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The right to expropriate - a lawsuit against Norway and its consequences for investors in the Arctic

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1. Introduction

"Just heard that Norway will ban new sales of fuel cars in 2025. What an amazingly awesome country. You guys rock!!" This is a message which Elon Musk, the chief executive officer of United States (hereinafter US) electric car company Tesla Motors, published at his Twitter account on the 3rd of June 2016. He reacted to the proposal of the Norwegian Government to ban the sale of petrol powered cars in the next decade. With this initiative the Kingdom of Norway strives to continue in its goal to become one of the most ecologically progressive countries worldwide.[1]

The ban of petrol powered cars is not the only initiative taken by this Scandinavian country in order to achieve its goal. The Kingdom of Norway for instance committed, as the first country in the world, to zero deforestation.[2] Furthermore, it plans to become carbon dioxide (hereinafter CO2) neutral by 2030, and to triple its wind power capacity by 2020 and thereby to achieve to cover 67.5% of its national electricity use from renewable sources.[3]

All in all this proves that Norway is extremely concerned about the environment and does its best to protect it. Therefore it was rather surprising when the Kingdom decided in May 2016 to offer production licences for petroleum exploitation in the 23rd Norwegian License Round for investors in petroleum sector and thereby to open the Barents Sea for oil and gas drilling.[4] Subsequently, ten production licences were indeed ratified and awarded to several oil companies.[5]

The decision of the Norwegian Kingdom was a bitter pill to swallow for the Norwegian public and especially for many environmental groups as drilling in the Barents Sea, being largely an unexplored territory close to the Arctic, would have serious consequences for the environment. Therefore Greenpeace and Nature & Youth, two major environmental groups,

[1] Jess Staufenberg, 'Norway to completely ban petrol powered cars by 2025' (*The Independent*, 4 June 2016) <http://www.independent.co.uk/environment/climate-change/norway-to-ban-the-sale-of-all-fossil-fuel-based-cars-by-2025-and-replace-with-electric-vehicles-a7065616.html> accessed 1 July 2017.
[2] *Ibid*.
[3] Joshua Hill, 'Norway Greenlights Wind Farms To Triple National Capacity' (*The Energy Collective*, 29 August 2013) <http://www.theenergycollective.com/joshshill/265861/norway-greenlights-8-wind-farms-triple-national-capacity> accessed 2 July 2017.
[4] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p.3.
[5] *Ibid*.

decided to take the matter in their own hands and protect the environment by suing the Norwegian Government. The lawsuit is regarded as a ground-breaking one because so far the Norwegian courts never had to deal with such issue.[6]

The case of the environmental groups is supported by majority of Norwegian legal academics and scholars who argue that drilling in the Barents Sea in the Arctic would not only severely harm the environment but would be also contrary to the Norwegian Constitution.[7]

Provided that the Norwegian courts will follow the arguments of the academics and hence will decide in favour of the environmental groups, what will be the consequences for the investors, meaning the oil companies that were successful in the 23rd Norwegian License Round? The oil companies were already awarded production licences for the Barents Sea and with such expensive investment they were certainly looking for some future revenue. Provided that the Norwegian courts will decide against the Norwegian Government then the latter will very likely have to take away the granted production licences from the foreign investors, in other words they will have to expropriate them. The question however is, can the Norwegian Government do that?

The author is very well aware of the fact that majority of this thesis is based on hypothetical premises. However, the upcoming case between Norwegian Government and Greenpeace and Nature & Youth signifies a presence of potential contradiction between environmental protection and investor protection. Hence there is no doubt that this it is worth paying more attention to this ground-breaking lawsuit and its consequences. Therefore the research question of this thesis is whether the Norwegian Government can expropriate investors of the 23rd Norwegian License Round provided that the lawsuit against Norwegian Government regarding the Arctic oil exploration, brought by the environmental groups Nature & Youth and Greenpeace, will be successful?

In order to conduct a thorough analysis and to provide the reader with best possible information on the matter, the very first part of the thesis will discuss the general investment

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[6] Thomas Nilsen, 'Groundbreaking lawsuit filed against Norway over Arctic oil drilling' (*The Independent Barents Observer*, 18 October 2016) <https://thebarentsobserver.com/en/ecology/2016/10/groundbreaking-lawsuit-field-against-norway-over-arctic-oil-drilling> accessed 2 July 2017.

[7] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 66.

profile of Norway. The following section will deal with exploration, exploitation and distribution of petroleum products in Norway. The fourth part of this work will focus on the lawsuit against Norwegian Government, including, *inter alia*, the origin of the conflict, the arguments of the parties and also the possible outcome of the case. The next section of the thesis will elaborate on the contradiction between investment protection and environment protection. Additionally, the general concepts of investment and expropriation will be analysed. Moreover, the eighth section of this work will tackle the main question of whether Norway can expropriate the investors in the 23rd Norwegian License Round, and this will include the discussion on selected international and national legal instruments that could be applicable. Lastly, the author of this thesis will provide the reader with his opinion on the matter and the final part of this work will be devoted to the concluding remarks.

2. Norway – investment profile overview

When one studies cases in international investment law then one realises that there are so many of them where for instance Argentine Republic is involved but there are only a few cases with the Kingdom of Norway. Admittedly, majority of investment lawyers know for instance the famous *Telenor v. Hungary* case,[8] where Norwegian multinational telecommunication company Telenor was involved. However, Norway itself, as a country, does not appear very much in context of international investment disputes. Naturally, this is not something negative but it signifies that the investment profile of this Nordic country is not described extensively by the literature and academics. Therefore the author of this thesis believes that it would be appropriate to describe the investment environment in the Kingdom of Norway and offer the reader a complex overview.

2.1 General information

To begin with, on the one hand Norway has a narrow domestic market but on the other hand this Scandinavian country has favourable geographic location in a fertile region and it is characterised by modern economy and rich energy resources.[9]

The peak of foreign investment in Norway was in 2011. Unfortunately because of the Eurozone crisis and issues connected to it, the pace of foreign investment in Norway slowed

[8] *Telenor Mobile Communications AS v The Republic of Hungary* [2004] No. ARB/04/15 (ICSID Case).
[9] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.

down and it gradually declined even into negative levels in 2015. This led the Norwegian Government to establish its official investment promotion agency *"Invest in Norway"* in order to attract more foreign investors and also to assist them. Pursuant to the latest data, the flow of foreign investment to Norway rose in 2016.[10]

As a matter of policy Norway welcomes foreign investments and it grants national treatment to foreign investors. Authorities in the country encourage foreign investments in particular in the offshore petroleum sector.[11]

In the Kingdom of Norway foreign investors can operate through a separate entity or through a branch office. Moreover, limited companies, be it private or public, and partnerships can be used. In practice, the most preferred establishment by a foreign investor in Norway is an incorporated subsidiary or a branch office.[12]

The legal system of Norway is dualist. It is a well-developed legal system which provides effective means for enforcing contractual and property rights. Laws that govern matters of commercial nature are applied consistently without undue government interference.[13]

2.2 A safe place for investment

Investing in Norway and doing business in this country is a good choice because it was ranked by the 2017 Doing Business report of the World Bank as the sixth best country in the world to do business in.[14]

It is very interesting to note that till this very day the Kingdom of Norway has never been involved in any case of disagreement concerning foreign investment. What is more, no international controversies with regards to Norway were registered by the United Nations

[10] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.

[11] Export, 'Norway - Openness to and Restriction on Foreign Investment' (*Export - Norway Country Commercial Guide*, 7 August 2016) <https://www.export.gov/article?id=Norway-openness-to-foreign-investment> accessed 2 July 2017.

[12] *Supra at* 10.

[13] Export, 'Norway - Openness to and Restriction on Foreign Investment' (*Export - Norway Country Commercial Guide*, 7 August 2016) <https://www.export.gov/article?id=Norway-openness-to-foreign-investment> accessed 2 July 2017; USA International Business Publications, *Norway Investment and Trade Laws and Regulations Handbook* (International Business Publications USA 2008), p. 116.

[14] *Supra at* 10.

(hereinafter UN) and its UN Conference on Trade and Development[15] or by the Organisation for Economic Co-operation and Development (hereinafter OECD) Investment Policy Review. Regardless of these impressive facts, Norway, as the European Economic Area (hereinafter EEA) member, however still strives to improve conditions for foreign investors and thus it gradually takes all necessary steps to liberalise its foreign investment legislation in order to follow the European Union (hereinafter EU) standards on investment.[16]

2.3 Protection of foreign investors

The Norwegian investment policy towards third countries is governed by reciprocity principles and by both bilateral and international agreements. Norway joined the abovementioned EEA in 1995 and since then it requires the country to apply national treatment principles in areas where foreign investment was restricted or prohibited in the past. Investment regime in Norway is based on the principle of equal treatment but there are also some national restrictions regarding, *inter alia*, ownership of some natural resources such as oil or gas.[17] This matter is discussed further in section 3 of the thesis.

