This has transfer value for other environmental topics – including in connection with mineral extraction on the seabed.

4.1.5 *Regarding the specific impact assessment in the case*

47. The Norwegian Petroleum Directorate has assisted the Ministry of Petroleum and Energy (MPE) in the process of conducting the impact assessment. In this regard, the Norwegian Petroleum Directorate has been in contact with the Norwegian Environment Agency to define relevant assessment topics and evaluations within their area of responsibility. As previously mentioned, the impact assessment and draft decision on opening the area were submitted for public hearing on 27 October 2022 with a three-month deadline.
48. The impact assessment was then carried out on the basis of an established assessment programme that was subject to consultation. The evaluations in the impact assessment have been carried out thematically and with the overall aim of identifying the types of impact that are the most significant. No assessments have been made of specific projects or scenarios,

but the impact assessment points to various technologies that may be relevant and identifies conditions that may require mitigating measures in order to fulfill the requirements for an environmentally sound activity.

49. In the white paper report to the Storting in regard to the opening proposal (Meld. St. 25 (2022-2023)), the MPE states that there is limited knowledge about natural and environmental conditions related to seabed minerals and the opening area. The available knowledge forms the basis for the impact assessment. Knowledge deficiencies have been emphasized. In the Ministry's view, the need for impact assessments pursuant to the Seabed Minerals Act is nevertheless adequately addressed and provides a basis for deciding on opening.
 50. In this context, the MPE refers to the fact that the impact assessment provides the basis for an assessment of the issue of opening the areas so that other participants other than the state may also map out, and when the knowledge basis may indicate it, extract seabed minerals. On this basis, it is claimed that the best possible knowledge basis has been obtained, and that the requirements of Section 8 of the Nature Diversity Act have been fulfilled.
 51. Reference is also made to the fact that there will be little impact on the environment from exploration activity and that the consequences in an extraction phase are little known because there has been no such activity to date. Companies with extraction licenses will therefore be required to collect data on environmental conditions in the areas they investigate in the first phase of the license. This knowledge, together with knowledge from further mapping by the authorities, will be used as a basis for processing extraction plans. According to the MPE, this, together with a step-by-step approach to activity in the area being opened, will ensure a precautionary approach that is in line with the requirements of section 9 of the Nature Diversity Act.
 52. The Government will therefore continue to map Norwegian seabed minerals and relevant natural and environmental conditions, while at the same time proposing to open up areas so that commercial participants can also contribute to knowledge acquisition and development. This is a special solution, where on the one hand it is recognized that the knowledge basis related to the environmental consequences of this new industry is too limited, while at the same time not taking the time to carry out further necessary investigations before allowing private participants in. In our view, this is highly problematic, as the impact assessment alone does not provide a sufficient basis for a decision on opening, as required by Section 2-2 of the Seabed Minerals Act. It is also problematic in relation to the provisions of the Nature Diversity Act, including the said precautionary principle.
- 4.1.6 *The Norwegian Environmental Directorates consultation statement*
53. In its consultation response, the Norwegian Environment Directorate writes that the impact assessment does not provide a basis for a decision to open up for offshore mineral extraction. The impact assessment shows significant knowledge deficiencies in regards to nature, technology and environmental impacts. Furthermore, it does not contain assessments of whether, or where and how, it is possible to conduct mineral activities in a responsible and environmentally sustainable manner. The Norwegian Environment Directorate assessment is therefore that the impact assessment does not fulfil the requirements in Section 2-2 of the Seabed Minerals Act. Nor can the Norwegian Environment Directorate see that the principles in Sections 8-10 of the Nature Diversity Act regarding precautionary approach and cumulative impact have been applied.
 54. The Directorate further writes in its statement that there is a lack of formalized procedural steps after opening to ensure the necessary knowledge gathering and area-based assessments of which areas should be protected for environmental reasons and which areas may be suitable for mineral extraction. They emphasize that it is too late to identify areas that should be protected from impact in any project-specific impact assessments. A knowledge-based approach requires that specific areas are identified, mapped and then investigated before

assessing the opening, and before licenses for exploration and extraction are announced and granted.