2.3.1 Bilateral investment treaties

Totally eighteen bilateral investment treaties (BITs) has been signed by Norway with other countries.[18] Until the 1990s BITs were regarded by Norway as the main instrument for protecting foreign investments. However, free trade agreements and multilateral investment treaties became gradually more favourable. There were several determinants that caused this change of approach. Firstly it was the emergence of the Energy Charter Treaty (hereinafter ECT) in 1994 which Norway signed bud did not ratify. Secondly it was the impact of the Multilateral Agreement on Investment (hereinafter MAI) which was a draft agreement negotiated by the OECD in years 1995 till 1998 which however never came to existence. Lastly it was the fact that Norway was becoming more and more interesting for foreign investors and thus the demand for international investment protection instruments increased.

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[15] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.

[16] Export, 'Norway - Openness to and Restriction on Foreign Investment' (*Export - Norway Country Commercial Guide*, 7 August 2016) <https://www.export.gov/article?id=Norway-openness-to-foreign-investment> accessed 2 July 2017.

[17] *Ibid*.

[18] *Supra at* 15.

The last negotiated BIT that Norway concluded was with Russia in 1995. A year later a BIT with Azerbaijan was signed but this one did not enter into force.[19]

Norway attempted to return to BITs in December 2007 when the Draft Model BIT was introduced to the public. However the Kingdom decided to abandon this BIT Model because of a very critical reaction from the public.[20] The Model contained many innovations over previous Norwegian BITs, for instance it required exhausting of local remedies before referring the case to international arbitration, or it guaranteed more transparent foreign investor – host State dispute settlement procedures.[21] The Norwegian Government strived for achieving a Model BIT that would balance investor protection with consideration of public goods. However, many businesses and non-governmental organisations in Norway claimed that the Model is imbalanced. Because of such negative feedback the Norwegian Government decided to abandon the BIT Model.[22]

Currently, it is uncertain whether Norway will negotiate any more BITs in the future. It seems that, as regards investment protection, Norway prefers and will continue to prefer multilateral investment treaties and free trade agreements.[23]

2.3.2 Norway and international institutions on investment

The Kingdom of Norway is a Member State of the Multilateral Investment Guarantee Agency (hereinafter MIGA) and is also a Contracting State to the International Centre for settlement of Investment Disputes (ICSID) Convention.[24] Hence it is a member of two major institutions concerned with investment protection.

2.3.3 Norwegian legislation

In general, there is no specific document in Norwegian legislation that would regulate foreign investments in this Scandinavian country. Nonetheless, there are some sectors which are

[19] Damon Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty' (*IISD*, 8 June 2009) <https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/> accessed 1 July 2017.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.

governed by specific laws and those are handled by respective ministries. One such sector is for example oil and gas sector which is controlled by the Norwegian Ministry of Petroleum and Energy.[25]

2.4 Investment areas

Traditionally, Norway has barred both domestic and foreign investors from investing in industries that were or are monopolized by the Norwegian Government. However throughout the time Norway slightly relaxed its restrictions and for example opened the electricity distribution system to foreign investors. The Kingdom of Norway is therefore now considered as one of the most liberal power sector investment regimes worldwide.[26]

As regards other industries in Norway, the most attractive industries to most of the foreign investors are retail, manufacturing, banking, and oil and gas. In particular the oil and gas industry is regarded as the most attractive one.[27]

2.4.1 Petroleum sector

The Norwegian Government embraces an open position towards foreign investment in the petroleum industry.[28] Oil companies are the main foreign investors in Norway, especially Dutch and American oil companies such as Royal Dutch Shell, Exxon-Mobil or Texaco have made big investments.[29] It is a very positive fact for future foreign investors that the oil companies investing in Norway report no discrimination in the award of petroleum production licences in the licensing rounds.[30]

The EU directives that require equal treatment of EEA oil and gas companies were implemented by Norway. An example is the EU directive 94/33/EU of May 30, 1994 on the

[25] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.
[26] Export, 'Norway - Openness to and Restriction on Foreign Investment' (*Export - Norway Country Commercial Guide*, 7 August 2016) <https://www.export.gov/article?id=Norway-openness-to-foreign-investment> accessed 2 July 2017.
[27] *Supra at* 25.
[28] *Ibid*.
[29] *Ibid*.
[30] *Supra at* 26.

offshore licence system which deals with the conditions for awards of production licences.[31] Nevertheless, the main legal instrument for the Norwegian authorities in the petroleum operations is the Act of 29 November 1996 No. 72 relating to petroleum activities (hereinafter Petroleum Act) because through this act the government controls exploration, production and transportation of petroleum in Norway.[32] This Act will be discussed in detail in section 3 of this work together with other important legal instruments for petroleum activities.[33]

2.5 Expropriation

The Kingdom of Norway has very positive results as regards risk of expropriation, in other words takings of property, and government action. The risk of expropriation and government action cover not only the risks of expropriation but also contract breach by the government, possibility of a negative change of attitude towards foreign investor, and the risks connected to the functioning of the judiciary system. Countries are assessed on how low or high risk of expropriation and government action they represent to a foreign investor. The assessment is classified into seven categories – from 1, which means low risk, to 7, meaning high risk. From the data from years 2014 to 2016 it was found that the expropriation risk and government action in Norway is in the category 1, meaning on the low risk level.[34] Therefore it is not surprising that so far there have been no cases of questionable expropriation in Norway.[35]

3. Exploration, exploitation and distribution of petroleum products in Norway

This section of the thesis discusses the process how an oil company is able to explore, exploit and eventually distribute petroleum products when engaging in petroleum activities in Norway. The relevant legislation will be elaborated as well and particular attention will be paid to production licence as it is one of the main features of the lawsuit against the Norwegian Government.

[31] Export, 'Norway - Openness to and Restriction on Foreign Investment' (*Export - Norway Country Commercial Guide*, 7 August 2016) <https://www.export.gov/article?id=Norway-openness-to-foreign-investment> accessed 2 July 2017.

[32] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.

[33] *Supra at* 31.

[34] The Global Economy, 'Norway: Expropriation risk' (*The Global Economy*, 2017) <http://www.theglobaleconomy.com/Norway/Expropriation_risk/> accessed 1 July 2017.

[35] *Supra at* 31.

3.1 State organisation of the petroleum activities

The Norwegian parliament, known as the Storting, is the main body which sets, by adopting legislation, the framework for petroleum activities in Norway. All major development projects must be deliberated in the Storting. However, the executive authority over petroleum operations is exercised by the Government which is assisted by various ministries among which the most important one is the Ministry of Petroleum and Energy.[36]

3.2 Norway - petroleum legal framework

To invest in the field of petroleum requires large commercial investments and such investments represent a long term perspective for recover and profit. Therefore stability and predictability of applicable law is a crucial concern of every investor in the petroleum field.[37] Naturally, another concern for the investor is the protection of its investment and its rights.[38]

The legal framework of petroleum operations in Norway is shaped by both Norwegian law and international law.[39]

3.2.1 Norwegian law

There are three important instruments connected to Norwegian law that concern petroleum activities.

3.2.1.1 Norwegian Constitution

Under the Norwegian Constitution the most important provisions are Articles 97, 105 and very likely also Article 112.[40] Article 97 stipulates that *"[n]o law must be given retroactive effect"*.[41] The ability of the Kingdom of Norway to expropriate is embodied in Article 105:

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[36] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 15.

[37] Ivar Alvik, 'Petroleum law: introduction' (*University of Oslo - Scandinavian Institute of Maritime Law*, 14 March 2016) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v16/presentasjoner/petroleum-law---intro.pdf> accessed 29 June 2017.

[38] *Ibid*.

[39] *Ibid*.

[40] *Ibid*.

[41] *The Norwegian Constitution*, 17 May 1814, Article 97.

"If the welfare of the state requires that any person shall surrender their movable or immovable property for the public use, they shall receive full compensation from the Treasury."[42]

Article 112 represents the right of people in Norway to environment:

"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. [...]"[43]

Whether Article 112 will be also of relevance for the petroleum legal framework is to be seen[44] once the case against Norway for opening the oil fields in the Barents Sea will be decided, as this provision is one of the core issues of the upcoming lawsuit. The provision is discussed further in section 4 of the thesis.

In addition, the general principles of Norwegian administrative law play a role as well, mainly the Act no. 17 of 1984 on Compensation in Cases of Expropriation or the Act no. 704 of 2009, better known as the Expropriation Act.[45]

3.2.1.2 The Petroleum Act and Petroleum Regulations

The Petroleum Act represents the general legal basis for the petroleum activities in Norway.[46] Pursuant to the Petroleum Act and the related regulations, specifically Regulation of 27 June 1997 No. 653 (hereinafter Petroleum Regulations), official permits and approvals by the Norwegian Government, represented by the Ministry of Petroleum and Energy, are necessary in all phases of the petroleum activities. This regards the phases such as awarding of exploration and production licences, acquisition of seismic data, plans for development and operation of an oil or gas field, and plans for fields cessation.[47]

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[42] *The Norwegian Constitution*, 17 May 1814, Article 105.
[43] *Ibid*, Article 112.
[44] Ivar Alvik, 'Petroleum law: introduction' (*University of Oslo - Scandinavian Institute of Maritime Law*, 14 March 2016) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v16/presentasjoner/petroleum-law---intro.pdf> accessed 29 June 2017.
[45] *Ibid*.
[46] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013)<http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.
[47] *Ibid*.

Additionally, one cannot forget about the Petroleum Taxation Act of 13 June 1975 No. 35 which deals with taxation of the petroleum activities.[48]

3.2.1.3 The Joint Operating Agreement

A crucial instrument in petroleum operations, and not only in Norway, is the Joint Operating Agreement concerning petroleum activities.[49] A Joint Operating Agreement is the most commonly used instrument in the petroleum industry which provides the contractual basis for cooperative exploration, development, and production of gas and oil among multiple parties to the agreement.[50]

3.2.2 International law

Among the most important international law instruments for legal framework concerning petroleum operations in Norway are international conventions, especially those that deal with the protection of foreign investors and their investments – for instance the ICSID Convention or the MIGA Convention.[51] Details on both ICSID and MIGA will be provided in section 7 of the thesis. Importantly, also the European Convention on Human Rights (hereinafter ECHR) must be emphasised as it plays a role with regards to property protection, especially its Article 1 on Protection of property is relevant.[52]

What is more, the UN Convention on the Law of the Sea (hereinafter UNCLOS) is another major international legal instrument. It is important mainly for the allocation of the rights to resources and also jurisdiction delimitation between states.[53] The UNCLOS together with the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter OSPAR) are crucial for the questions of environment protection. Needless to say that oil and gas mining can have, in fact it has, serious consequences for the environment.[54]

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[48] *The Petroleum Taxation Act* - Act of 13 June 1975 No 35.
[49] Ivar Alvik, 'Petroleum law: introduction' (*University of Oslo - Scandinavian Institute of Maritime Law*, 14 March 2016) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v16/presentasjoner/petroleum-law---intro.pdf> accessed 29 June 2017.
[50] Austin Brister, 'Introduction to Joint Operating Agreements' (*Oil and Gas Law Digest*, 1 September 2014) <https://oilandgaslawdigest.com/primers-insights/introduction-joint-operating-agreements/> accessed 1 July 2017.
[51] Ole Kristian Fauchald and Kjersti Schiøtz Thorud, 'Protection of Investors against Expropriation' [2006] Universitetsforlaget, p. 140.
[52] *Supra at* 49.
[53] UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.
[54] *Supra at* 49.

Finally, one cannot omit the EEA and EU legislations on licensing and environment protection.[55]

3.2.2.1 Arbitration

There are two relevant forms of arbitration, either there is an option that there is an arbitration clause in the contract, or there is an investor - State arbitration based on a BIT.[56] Indeed, international investment disputes have been avoiding Norway but with the ground-breaking lawsuit against the Norwegian Government it cannot be excluded that this Scandinavian country will not appear in front of an arbitration Tribunal, for instance an ICSID Tribunal. This will be further discussed in section 8.

3.3 Opening of new areas and impact assessment

Before the Norwegian Government awards a production licence it has to decide that a certain area will be opened for petroleum operations. Consequently, before opening such area, an impact assessment must be conducted. This kind of assessment evaluates social and economic effects of opening an area for petroleum activities, and it also analyses the environmental impact of such activities for adjacent districts and for other industries. Chapter 3 of the Petroleum Act and Chapter 2a of the Petroleum Regulations govern the opening of new areas and the impact assessment.[57]

3.4 Announcement

Production licences are awarded through so called licensing rounds which the Norwegian Government announces each year. The announcement is published in the *Norsk Lysingsblad,* which is the Official Journal of Norway, then also in the Official Journal of the EU and finally it is available on the website of the Norwegian Petroleum Directorate (hereinafter NPD). The idea is to alert interested investors. When it comes to applicable legislation, the chapter 3 of

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[55] Ivar Alvik, 'Petroleum law: introduction' (*University of Oslo - Scandinavian Institute of Maritime Law*, 14 March 2016) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v16/presentasjoner/petroleum-law---intro.pdf> accessed 29 June 2017.

[56] Ivar Alvik, 'Petroleum law – lecture 2: Host government agreements' (*University of Oslo - Scandinavian Institute of Maritime Law*, 6 March 2015) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v15/presentasjoner/petroleum-law---host-government-agreements.pdf> accessed 1 July 2017.

[57] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.

the Petroleum Regulations and Chapter 3 of the Petroleum Act are governing the process of announcement.[58]

3.5 Application and award

An investor interested in petroleum operations in Norway can apply individually or together with other investors as a group. The oil companies that decide to submit a group application must conclude a cooperation agreement which is in force until the time of application.[59] Chapter 3 of the Petroleum Act and Chapter 3 of the Petroleum Regulations are of relevance when it comes to the procedure for applying for production licences and the content of the application itself.[60]

The Norwegian Ministry of Petroleum and Energy awards production licences to companies or a group of companies that submit the strongest application. Fair, non-discriminatory and objective criteria are the basis of such awards. The same Ministry also designates an operator that will be responsible for operational activities which were authorised by the licence.[61]

3.6 The production licence

The rights and obligations of the oil companies towards the Norwegian Government are regulated by the production licence. This licence awards the companies with exclusive rights to surveys, exploration drilling and production of petroleum in the geographical area which is covered by the licence. It also entitles the licensee to become the owner of the produced petroleum. Detailed provisions regarding the production licence are to be found again in Chapter 3 of the Petroleum Act and Chapter 3 of the Petroleum Regulations but also in the production licence itself because it supplements the Petroleum Act requirements with detailed terms and conditions. Importantly, the content of the contract on production licence between the Norwegian Government and an investor is usually not disclosed to the public.[62]

Furthermore, there are two equally important types of production licences in the licensing system of Norway. Firstly, there are numbered licensing rounds for the least explored parts of

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[58] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.

[59] Norsk Petroleum, 'The Norwegian Licensing System' (*Norwegian Petroleum*, 9 May 2017) <http://www.norskpetroleum.no/en/exploration/exploration-policy/> accessed 3 July 2017.

[60] *Supra at* 58.

[61] *Ibid*.

[62] *Ibid*.

the shelf, so called frontier areas. Secondly, there are awards in predefined areas (hereinafter APA) for mature parts. This system secures that the Norwegian continental shelf is explored sufficiently.[63]

3.6.1 Awards in predefined areas

The APA system was introduced in 2003 for the continental shelf of Norway and its mature areas. Originally the petroleum activities in the Norwegian continental shelf started in the North Sea but throughout the time these operations expanded northwards, following the step by step exploration principle. Therefore the entire North Sea is nowadays considered as mature.[64]

Mature areas are areas where the geology is well known, the infrastructure is well planned or already developed, and it imposes less difficulties for exploration. It is probable that new discoveries will be made in such areas but they will not be very large.[65] When it comes to APA, most important is fast exploration conducted at the right time rather than a diligent step by step exploration.[66]

In the system of APA all of the mature acreage on the continental shelf is basically a predefined exploration area and companies may apply for licences for all acreage that is not already covered by licences. As new areas mature, the APA areas expand but no acreage is withdrawn. The APA system was introduced in order to secure that profitable resources in mature areas are both proven and recovered before existing infrastructure is closed.[67]

Unlike in the numbered licensing rounds, in the APA licensing rounds the oil companies do not nominate blocks in the designated area. However, the proposals on expanding APA acreage must be submitted to public consultation. Between years 2003 and 2017 there have been fifteen licensing rounds initiated in mature areas,[68] which is not a very large number.

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[63] Norsk Petroleum, 'The Norwegian Licensing System' (*Norwegian Petroleum*, 9 May 2017) <http://www.norskpetroleum.no/en/exploration/exploration-policy/> accessed 3 July 2017.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.