55. The Directorate is clear on the fact that the information in the impact assessment does not provide a basis for opening. Furthermore they are clear on the fact that if the information in the impact assessment and the principles in the Nature Diversity Act are used as a basis, in their judgement there is no basis for taking a position on the question of opening. There is thus insufficient technical and legal basis for the draft resolution. The Directorate also emphasized that the opening process is the only formalized procedural step under the Seabed Minerals Act that gives the relevant authorities and the general public the opportunity to weigh up different considerations such as industry and the environment, on the basis of area-based impact analyses.
56. The Norwegian Environmental Directorate is the administration's highest specialized body for environmental assessments. Furthermore, the SEA protocol (see section 5.2.3 of the memo) states that the opinions of specialized authorities must be given special consideration. In light of this it is remarkable that the Directorate's clear assessments and clear recommendations have been set aside in a case with such significant potential environmental impacts.

4.2 The Nature Diversity Act

57. The Nature Diversity Act covers all nature and applies to all sectors that manage natural diversity or make decisions that have consequences for this diversity. The Nature Diversity Act contains principles for sustainable use of nature, such as knowledgeable requirements, the precautionary principle, the ecosystem approach and the principle of cumulative impact. In principle, the scope of the Nature Diversity Act extends to the limits of the territorial waters, but the principles of the Act also apply outside this area, cf. section 2. On the continental shelf, the management objectives in sections 4 and 5 and the principles in sections 7 to 10 apply as far as they are applicable. The Nature Diversity Act works in conjunction with other laws, and the principles of the Act shall be used as guidelines when making decisions that affect nature.
58. In the event of knowledgeable deficiency and doubt regarding the consequences for the environment, the precautionary principle must still be applied, cf. section 9 of the Nature Diversity Act. The precautionary principle is a guideline for how the authorities should handle such uncertainties. The essence of this norm is that attempts must be made to avoid possible damage to biodiversity, regardless of the knowledge of the risk being inadequate. In many contexts, this will mean refraining from an activity if its consequences are unknown.

4.3 The GBF

59. The Kunming-Montreal Global Biodiversity Framework (GBF) was adopted in December last year at the parties' joint meeting at the UN Convention on Biological Diversity. The GBF includes an overall goal that at least 30 per cent of the earth's land and oceans shall be preserved by 2030 and a goal that all nature shall be managed sustainably. The agreement also includes a target of restoring 30 per cent of the nature that is currently destroyed by 2030.
60. The agreement stipulates that by the next joint meeting of the parties to the agreement, which is in 2024, the countries must submit national action plans for biodiversity in accordance with the agreement and its global goals. The government will do this in the form of a white paper (stortingsmelding).
61. In light of Norway's commitments under the GBF there is a need to assess the preservation of Norwegian marine areas. This should be seen in the context of the evaluation of a possible opening resolution pursuant to the Seabed Minerals Act. This has also been highlighted by several consultary bodies that are entitled to comment such projects, such as the Norwegian Environmental Directorate. The MPE has noted that the goal pursuant to The GBF is global,

meaning that it is not required that 30 per cent of Norwegian land and sea areas is to be preserved. In our view, this is a defensive approach, which also sends an unfortunate signal internationally about how Norway thinks when it comes to fulfilling its obligations under the GBF.

4.4 Summary

62. Based on an overall assessment, it is our opinion that the requirements for an impact assessment pursuant to Section 2-2 of the Seabed Minerals Act have not been fulfilled. Although it is largely left to the authorities' discretion to decide on the opening, including weighing different interests against each other, the provision stipulates some minimum legal standards that must be met. The assessment must analyze the effects of an opening on the environment and the presumed industrial, economic and social effects. To fulfil this requirement, an impact assessment must be sufficiently detailed to be suitable for use as a basis for decision-making on opening. In our view, the present impact assessment does not fulfil this requirement, as it takes a particularly overarching and general approach to the environmental consequences. This is exacerbated by the size of the area and the fact that the assessment has taken too little account of local environmental conditions that will vary across the large area proposed to be opened.
63. This is supported by the case law and in particular the arguments of the Supreme Court's majority faction in the climate lawsuit, which points out that a solid basis for decision-making is required in cases that have major social consequences, and that there are clear requirements for the thoroughness of the knowledge base before an opening. The reasoning also has great transferable value to future possible mineral extraction on the seabed, as the Seabed Minerals Act is based on the system of the Petroleum Act, and that it also, like petroleum activities, has potentially significant consequences for the environment and society as a whole. The Supreme Court also commented on the significance of an opening decision and emphasized that an opening resolution is based on the premise of a balancing of interests in favor of future activity. The impact assessment cannot therefore be general and overarching, but sufficiently detailed for decision-makers and the general public to have a real opportunity to make good trade-offs.
64. It may also be raised questions in regards to whether the said principles in the Nature Diversity Act regarding the knowledge basis, precautionary approach and overall impact have been sufficiently taken into consideration. The fact that the area that is proposed opened is so large increases the risk of irreversible damage and strengthens the obligation to take a precautionary approach.
65. The shortcomings in the knowledge basis are also invoked by the Norwegian Environmental Directorate in their consultation responses. The Norwegian Environmental Directorate is the administration's highest specialized body for environmental assessments, and as an expert body for the environment, it must be consulted in particular with regard to environmental law arguments. It is remarkable that the Directorate's clear assessments and clear recommendations have been set aside in a case with such significant potential environmental consequences.

5 NORWEGIAN INTERNATIONAL LAW OBLIGATIONS

5.1 Introduction

66. International law imposes a number of obligations on Norway, including obligations to carry out impact assessments, publish environmental information and prevent cross-border damage. Norway operates a dualistic legal system. This means that: 1) international law must be implemented in order to become part of Norwegian law; and 2) in Norwegian courts, international law obligations cannot be invoked directly. Under Norwegian law, Norway's

international law obligations are still of great importance for the interpretation of Norwegian law as a result of the ‘principle of presumption’, meaning that there is a strong presumption that domestic law can and should be read in accordance with international law. The Courts tend to comply with this principle by interpreting Norwegian statutory provisions in accordance with Norway’s international law obligations.

67. The sections below set out international law obligations which are relevant to interpretation of the requirements for, *inter alia*, the implementation and content of impact assessments in accordance with Norwegian provisions. We also detail how international agreements may have their own appeal mechanisms, such as committee or court proceedings.

5.2 Espoo Convention and SEA Protocol

5.2.1 Introduction

68. The Espoo Convention and its additional protocol, the SEA Protocol, are international instruments that impose requirements on its member parties for the conduct of Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEAs) in certain situations. Norway is a party to the Espoo Convention and the SEA Protocol. A key distinction between these two regards assessment at plan level and project level. The SEA Protocol provides rules for impact assessment of the steps in the decision-making process that precede the project stage, and is therefore of greater relevance to a decision to allow mineral exploration than the requirements under the Espoo Convention. However, the latter is briefly considered below because it deals with available dispute mechanisms.

5.2.2 The Espoo Convention

69. The Espoo Convention is a United Nations Convention negotiated under the United Nations Economic Commission for Europe (ECE). It establishes a framework for the use of impact assessments for cross-border environmental problems.⁷ The Espoo Convention was ratified by Norway in 1993 and entered into force on 10 September 1997. Under the Convention, the Parties are obliged to notify neighboring States of the planning of specified measures that may have cross-border environmental effects. The Convention also entails an obligation to include authorities and populations in affected states in the impact assessment process, when an activity is likely to cause significant adverse transboundary impact, cf. Article 2. The Parties shall take “all necessary and effective measures to prevent, reduce and control significant, negative cross-border environmental effects from intended activities”, cf. Article 2 No. 1. The Convention is based on States retaining their respective environmental impact assessment systems, but it nevertheless requires Member States to comply with certain minimum requirements under the Convention.⁸
70. These obligations will primarily come into effect if, after an opening decision, activity is initiated in the form of investigations or extraction.

5.2.3 SEA protocol

71. In 2003, the Convention was supplemented with a supplementary protocol on strategic environmental impact assessment (SEA Protocol) and complements the Convention, and partly the Aarhus Convention, by providing rules for impact assessments of the steps in the decision-making process preceding the project stage.⁹ Contrary to the Convention, the SEA

⁷ UNECE Convention on the Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991.

⁸ Sigrid Eskeland Schütz, Environmental impact assessment of plans and measures Planning and Building Act Chapter VII-a in light of EoS Directives 85/337 and 2001/42, Thesis for the degree of doctor juris (Dr.juris), University of Bergen, 2007.