3.6.2 Numbered licensing rounds

The numbered licensing rounds apply to frontier areas. These areas provide limited geology knowledge, there is a lack of infrastructure, and there are usually greater technical challenges than in the mature areas. Therefore the operators that plan to explore a frontier area are expected to have good experience, geological and technical expertise, and sufficient financial capacity.[69] In the frontier areas is on the one hand greater uncertainty whether deposits of petroleum will be found but on the other hand there is also a greater potential for large discoveries. Exploration of such areas must be made very carefully and on a step by step basis in order to avoid unnecessary drilling of dry wells.[70] The areas of the Norwegian continental shelf that are marked as frontier areas cover a large parts of the Barents Sea, then the deep-water areas of the Norwegian Sea and also some small areas of the North Sea.[71]

A licensing round is started by inviting oil companies to nominate blocks in the designated area. Based on the assessment of the nominations by the authorities, an announcement proposal is submitted for public consultation. In the final instance the Norwegian Ministry of Petroleum and Energy announces the licensing round. Norway started with the numbered licensing rounds in 1965. In the recent years the rounds have been announced every other year. The example of a numbered licensing round is the crucial 23rd Norwegian License Round.[72]

3.6.2.1 The 23rd Norwegian License Round

In January 2015 the Norwegian Ministry of Petroleum and Energy announced the 23rd Norwegian License Round and offered 57 blocks or part blocks to foreign and domestic investors. Majority of those blocks are located close to the Arctic in the Barents Sea in its south-eastern part in the formerly disputed area west of delimitation line between Russia and Norway. The 23rd License Round was very attractive for the investors because it included an entirely new acreage for exploration of the Norwegian continental shelf. This happened for the first time in twenty years.[73]

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[69] Norsk Petroleum, 'The Norwegian Licensing System' (*Norwegian Petroleum*, 9 May 2017) <http://www.norskpetroleum.no/en/exploration/exploration-policy/> accessed 3 July 2017.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.

Consequently, after assessing applications from 26 petroleum firms the Norwegian Ministry of Petroleum and Energy issued in May 2016 an offer of new production licences in the Barents Sea. The applications from foreign investors were made through branch offices residing in Norway.[74]

3.7 Exploration – time and program

The production licence is valid for an initial period, so called exploration period, which is usually ten years. A work commitment program must be conducted during this period. This program contains requirements for geophysical and geological preliminary work and also exploration drilling. Traditionally, Chapter 3 of the Petroleum Regulations and Chapter 3 of the Petroleum Act deal with the exploration time and program in detail.[75]

3.8 Area fees

The area fees system provides the companies with the incentive to move from discoveries to development and production of petroleum in the areas for which they have licences. Section 4-10 of the Petroleum Act represents the legal authority for area fees which are payable each year per square kilometre of the area that is covered by a production licence.[76]

"The licensee shall pay a fee for a production licence, [...], calculated per square kilometre (area fee)."[77]

The area fee is not payable for areas that are actively explored or areas where is petroleum production. There is also the possibility for the companies to apply for an exemption from the area fee. However the exemption is only granted if extra exploration wells are drilled in addition to those wells that are required by the work commitment program. Another option to apply for an exemption is if there is a lack of infrastructure in the designated area.[78]

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[74] Norwegian Petroleum Directorate, '26 companies want to explore in the north' (*Norwegian Petroleum Directorate*, 4 December 2015) <http://www.npd.no/en/Topics/Production-licences/Theme-articles/Licensing-rounds/23rd-Licencing-round/26-companies-want-to-explore-in-the-north/> accessed 28 June 2017.
[75] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.
[76] Norsk Petroleum, 'The Norwegian Licensing System' (*Norwegian Petroleum*, 9 May 2017) <http://www.norskpetroleum.no/en/exploration/exploration-policy/> accessed 3 July 2017.
[77] *The Petroleum Act* - Act 29 November 1996 No 72 relating to petroleum activities, Section 4-10.
[78] *Supra at* 76.

The current fees are the following: for the first year a company has to pay 34 000 Norwegian Krone (NOK) (3594 EURO) per km2, the second year costs 68 000 NOK (7187 EURO) per km2, and then every year after the second year the fee amounts to 137 000 NOK (14480 EURO) per km2.[79]

3.9 Development and operation

Once a company finds that it is commercially viable to develop a petroleum field then they are required to carry out prudent development and operation of proven petroleum deposits. Indeed, a company is responsible for new project development but the final consent to start the process is given by the Norwegian authorities. Hence a so called Plan for Development and Operation must be submitted by an oil company to the Ministry of Energy and Petroleum for approval. An important part of this Plan is a compulsory impact assessment which is sent for consultation to various State and non-State bodies. This impact assessment shows how the operation and development is expected to affect fisheries, society and environment, and thereby such assessment secures that the project is prudent and has acceptable consequences for general public interests. Both Petroleum Act and Petroleum Regulations in their Chapters 4 govern development and operation of petroleum deposits.[80]

3.10 Cessation of petroleum activities

Provided that a licensee does not longer wish to operate in an area for which it holds a production licence then the area must be either relinquished or transferred to companies that are willing to continue with the work commitment program.[81] Additionally, there is an obligation for the companies to relinquish areas where no discoveries have been made at the end of their licence period.[82]

In order to cease its petroleum activities, an oil company must submit a decommissioning plan from two to five years before the relinquishment or expiration of the licence. This plan must have two parts, namely the disposal section and the impact assessment. The latter, the impact assessment, is basically an overview of expected consequences of the cessation of

[79] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.
[80] *Ibid*, p. 15.
[81] Norsk Petroleum, 'The Norwegian Licensing System' (*Norwegian Petroleum*, 9 May 2017) <http://www.norskpetroleum.no/en/exploration/exploration-policy/> accessed 3 July 2017.
[82] *Ibid.*

petroleum operations for the environment, whereas the former, the disposal section, shall include proposals on how to accomplish the cessation of petroleum activities. With regards to cessation of petroleum operations, Petroleum Act Chapter 5 and Petroleum Regulations Chapter 6, and also OSPAR Convention are of relevance.[83]

3.11 Safety and liability for pollution damage

Petroleum Act and its Chapters 7, 9 and 10 are applicable for safety aspects associated with petroleum operations. The general rule is that the petroleum activities shall be conducted in a prudent manner.[84] When it comes to pollution damage, there is a strict liability, meaning that licensees are responsible for pollution damage without regard for fault.[85]

4. The lawsuit against Norway

This section will discuss what led the environmental groups Greenpeace and Nature & Youth to bring a lawsuit against the Norwegian Government. It will also elaborate on the arguments of the parties, especially of the applicants, and introduce opinion of Norwegian academics on the matter.

4.1 Origin of the conflict

It was on the 18th of May 2016 when the Norwegian Government, represented by the Ministry of Petroleum and Energy, decided to offer ten production licences for petroleum production, as part of the 23rd Norwegian License Round, to thirteen companies involved in petroleum business. Subsequently, a final license decision was made on the 10th of June 2016 and ten production licences were indeed ratified and awarded by the Order in the Norwegian Council.[86]

Among the 13 oil companies that were awarded the production licences in the Barents Sea were for instance Statoil from the Kingdom of Norway, Russian Lukoil, Österreichische

[83] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 15.
[84] *Ibid*.
[85] *Ibid*.
[86] Greenpeace, 'Historic lawsuit against Arctic oil' (*Greenpeace International*, 18 October 2016) <http://www.greenpeace.org/international/en/press/releases/2016/lawsuit-arctic-oil-norway-historic/> accessed 1 July 2017.

Mineralölverwaltung (OMV) from Austria, or Lundin Petroleum from Sweden.[87] With this decision the selected oil companies became entitled to conduct petroleum exploration and exploitation in previously unexplored parts of the Barents Sea in the Arctic.[88]

The whole matter becomes interesting with the date 20th of June 2016, thus only ten days later after the Order in the Council. On this very day Norway, as first developed country worldwide, ratified one of the most important environmental agreements - the 2015 Paris Agreement. This was not surprising because Norway has always been extremely environmentally concerned.[89] However, surprising was that it decided before the ratification to award ten production licences for petroleum production in the Barents Sea. Why was this surprising? Well petroleum production, even if conducted in the most prudent way, while taking into account all environmental protection and safety measures, still represents a major negative impact for the environment and significantly contributes to global warming with production of CO2. The absurdity is that with ratification of the 2015 Paris Agreement the Kingdom of Norway bound itself to reduce its CO2 emissions and thereby pledged to avoid contributing to global warming and irreversible climate changes.[90] Details on this environmental Agreement are discussed further in the text.

4.2 The lawsuit

The rather controversial, contradictory and inconsistent conduct of the Norwegian Government was not accepted by the two major environmental groups Greenpeace and Nature & Youth which decided to bring a lawsuit against the Norwegian Government represented by the Ministry of Petroleum and Energy. The applicants question the validity of the final license decision on awarding production licences which was made by the Norwegian Ministry of Petroleum and Energy. The matter was brought before the Oslo District Court in October 2016 but the actual approval that the matter represents a legitimate case and thus can be decided by the Court was on the 14th of February 2017.[91] As the case regards a validity of an

[87] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 3.
[88] *Ibid*.
[89] *Ibid*.
[90] United Nations Framework Convention on Climate Change, *The Paris Agreement*, 12 December 2015.
[91] Vilhelm Carlström, 'Greenpeace's historical lawsuit against Norway for Arctic drilling has been approved for court' (*Business Insider Nordic*, 15 February 2017) <http://nordic.businessinsider.com/greenpeaces-historical-

administrative decision, no arbitration shall take place pursuant to the Norwegian Dispute Act Section 6-2 (1).[92] The legal proceedings will start in November 2017.[93]

Frode Pleym who is the Head of Greenpeace Sweden stated that "*[...] the trial is about testing the Norwegian state's responsibility for peoples health and safety, which the Norwegian state is jeopardizing by allowing further oil exploration in the Arctic region. To extract fossile fuels in sensitive areas goes against the Paris Agreement as well as Norway's own constitution*."[94] Hence the case will test, *inter alia*, whether the new Arctic drilling rights can be distributed while observing the law.[95]

4.3 Arguments of the applicants

"By allowing oil companies to drill in the Arctic, Norway risks undermining global efforts to address climate change. When the government fails to redress this we have to do what we can to stop it", said Truls Gulowsen from Greenpeace Norway.[96]

Both environmental organisations argue that the final license decision on awarding production licences for petroleum production in previously unexplored areas will have serious negative consequences for the environment because Norway will contribute heavily to major CO2 emissions and thereby to global warming.[97] It was proved by an extensive research and particularly by the UN Intergovernmental Panel on Climate Change and its report from 2014 that man-made global warming is a real issue. There is no doubt that global warming must be restricted in order to prevent devastating and irreversible climate change and therefore all

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lawsuit-against-norways-government-for-arctic-drilling-has-been-approved-for-court-2017-2> accessed 9 July 2017.

[92] Vilhelm Carlström, 'Greenpeace's historical lawsuit against Norway for Arctic drilling has been approved for court' (*Business Insider Nordic*, 15 February 2017) <http://nordic.businessinsider.com/greenpeaces-historical-lawsuit-against-norways-government-for-arctic-drilling-has-been-approved-for-court-2017-2> accessed 9 July 2017.

[93] *Ibid*.

[94] *Ibid*.

[95] *Ibid*.

[96] Greenpeace, 'Historic lawsuit against Arctic oil' (*Greenpeace International*, 18 October 2016)<http://www.greenpeace.org/international/en/press/releases/2016/lawsuit-arctic-oil-norway-historic/> accessed 1 July 2017.

[97] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 3.

countries that signed the 2015 Paris Agreement bound themselves to do their utmost best to tackle the global warming issue.[98]

4.3.1 The 2015 Paris Agreement

In December 2015 the Paris climate conference took place at which in total 195 countries adopted the very first universal and legally binding global climate deal which is known as the 2015 Paris Agreement. The main goal of this Agreement is to put the world on track in order to avoid climate change by limiting global warming below 2°C.[99]

The governments of all participating countries agreed on a long-term goal to keep the increase in global average temperature bellow 2°C, while aiming to limit the increase to 1.5°C preferably. The main key element of the 2015 Paris Agreement in order to achieve the long-term goal is the reduction of CO2 emissions. Therefore the participating countries, including the Kingdom of Norway, submitted each its Nationally Determined Contributions (hereinafter NDC) during the Paris conference. The NDC represents a comprehensive national climate action plan on the CO2 emissions reduction in order to contribute to the goal of the 2015 Paris Agreement. Each country determines its contribution individually.[100]

The applicants argue that Norway pledged to contribute to the goal of the 2015 Paris Agreement and hence it must take all necessary steps to fulfil it. The challenge is that the final license decision on awarding production licences which permitted the petroleum production in the Arctic is very hard to reconcile with the Norwegian pledge to the 2015 Paris Agreement to reduce CO2 emissions.[101] Therefore the applicants in the lawsuit against the Norwegian Government argue that Norway has to cease the petroleum production in the Arctic, specifically in the Barents Sea.[102]

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[98] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 3.

[99] European Commission, 'Paris Agreement' (*European Commission - Climate Action*, 10 July 2017) <https://ec.europa.eu/clima/policies/international/negotiations/paris_en> accessed 1 July 2017.

[100] *Ibid*.

[101] *Supra at* 98.

[102] *Ibid*.

4.3.2 Other issues and alternative argumentation

It is claimed by the applicants that the petroleum production conducted in previously unaffected areas will have a negative impact on the polar marginal ice zone. Needless to say that in the event of an oil spill there could be devastating environmental consequences.[103] Moreover, Greenpeace and Nature & Youth argue that the exploration, production, development and infrastructure costs together with the great degree of uncertainty connected to the future value of the production signifies that the positive aspects of the license decision on awarding production licences are outweighed by its negative aspects.[104]

In addition, the claimants to the case are prepared to argue, as an alternative, that the license decision in the 23rd Norwegian License Round is invalid because of procedural errors.[105] The environmental groups emphasise that there has been no proper proceeding as regards the importance of environmental and climate considerations.[106][107] Specifically, prior to the license decision there was no public discussion in Norway on whether such decision is compatible with the CO2 emissions reduction.[108]

4.3.3 Article 112 of the Norwegian Constitution

Another argument of the claimants for invalidating the license decision is that the negative environmental effects of the awarded production licences are serious enough to be incompatible with the fundamental constitutional right of every person in Norway, including future generations, to a healthy environment and a liveable climate, which is enshrined in Article 112 of the Norwegian Constitution. Applicants claim that the Norwegian Government clearly omitted this when deciding on the license decision.[109] This is the wording of Article 112:

"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be

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[103] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 3.

[104] *Ibid*, p. 6.

[105] *Ibid*.

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid*, p. 3.

[109] *Ibid*.

managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

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

The authorities of the state shall take measures for the implementation of these principles". [110]

Article 112 of the Norwegian Constitution is relatively new as originally the aforementioned right was only present as part of subsection (b) in Article 110 but the Norwegian Constitution was revised in 2014. This revision strengthened the peoples right to safe environment and it is now considered as one of the key human rights in Norway because it represents implementation of the Kingdom's European and international environmental and human rights obligations.[111] One of the changes made in 2014 regarding Article 112 is the for instance visible in the third paragraph of the provision. Originally the paragraph stated: *"[t]he authorities of the state issue further provisions [...]."* This was amended to: *"[t]he authorities of the state shall take measures [...]."* The idea was to strengthen the obligations of the Kingdom under the Article as well.[112]

Article 112 of the Norwegian Constitution represents the absolute threshold governing the extent of damage and risk to which the environment can be exposed.[113] This provision includes proportionality requirements for decisions that have a negative impact on the environment. This means that if a decision constitutes a disproportionate environmental encroachment in comparison to the benefit of such decision, then the decision will contravene Article 112.[114] Indeed, the claimants argue that there are some environmental encroachments that are so serious that they cannot be justified by any purpose. They clearly refer to the final

[110] *The Norwegian Constitution*, 17 May 1814, Article 112.
[111] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 5.
[112] *Ibid.*
[113] *Ibid*, p. 6.
[114] *Ibid.*

license decision. It is claimed by the applicants that this decision is contrary to the duty of the State to take into consideration environmental issues, including climate change.[115]
It is emphasised by the Greenpeace and the Nature & Youth that when interpreting Article 112 of the Norwegian Constitution, a particular importance must be also attached to international obligations of Norway under international law agreements and treaties on global challenges that the planet Earth faces, such as for instance the discussed 2015 Paris Agreement.[116]

The claimants believe that all negative impacts of the license decision on the environment in total lead to absolute limitation of Article 112 of the Norwegian Constitution and thus render the controversial decision on awarding production licences invalid.[117]

4.4 Petroleum activities in the Arctic against the law?

Arguments of the applicants are one thing, but what is the perspective of unbiased and independent academics?