⁹ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kiev, May 21, 2003. Signed by Norway on the same day.

Protocol does not limit the impact assessment requirements to apply only to intended activities that may have cross-border effects. An impact assessment is also required when it is likely that an activity will have “significant environmental, including health, effects”, cf. The SEA Protocol Article 4 no. 1.

72. The SEA Protocol strengthens the obligation to ensure consultation, to share information and to take into account feedback as well as to consider less invasive measures. Mining is a sector where strategic environmental impact assessment is required at the planning and programme stage, cf. Article 4(2) of the SEA Protocol.
73. In summary, the requirements under the SEA protocol are as follows:
- Obligation to conduct strategic environmental impact assessment when an activity will have “significant environmental, including health effects”.
 - Obligation to prepare an impact assessment program.
 - The impact assessment shall identify, describe and assess likely environmental effects and shall contain as much information as may reasonably be required.
 - Obligation to ensure early, timely and effective public participation
 - Obligation to take substantially into account;
 - (i) the conclusions of the selected authorities in the relevant environmental reports;
 - (ii) the preventive measures to prevent or limit the adverse effects set out in the Environmental Report; and,
 - (iii) other comments made by both the general public and other states
 - Obligation to monitor and disclose likely environmental and health effects of intended activities.
74. Failure to comply with the Convention and the SEA Protocol can be investigated by the Implementation Committee, based on a complaint from a party, input from civil society or action from Norway itself. Norway therefore risks an investigation by this committee, in line with other countries covered by these instruments. For example, this may happen if a complaint has been made against Norway with reference to the fact that the impact assessment related to mining on the seabed is not sufficient as a basis for an opening decision.

5.3 The Aarhus Convention

75. The Convention of 25 June 1998 on access to environmental information, public participation in decision-making processes and access to appeals and court trials in the environment (the Aarhus Convention),¹⁰ has been implemented in Norway through the Environmental Information Act. The overall objective of the Aarhus Convention is to strengthen the right of the individual to live in an environment that ensures health and well-being, and emphasizes access to environmental information together with other procedural rights as a means for safeguarding the more material rights to the environment and health. The Convention entered into force on 30 October 2001.
76. The Aarhus Convention consists of three pillars: 1) access to environmental information, 2) participation in decision-making processes, and 3) access to appeals and court trials in the environment. The Aarhus Convention is unique as an environmental convention in that it gives citizens environmental rights. This includes the right to information, participation in decision-making and access to legal remedies.

¹⁰ Convention on access to information, public participation in decision-making and access to justice in environmental matters, adopted on 30 October 2001 in Aarhus, in effect on 31 July 2003.

77. The Convention therefore does not imply an obligation to an impact assessment, but in order for the Convention's rights to be real and effective, it must be considered in the context of obligations to investigate environmental consequences. In terms of the right to information, this is particularly clear: If the authorities receive a request for access to environmental information that is not available from them, they can refuse the request for access, cf. Article 4(3) a. An important question is therefore what information the authorities have a duty to have or obtain. According to Article 5 (1) a, the authorities shall "possess and update environmental information relevant to their field". However, the Convention does not answer what will be environmental information that is "relevant to their field". It is therefore necessary to look into the Espoo Convention and other investigation obligations. If a State has not complied with the obligations under the Espoo Convention and the SEA Protocol relating to the content of the duty to investigate, this therefore states that the provisions of the Aarhus Convention have not been complied with. This allows for the application of the Aarhus Convention's provisions on appeal and court trials.

5.4 The Law of the Sea Convention

5.4.1 Introduction

78. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is a global convention that governs the order of all sea areas. The treaty regulates the various maritime zones and the rights and obligations of States in these. As a party to the UNCLOS, Norway is subject to a number of obligations. This includes the obligation to protect and preserve the marine environment.