The law professors Beate Sjåfjell from University of Oslo and Anita Halvorssen from University of Denver wrote a research paper which deals with the question whether opening the Barents Sea for oil drilling would be not contrary to Norwegian Constitution and international obligations of the Kingdom of Norway. Both authors basically share the view of the claimants to the case, emphasising that the Arctic region is a vulnerable area which is very important to protect not only for the sake of the local environment but also in order to protect the rights of indigenous peoples in the area and to mitigate climate change as well.[118]

4.4.1 International conventions

The abovementioned law professors argue in their research paper that *"[...] new or large scale exploitation of oil and gas in the Arctic region is not in line with the object and purpose of relevant international conventions [...]."* By relevant international conventions is meant

[115] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 6.
[116] *Ibid*.
[117] *Ibid*.
[118] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 66.

the UNCLOS, the OSPAR and the 2015 Paris Agreement.[119] The UNCLOS represents the legal framework within which all activities in the seas and oceans are carried out.[120] OSPAR is more specific, as it is the main legislative instrument which regulates international cooperation on environmental protection in the North-East Atlantic.[121] The 2015 Paris Agreement's details were already introduced above. The aim of all the conventions is the protection of the environment, specifically sustainable development and climate change prevention. The authors of the research paper argue that oil and gas exploitation in the Arctic is not only contrary to these international objectives enshrined in the aforementioned conventions but also contrary to the EU objectives in the same areas. The EU objectives on climate change and sustainable development are represented in various EU Directives on environment protection, such as Directive 2011/92/EU,[122] which are implemented by Norway as an EEA Member State.[123]

Nonetheless, both Beate Sjåfjell and Anita Halvorssen acknowledge, when considering the case of Norway, that neither EU law nor international law give sufficient grounds to declare the 23rd Norwegian License Round to be clearly and directly unlawful.[124] The reasoning for such conclusion will be only elaborated as regards the 2015 Pars Agreements and not the UNCLOS and the OSPAR because these instruments were only briefly mentioned.

The problem with the Paris Agreement is that it does not include binding CO2 emission reduction commitments. Respectively, the Agreement itself is binding in form but the commitments or rather pledges of individual countries, referred to as NDCs, in the Agreement are only voluntary and thus not legally binding.[125] Therefore, unfortunately, if a State does not comply with its pledged contribution under the NDC, there is no legal mechanism to hold such State accountable. There will be only the procedure of "naming and shaming" and this is

[119] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 66.
[120] UN - Sustainable Development, 'United Nations Convention on the Law of the Sea (UNCLOS)' (*UN - Sustainable Development*, 2017) <https://sustainabledevelopment.un.org/topics/oceans/unclos> accessed 7 July 2017.
[121] *The Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992.
[122] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ 2 26/1.
[123] *Supra at* 119.
[124] *Ibid*.
[125] Sophie Yeo, 'Timeline: the Paris agreement's 'ratchet mechanism' (*Carbon Brief*, 19 January 2016) <https://www.carbonbrief.org/timeline-the-paris-agreements-ratchet-mechanism> accessed 7 July 2017.

a very weak and frankly inefficient enforcement procedure.[126] Hence, if a State wants to violate its pledge, it will and it will very likely not care about its reputation.

4.4.2 The Norwegian Constitution

The conclusion of the two law professors is different when analysing the case of Norway in light of the Norwegian Constitution and its Article 112.

Instead of contributing to the international shift towards sustainable development and renewable energy, the Kingdom of Norway is, by opening Barents Sea for petroleum activities, participating in the promotion of petroleum race in the Arctic.[127] Beate Sjåfjell and Anita Halvorssen claim that allowing this is directly contrary to the internationally adopted two-degree limit which was agreed via the Paris Agreement.[128] Indeed, the Paris Agreement, together with other relevant international legislations and laws, does not give sufficient ground to challenge the conduct of Norway as unlawful, but this conduct is clearly contrary to Article 112(1) of the Norwegian Constitution.[129] The fact that the Norwegian State willingly disregards the necessity of doing everything that is possible to mitigate climate change constitutes violation of Norway's duty that is enshrined not only in the first subsection of Article 112 but also in the third subsection.[130]

Moreover, Norway did not fulfil its obligation under European, international and Norwegian legal instruments to conduct a proper environmental impact assessment which is essential in order to determine in advance what would be the effects of the oil drilling in the Barents Sea on the local environment and how severely it would contribute to climate change. As this was not done, it thereby constituted a violation of the second subsection of Article 112.[131]

4.4.3 Similar cases

The judicial review of Norway's contribution to CO2 emissions through petroleum production has parallels in other jurisdictions.[132] Recent cases, for instance in the Netherlands

[126] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 66.
[127] *Ibid*.
[128] *Ibid*.
[129] *The Norwegian Constitution*, 17 May 1814, Article 112(1).
[130] *Supra at* 126.
[131] *Ibid*.
[132] *Ibid*, p. 67.

or the US, represent examples of an emerging trend to use national courts as guardians of peoples right to viable environment.[133]

With regards to the Netherlands, there was a ground-breaking *Urgenda* case in which the Dutch courts ordered the Dutch State to reduce CO2 emissions by at least 25% at the end of 2020 compared to the level of the emissions in 1990.[134] This decision is an example which proves that a State can be held legally liable for not complying with their obligation to reduce global emissions of CO2.[135]

In the US is a pending case *Our Children's Trust*. The environmental group Our Children's Trust filed a lawsuit against the US Federal Government claiming that the Government violated constitutional rights to life, property and liberty of the youngest generation, and that the Government failed to protect important public interests. The reason for the lawsuit is that the US does not have a national plan to decrease atmospheric concentrations of CO2. Therefore it was demanded by the applicants that the Court shall order the US Government to *"[...] immediately implement a national plan to decrease atmospheric concentrations of carbon dioxide to a safe level."* The decision has not yet been rendered.[136]

4.5 Arguments of the Norwegian Government

The counter arguments that can be expected from the Norwegian Government in order to justify that it has legally awarded the production licences are that Norway's petroleum exploitation has in fact one of the highest, if not the highest, environmental and safety requirements in the world. Therefore prohibiting the oil drilling in the Barents Sea will only lead to "less environment friendly" petroleum exploitation in other parts of the world. Another expected argument from Norwegian State is that the world needs the gas from Norway in order to replace coal as the most environment unfriendly fossil fuel and thereby to achieve the two degree requirement by the 2015 Paris Agreement. It is also assumed that the

[133] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 67.
[134] *Ibid*, p. 61.
[135] Greenpeace, 'The People vs Arctic Oil - The Lawsuit against the Norwegian Government' (*Greenpeace*, 18 October 2016) <http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf?utm_source=internal&utm_medium=post&utm_term=legal,arctic,writ,norway&utm_campaign=Polar&__surl__=IgOsJ&__ots__=1476789593910&__step__=1> accessed 1 July 2017, p. 4.
[136] *Supra at* 133, p. 62.

Norwegian Government will emphasise that it is already taking other steps in order to mitigate global warming, for instance it participates in the EU Emission Trading System.[137]

4.6 Possible outcome of the case

In February 2017 in Kirkenes, a Norwegian town in the northern part of the country, an event called the Trial of the Century took place. It lasted for three days and it was basically a Moot Court on the issue whether the drilling in the Barents Sea is in conflict with the Norwegian Constitution and its Article 112. Naturally, it was all staged as a performance but the case was still real. Both claimants and defendant were represented by law experts and the witnesses to the case were representatives from various Norwegian key institutions.[138]

The claimants argued that Article 112 forbids the steps that were taken by the Norwegian Government as these threaten the well-being of future generations. The defendant stipulated that this is not the case, underpinning its position by emphasising the fact that Norwegian courts cannot be used to overturn decisions of the Government and that the oil industry provides work and values that are needed for further society development.[139]

In this Moot Court the jury was made up of the audience, there were in total 123 juries. Their decision was the following: there were 49 juries that rejected the lawsuit and there were 74 juries that voted against the Norwegian Kingdom. Hence they held that opening the Barents Sea for oil drilling is in conflict with Article 112 of the Norwegian Constitution.[140]

The event Trial of the Century was basically an indication of how the real case could end up. Mrs. Stine Østnor, who is a real representative of the claimants to the case, the environmental groups Greenpeace and Nature & Youth, claimed that this Moot Court is of great relevance to the upcoming real case. She said that it *"sends a signal"*.[141] On the other hand, the law professor from University of Oslo Hans Petter Graver, who represented the claimant in the Moot Court case, is of the opinion that the outcome of the Trial of the Century event will not have any impact on the upcoming proceedings. However he acknowledged that it might

[137] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 56.
[138] Atle Staalesen, 'Norway lost The Trial of the Century' (*The Independent Barents Observer*, 12 February 2017) <https://thebarentsobserver.com/en/ecology/2017/02/norway-lost-trial-century> accessed 1 July 2017.
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*.

contribute to the discussion on the issue.[142] Interestingly enough, regardless of the fact that Mr. Graver won the Moot Court case, he is of the opinion that the environmental groups have a rather small chance to win the case in real. He said: *"seen with a traditional legal approach, it is unlikely that they win"*.[143]

4.6.1 The Norwegian Supreme Court

Some Norwegian lawyers and academics argue that the Norwegian Supreme Court is a State-friendly Court but there are also some who claim that it is rather environment and human rights friendly. Be it as it may, there is no doubt that the case will end at the table of the Supreme Court.[144] This is because neither applicants nor defendant will be satisfied with the rendered decisions of Norwegian courts at different instances. Undoubtedly the Norwegian courts, and in particular the Supreme Court, will have a very difficult task to decide the case. This is because it will have to overcome financial, psychological and procedural barriers.[145] There will be an extreme pressure from both the State and the Norwegian public which is sensitive to environment topics. In the end the dispute may be even more political than legal.

5. Investment protection vs. environment protection

There is no secret that for a long period of time, certainly for more than two decades, the environment of the planet Earth is subject to degradation caused by CO_2 emissions leading to climate change, loss of biodiversity, deforestation, etc. This environmental destruction is caused by intense economic activity to which foreign investors are significantly contributing. This is because, traditionally, the biggest investments are connected to natural resources and their use and extraction, particularly mineral and fuel production.[146]

The idea how to tackle this environmental destruction is to move from brown to green economy. A brown economy is a reference to economic development which relies heavily on fossil duels, such as coal and petroleum, and does not consider the negative effects of such economy on the environment. By green economy is meant a clean energy system, represented

[142] Atle Staalesen, 'Norway lost The Trial of the Century' (*The Independent Barents Observer*, 12 February 2017) <https://thebarentsobserver.com/en/ecology/2017/02/norway-lost-trial-century> accessed 1 July 2017.
[143] *Ibid*.
[144] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 65.
[145] *Ibid*, p. 67.
[146] Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' (*OECD*, August 1999) <http://www.oecd.org/investment/mne/2089912.pdf> accessed 3 July 2017.

mainly by renewable energy sources, which uses energy efficiently and in an environmentally responsible way.[147] This shift from brown to green economy is achieved by various policies. The EU has its policy on Moving towards a green economy and also the UN has its Green Economy Programme.[148] However there are also policies that are concerned with supporting investors and investments.[149]

The idea to promote environment but at the same to keep economic development leads to the fact that there are constant clashes between the environment protection and investment protection.[150] Therefore it is important to bring environmental policies and investment policies together. This will require a regulatory change on international, national and regional levels and more intensive interaction between investment and environment fields. If this will not be achieved it is very likely that effort of the States to improve environment will negatively affect investments.[151] Indeed, concerns of countries regarding legal liability can play a role when deciding on agreeing on investment contracts and treaties. This is because progressive goals of States regarding environmental protection can lead to money claims brought by investors against such States. These scenarios are realistic as can be seen for instance in the Vattenfall case.[152]

5.1 Vattenfall case

A short time after the tragic incident of Fukushima nuclear power plant in Japan, which happened on the 11th of March 2011, the Federal Republic of Germany decided to close all of its nuclear power plants by 2022 and with that it also decided to immediately close two nuclear power plants in Brunsbüttel and Krümmel that were built by the Swedish power

[147] The World Bank, 'From Brown Growth to Green: the Economic Benefits of Climate Action' (*The World Bank*, 25 June 2013) <http://www.worldbank.org/en/news/feature/2013/06/25/growing-green-europe-and-central-asia> accessed 10 July 2017.
[148] European Commission - International Cooperation and Development, 'Moving towards a green economy - policy' (*European Commission - International Cooperation and Development*, 2017) <https://ec.europa.eu/europeaid/sectors/environment/environment-and-green-economy/green-economy_en> accessed 8 July 2017; UNEP, 'Green Economy' (*UNEP*, 2017) <http://www.unep.org/greeneconomy/> accessed 5 July 2017.
[149] Law plays a crucial rule with regards to policies as these are implemented by various law instruments, especially legislations.
[150] Rosalien Diepeveen and others, '"Bridging the Gap between International Investment Law and the Environment", 4th and 5th November, The Hague, The Netherlands' [2014] 30(78) Utrecht Journal of International and European Law, pp. 145-160.
[151] *Ibid*.
[152] *Ibid*.

company Vattenfall.[153] Vattenfall did not question the Germany's decision to leave nuclear power. However it insisted on being compensated for financial loss that resulted from the decision. The applicable law to the contract between Sweden and Germany was the ECT. Consequently, in 2012 Vattenfall decided to file a case against Germany at the ICSID. Vattenfall, as a foreign investor, regarded this step to be the only way to be heard.[154]

Interestingly, there was a similar case in 1997 in which Swedish Government decided to close down its nuclear power plant Barsebäck which was owned by German citizens. The German owners were however compensated for the premature closure. Regardless of the similarity of the cases and the outcome of the 1997 case, Germany still refuses to compensate Vatenfall.[155]

Investments in energy sector, be it petroleum or nuclear energy, is always extremely expensive and long-term planning is necessary. Vattenfall argues that if a foreign company makes an investment in a high-resource industry, such as nuclear power, under the precondition that certain type energy will be part of the energy mix of the country, then the company should not have to assume the consequences of sudden political change. On the contrary, the consequences should be taken by the country which controls the further course of events and makes the decisions.[156] It will be interesting to see what will be the outcome of this case. Nevertheless, a certain parallel can be found between the Vatenfall case and the case against Norwegian Government and the thesis will mention this similarity in section 8 of the thesis.

6. Lawsuit against Norway – is there an investment?

Before answering the question whether Norwegian Government can expropriate oil companies involved in the 23rd Norwegian License Round, another question needs to be answered. Namely, whether purchasing a production licence constitutes an investment.

[153] Vattenfall, 'Why Vattenfall is Taking Germany to Court' (*News from Vattenfall*, 6 October 2016) <http://news.vattenfall.com/en/article/why-vattenfall-taking-germany-court-ICSID> accessed 1 July 2017.
[154] *Ibid*.
[155] *Ibid*.
[156] *Ibid*.

6.1 Investment definition

The Oxford dictionary defines investment as *"[t]he action or process of investing money for profit."*[157] This is a rather broad definition which is not very helpful in the field of investment law. A better definition can be found in various investment law instruments, be it BITs or multilateral treaties.

6.1.1 BITs

Majority of BITs have investment definitions. These definitions are mostly introduced by a general and broad description which is followed by a non-exhaustive list of rights.[158] An example is the US Model BIT of 2012 which states:

"Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: an enterprise; […]."[159]

BITs are however not the main concern with regards to the research question of this thesis and therefore will not be further discussed. This is because Norway prefers multilateral investment treaties and free trade agreements over BITs[160] and hence it is unlikely that the production licence contracts are based on any of the eighteen BITs concluded by Norway.

6.1.2 The ICSID and Salini test

One would expect that ICSID, as the leading international institution focusing on solving investment disputes between foreign investors and host States, has a definition of investment. Nevertheless, surprisingly, the ICSID Convention does not contain such definition.[161] Pursuant to the authors of the Convention, the explanation for this fact is that an investment definition would lead to limited scope and redundant jurisdictional problems. Hence they argued that it will be best to let the parties to the dispute to decide what investment type they

[157] Oxford Dictionaries, 'Investment' (*Oxford Dictionaries*, 2017) <https://en.oxforddictionaries.com/definition/investment> accessed 3 July 2017.
[158] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 13.
[159] 2012 US Model Bilateral Investment Treaty.
[160] Damon Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty' (*IISD*, 8 June 2009) <https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/> accessed 1 July 2017.
[161] *Supra at* 158, p. 11.

would like to submit to the ICSID.[162] Nevertheless, it was clear that at least some requirements for defining investment must be established. Subsequently, such requirements came with the *Salini v. Marocco* case where the Tribunal introduced so called *Salini test*. This test contains four conditions for defining investment. Those conditions are the following: there must be a contribution by the investor, the operation must be of certain duration, the operation must involve some risk, and there must be a significant contribution to the host State's development.[163]

The first three criteria are pretty uncontested and they are not very difficult to fulfil. The fourth condition is rather problematic as will be seen bellow. Moreover, in the ICISD case *Phoenix Action, Ltd. v. The Czech Republic*[164] the Tribunal introduced an extra requirement that the investment must be in good faith[165] but this additional condition will not be discussed as it is not used. However, the four Salini criteria will be analysed in the following paragraphs and this will help to establish whether the *Salini test* is fulfilled in the case at hand, respectively whether buying a production licence, which entitles the licensee to explore and exploit petroleum products, constitutes an investment.

6.1.2.1 Contribution by the investor

By contribution by the investor is usually meant money but it can also be know-how, equipment or personnel.[166] In the present Norwegian case, it is clear that this condition is met because the investors paid the Norwegian Government for the petroleum production licences.