5.4.2 *Obligation not to cause cross-border damage*

79. The duty to protect and preserve the marine environment is enshrined in Part XII of the Convention. The duty is set out in Article 192, which states that states have a duty to "protect and preserve the marine environment". The provision establishes a general obligation that applies to all states across maritime zones, including on the seabed. It must be read in conjunction with the other provisions of Part XII that explain the further content of the obligation, including the obligation in Article 194 to take all necessary measures to prevent, limit and control pollution of the marine environment from any source. Article 194(2) lays down the duty not to cause cross-border damage:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

80. In terms of "caus[ing] damage by pollution to other States and their environment", this not only covers the maritime zones of other states that are immediately adjacent to the proposed area, but the wording allows areas further away to be covered. This can be actualized if mining on the seabed has negative effects on marine species with great prevalence, such as marine mammals, tuna and tuna species, pelagic species such as herring, mackerel and blue whiting, and Atlantic salmon.
81. Furthermore, the reference to "outside the areas where they exercise sovereign rights" must be understood not only in a horizontal perspective, but also apply in a vertical perspective. This means that mining on the seabed on the Norwegian continental shelf located below sea areas/sea islands that are on the high seas, such as the Banana Hole, Norway is obliged to carry out the activity in such a way that it does not infringe the interests and rights of other states in these areas.

82. The obligation not to cause cross-border damage will initially be considered actualized as activity is initiated. However, the obligation also has an impact on the opening process by providing guidance on who should be consulted, including actors who have interests in areas above the Norwegian shelf but which are part of the high seas.

5.4.3 *Obligation to conduct impact assessments*

83. Article 206 of the UNCLOS imposes an obligation on States to conduct impact assessments and communicate the results when States have “reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”. This obligation applies both to the risk of pollution or damage to the marine environment under Norwegian jurisdiction, and to pollution or damage to the marine environment under the jurisdiction of other states and areas outside the jurisdiction of any states. Among other things, this has been established by the International Tribunal for the Law of the Sea (ITLOS) in its 2011 advisory statement on “the responsibilities and obligations of states in relation to persons and entities supporting activities on the seabed”, where ITLOS states that the obligation to conduct EIAs under common law also applies to activities that may lead to effects in areas outside of national jurisdiction.

84. The wording in Article 206 is general and it is difficult to say that it establishes material requirements for the implementation of impact assessment. The UNCLOS is a framework convention, which sets out overall provisions that states are obliged to develop further through regional and/or international agreements or cooperation. Thus, the law of the sea can be adapted to societal and natural changes without changing the Convention. The UNCLOS shall therefore be interpreted in light of other provisions.

85. In particular, in relation to the requirement for the implementation of impact assessments, the provisions of the Convention on Biological Diversity (CBD) are relevant.¹¹ Article 14(1)a) cf. Article 7c), specifies the obligation to conduct impact assessments where planned activity is assumed to have significant adverse effects on biodiversity. The provisions of CBD and its policies are not limited to neighboring states to the activity in question, but cover adverse effects on biodiversity in other states and in areas outside the jurisdiction of states. This means that it will not be sufficient only to consult Iceland and Denmark, as the Norwegian authorities have done, but that Norway is obliged to consult other states where there is a risk that mining on the seabed may have a negative effect on biodiversity.

86. On 19 June 2023, an additional convention was adopted to the Law of the Sea Convention, the so-called BBNJ Agreement.¹² Norway has already signed. The BBNJ Agreement also contains relevant provisions related to impact assessments, including in relation to planned activities “to be carried out in marine areas within national jurisdiction” that “may cause significant pollution or significant and harmful changes in the marine environment” in areas outside of national jurisdiction, cf. Article 28(2). The provision reinforces and clarifies the responsibility of a state to investigate not only in relation to possible damage in the adjacent areas of other states, but also that the consequences for areas further away and areas outside of national jurisdiction should be considered.

5.4.4 *Obligations related to management of the shelf*

87. Article 208(1) of the UNCLOS requires coastal states to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction”. Article 208(3) states that “such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures”. The legal technique used by the Convention is a

¹¹ Convention on Biological Diversity, Nairobi, May 22, 1992. In force 29 December 1993, 1760 UNTS 143.

¹² Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, doc. A/CONF.232/2023/4, of 19 June 2023.

so-called 'rule of reference', which means that more specific legislation in the field developed by other international bodies complements the obligation under the Law of the Sea Convention.

88. The reference to 'International Rules, Standards and Recommended Procedures' will include the ISA Mining Code. A stricter Mining Code from the ISA thus has direct consequences for the obligations under domestic law, as Article 208 of the Law of the Sea Convention as mentioned above imposes that these "shall be no less effective than" international rules. The reference rules in Article 208(3) may thus have implications for Norway if the ISA adopts a temporary halt or precautionary pause for mining on the seabed. There are ongoing discussions in the ISA on further development of the framework for mining on the shelf outside the jurisdiction of states (the Area).
89. The relationship between Article 77 of the Law of the Sea Convention establishing the sovereign rights of the coastal state to resource exploitation on its own continental shelf, and Article 208 establishing an obligation to prevent pollution of seabed activities in accordance with international rules, has not been addressed before. Thus, it is not given which of these provisions takes precedence in cases where they exhibit contemporaneous conflicting obligations and rights. In any case, a temporary moratorium from ISA will be a strong signal of what international legal developments and expectations are, and can thus have not only legal implications, but also major reputational challenges for Norway.

5.4.5 *Dispute Resolution*

90. The Law of the Sea Convention allows for the use of various dispute resolution bodies, such as the International Court of Justice, International Arbitration or The International Tribunal for the Law of the Sea. The dispute resolution system of the Law of the Sea Convention allows the parties as a general rule, with some exceptions, to bring proceedings before international courts and the arbitral tribunal with the possibility of binding decisions against other parties without their consent. Only states may be parties to the Law of the Sea Convention, and only States that are parties to the Law of the Sea Convention can use the dispute mechanisms of the Convention.

5.5 **The OSPAR Convention**

91. The Convention on the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention) was adopted on 22 September 1992, and entered into force on 25 March 1998.¹³ Norway is one of 15 states, in addition to the EU, who are parties to the Convention. The Convention is considered to be the primary instrument in the North-East Atlantic region in respect of the implementation of the environmental provisions of the Law of the Sea Convention Part XII.¹⁴
92. The geographical area of application of the Convention extends to the east coast of Greenland in the west, south to the Strait of Gibraltar, and to the North Pole in the north.¹⁵ The maritime area is further divided into five regions, where the Arctic seas, Region I, constitute the northernmost part of the OSPAR regions. The proposed area for mining on the seabed is within Region I of the Convention.
93. Article 2(1)a of the OSPAR Convention sets out that the contracting parties are obliged to protect the marine environment in areas both within and outside their jurisdiction. In

¹³ Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, September 22, 1992. In force 25 March 1998; 2345 UNTS 67, as amended. Annex V 'On the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area', Sintra, 23 September 1998. In force August 30, 2000.

¹⁴ NOU 2005:10 pages 264 - 265

¹⁵ Article 1(a) of the OSPAR Convention

comparison with the Law of the Sea Convention, OSPAR seems to establish clearer obligations to protect the marine environment by imposing the Member States to preserve marine ecosystems, cf. Article 2(1)a), and to apply the precautionary principle, cf. Article 2(2)a).

94. The Convention's Annex III, "On the Prevention and Elimination of Pollution from Offshore Sources", contains detailed and strict requirements, but these apply only to petroleum activities. Although it is obvious that mining on the seabed can be identified as human activity according to Appendix 3 under Annex V, the parties to the OSPAR Convention have not yet taken concrete steps towards adopting programmes and real measures in relation to this type of activity. However, if mining on the seabed were to occur in the OSPAR Convention's marine protected areas, it would be covered by the Convention's Annex IV, "On the Assessment of the Quality of the Marine Environment".
95. Despite recent developments under the OSPAR Convention with regard to the establishment of a network of marine protected areas outside of national jurisdiction, open sea marine protected areas have not yet been established within the Arctic seas, including within said Region I. Consequently, the area proposed by Norway in connection with mining on the seabed is also not comprised by any of the OSPAR Convention marine protected areas. Initiatives have repeatedly been taken to establish an 'Arctic Ice High Seas MPA',¹⁶ but Arctic states such as Norway, Iceland and Denmark have so far been against such proposals.

5.6 Summary

96. The review shows that shortcomings in impact assessments also involve breaches of several of Norway's international law obligations. A duty to conduct impact assessments at plan level follows both from the SEA Protocol under the Espoo Convention and the provisions of the Law of the Sea Convention. Compared with the obligations under the Seabed Minerals Act and the KU regulations, the obligations under the international law instruments are partly more generally formulated. This means that where violations are demonstrated under Norwegian domestic law, there is a significant probability that this also involves violations of Norwegian international law obligations. At the same time, both the SEA Protocol and the Law of the Sea Convention are important in themselves in that they inform the interpretation of Norwegian domestic law. In light of international law, it e.g. appears clear that the obligation to consult must also take into account the risk of damage to the marine environment, including to biodiversity, that may arise in areas outside those bordering the proposed opened area. It is also emphasised that in the assessment of who the potential stakeholders are, the law of the sea's system with different zones must be taken into account. This means that an impact assessment must take into account that parts of the proposed area are located on the Norwegian continental shelf under maritime zones that are not under Norwegian jurisdiction.
97. International law is evolving. The Law of the Sea Convention's function as a framework convention and the use of "rules of reference" makes it dynamic, and it is also developed in line with other international law. A future framework with a possible moratorium for mineral development on the shelf outside the jurisdiction of the states (the area) will also have an impact on the rights and obligations of the Norwegian authorities related to future mineral development on the Norwegian shelf.
98. Violations of Norway's international obligations may also give access to the individual conventions' dispute mechanisms. For most of the said conventions, with some exceptions,

¹⁶ Biodiversity Committee, Meeting of the Biodiversity Committee (BDC), Cork, Ireland: 2-6 March 2015, item 5.22; Intersessional Correspondence Group, Meeting of the Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA), Lisbon, Portugal: 13-15 October 2015, item 4.3; Biodiversity Committee, Meeting of the Biodiversity Committee (BDC), Gothenburg, Sweden: 29 February-4 March 2016, item 5.8

the parties are the states. It is thus primarily states that have the right to make complaints against other parties in the event of a breach of the Convention's obligations.

6 THE RELEVANCE OF THE SVALBARD TREATY

99. A part of the area identified in the White Paper is the Norwegian continental shelf located under the Svalbard Fisheries Protection Zone. The question arising in that connection is whether the Svalbard Treaty applies to this part of the area.¹⁷ If the Svalbard Treaty does apply to activity in the Fisheries Protection Zone and on the continental shelf underneath, so does the equal treatment rule.
100. The question whether the Svalbard Treaty applies to areas outside Svalbard's territorial waters, including in the Fisheries Protection Zone and on the continental shelf underneath, has recently been subject to review by the Supreme Court in the so-called "Snow crab" case (HR-2023-491-P). The Supreme Court concluded that the Svalbard Treaty only applies to Svalbard's land territory and to Svalbard's inland waters and territorial sea (12 nm from the baseline).
101. However, not all states and international academics agree with the Supreme Court's understanding and application of the Svalbard Treaty, including the UK and the Netherlands. These states argue that all the usual maritime zones under the Law of the Sea Convention, including both economic zone and its own continental shelf, pertains to Svalbard, and that the Svalbard Treaty also applies to these zones. In accordance with this, these states argue that the provisions of the Svalbard Treaty granting contracting parties the right to participate in activities such as hunting and fishing (Article 2) apply, as well as the obligation in Article 8(2) that "taxes, dues and levies shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view". The Supreme Court judgment in the snow crab case shows that there are other legal arguments that could support an opposite argumentation.
102. So far, there have been no cases on the interpretation of the Svalbard Treaty's geographical scope between Norway and other states. The Svalbard Treaty has no own mechanism for dispute resolution and does not establish any institutions. This means that a different legal basis for dispute resolution is necessary. Iceland considered bringing a case regarding fishery and the Svalbard Treaty against Norway before the International Court of Justice (ICJ) around 2007, possibly based on a bilateral agreement between Iceland and Norway, but ultimately chose not to pursue that possibility. The main arguments that the parties to the Svalbard Treaty can argue against Norway's plans for mining on the seabed may be; (1) that this will pose a threat to the exercise of their rights under the Svalbard Treaty, and (2) that they may be contrary to Article 8(2).
103. Facilitating activity in this area through a decision to allow exploration drilling will involve a risk of increased friction and attention related to Norway's position on the understanding of the Svalbard Treaty's area of application and an opportunity to bring the case before international courts. It is not given what the outcome would be if the latter were to happen.

¹⁷ Treaty between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, the United Kingdom and Ireland and the British overseas territories and Sweden regarding Spitsbergen, passed 9 February 1920, entered into force on 14 August 1925.