6.1.2.2 Certain duration of the operation

The requirement that the operation must be of certain duration is designed in order to exclude simple transactions. Hence if an investor engages in an activity which lasts for a longer period of time then it is probable that such activity will constitute an investment. Still this condition imposes many unclear issues, namely how long does the activity of the investor have to last?

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[162] David A. Lopina, 'The international Centre for Settlement of Investment: Investment arbitration for the 1990s' [1988] 4(1) Ohio State Journal on Dispute Resolution, p. 114.

[163] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* [2000] No. ARB/00/4 (ICSID Case); Christoph Schreuer, *The ICSID convention: a commentary: a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2001), pp. 212-225.

[164] *Phoenix Action, Ltd. v. The Czech Republic* [2006] No. ARB/06/5 (ICSID Case).

[165] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 21 March 2017.

[166] *Ibid*.

Some Tribunals held that the minimum threshold is five years, other said only two years. Furthermore, another issue is when one should start counting, meaning as from which point the alleged investment started? There are some activities connected to the investment which require preparatory steps. Do these steps count as well?[167] Admittedly, answers to these questions depend very much on the discretion of the particular Tribunal.

It is questionable whether the Norwegian case fulfils this condition. It has been more than a year since the Norwegian Government awarded ten production licences to the investors as part of the 23rd Norwegian License Round. Only administrative and preparatory steps were taken during that time, no actual drilling of oil in the Barents Sea took place so far. Hence from this point of view one could argue that the duration condition is not met. However, exploring and exploiting oil and gas is a long term activity, it cannot be successfully conducted in several months. Generally, both governments and companies involved in petroleum operations are aware of this fact. Provided that one would apply common sense to this issue, one could reasonably argue that the condition that an operation must be of certain duration is fulfilled in the present case.

6.1.2.3 Operation involving some risk

As regards the risk factor, one could say that risk should be involved once there is a certain duration and contribution. Risk is usually not very difficult to prove but sometimes there is a debate on what type of risk. For instance, what about unforeseeable political risk?[168]

Buying a production licence imposes risk indeed because the buyer invests a lot of money without financial profit guarantee. This is because the investing oil company can explore the designated area in the Barents Sea but it can happen that no oil or gas deposits will be found. Therefore the risk criterion should be fulfilled in the present Norwegian case. In addition, there is no issue with unforeseeable political risk in this case. As was discussed, the Kingdom of Norway is a stable country with favourable climate for investment and no investment controversies.

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[167] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 21 March 2017.
[168] *Ibid*.

6.1.2.4 Contribution to the host State development

Contribution to the development of the host State is the most contested condition. For example, investments in the arms industry, tobacco or alcohol industries on the one hand bring jobs and capital in the country but on the other hand they cause destruction and lead to health problems of the inhabitants of that particular country.[169] Which side of the coin prevails? It is indeed questionable.

There are two ICSID cases which nicely illustrate how challenging it is to establish what actually constitutes a contribution to the economic development of the host State.[170] First case is the *Malaysian Historical Salvors v. The Government of Malaysia* in which the Malaysian Historical Salvors company had a contract with Malaysia to undertake complex salvage operations.[171] The Tribunal held that there was no contribution to the development of Malaysia and that there was no investment. This award caused an outcry and it was later on annulled.[172] The second case is *Mr. Patrick Mitchell v. Democratic Republic of the Congo* which concerned an American lawyer who set up a legal consultancy in Congo.[173] Firstly the Tribunal held that there was a contribution to the host State development and that there was an investment. Later on the award was challenged by Congo and it was annulled as well, it was found that legal services did not contribute to Congo's development and there was no investment.[174]

Undoubtedly, investors that bought a petroleum production licence will bring capital and job opportunities to Norway. From this point of view there is a clear contribution to the development of this Nordic country. However, activities which are connected to petroleum exploration and particularly exploitation have negative consequences for the environment, thus there is a room to argue that there would not be a contribution to the development of the host State.

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[169] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 21 March 2017.
[170] *Ibid*.
[171] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* [2005] No. ARB/05/10 (ICSID Case).
[172] *Supra at* 169.
[173] *Mr. Patrick Mitchell v. Democratic Republic of the Congo* [1999] No. ARB/99/7 (ICSID Case).
[174] *Supra at* 169.

6.1.2.5 Is there an investment?

The make a conclusion on whether the *Salini test* is fulfilled in the Norwegian case, meaning that buying a petroleum production licence constitutes an investment, would depend on the view and interpretation of respective arbitrators to the case. In the opinion of the author of this thesis the conditions of the *Salini test* are met because of the abovementioned arguments and it can be assumed that the Tribunal would decide in the same way. This is because exploration, exploitation and distribution of petroleum products were identified by the ICSID Tribunals as investments.[175] This can be proven, *inter alia*, by the ICSID case *Caratube v. Kazakhstan* but also by many others.[176] As a production licence entitles the licensee to explore and exploit petroleum then there is no doubt that purchasing such licence constitutes an investment. This means that the thesis can now focus on the hypothetical question of whether the production licences awarded in the 23rd Norwegian Licence Round can be expropriated.

7. Expropriation

Before tackling the research question, one should first start with the question what does expropriation actually mean. Admittedly, there are different views on the expropriation concept but in a nutshell it can be characterised as an act of a government which takes privately owned property to be used for purposes that will benefit the overall public and such property is taken against compensation. Naturally, this is a narrow definition as it does not cover all expropriation categories.[177]

From the perspective of a foreign investor an expropriation is practically the worst thing that can happen because it is an interference with his or her property rights and it basically ceases the investment.[178] In fact the investor is rather powerless because the act of expropriation is an ultimate prerogative of a State and if it decides to expropriate it will expropriate. However,

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[175] August Reinisch, 'What is International Investment Law? - Presentation' (University of Vienna - Faculty of Law), 10 October 2016.

[176] *Caratube International Oil Company LLP v. The Republic of Kazakhstan* [2008] No. ARB/08/12 (ICSID Case)

[177] Investopedia, 'Expropriation' (*Investopedia*, 2017) <http://www.investopedia.com/terms/e/expropriation.asp> accessed 9 July 2017; Francis Yacine, 'Workshop on International Investment Policies, Investment Promotion Strategies and Sustainable Development' (*UNCTAD*, November 2012) <http://investmentpolicyhub.unctad.org/Upload/Documents/Yacine_Expropriation_Presentation.pdf> accessed 1 July 2017.

[178] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 22.

the act of expropriation is subject to certain conditions and thus a State's conduct is somehow controlled.[179] Importantly, expropriation does not concern only tangible property but also intangible property, meaning for instance a licence.[180] Indeed this means that the disputed production licences can be subject to expropriation.

7.1 Expropriation - examples and types

Various BITs and multilateral investment treaties usually deal with expropriation.[181] For instance the North American Free Trade Agreement (hereinafter NAFTA) with its Article 1110 states:

"No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: for a public purpose, on a non-discriminatory basis, in accordance with due process of law, on payment of compensation."[182]

Similar definition is also provided by Article 13 of the ECT[183] and there are also many BITs which follow the same structure as NAFTA, for instance the Japan-Papua New Guinea BIT of 26/04/2011.[184]

There are some scholars that distinguish between totally four options of expropriation. First is expropriation - taking against compensation, second is nationalisation - large scale taking, third option is confiscation - taking without compensation, fourth and last option is indirect expropriation - constructive taking.[185] The matter can be simplified by distinguishing between two groups of expropriation – direct and indirect.[186]

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[179] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 22.
[180] *Ibid*, p. 24.
[181] *Ibid*, p. 22.
[182] *The North American Free Trade Agreement*, 8 December 1993, Article 1110.
[183] *The Energy Charter Treaty*, 14 July 2014, Article 13.
[184] *Supra at* 179, p. 23.
[185] *Ibid*.
[186] Anna Kuprieieva, 'Regulatory Freedom and Indirect Expropriation: Seeking Compatibility with Sustainable Development in New Generation Bilateral Investment Treaties' (University of Ottawa, Faculty of Graduate and Postdoctoral Studies), February 2015, p. 6.

7.2 Direct expropriation

It is rather easy to identify direct expropriation. When there is a formal transfer of title to third party or State, or there is an outright seizure from the investor then one speaks of investment being directly expropriated. Generally, the only problematic issue with regards to direct expropriation is the calculation of compensation as the legal obligation to compensate and the act of expropriation are clear.[187]

7.3 Indirect expropriation

Indirect expropriation is in the situation when there are State measures that have the effect of substantially depriving the investor of the value of the investment, in other words measures having equivalent effect to expropriation. Identifying indirect expropriation is much more difficult task. This is because it covers all situations where a State, through legislative or administrative procedures, basically provokes a unilateral change in conditions of the contract with the effect that the investor is not able to recover the expected business rents under the original contract.[188]

7.4 Expropriation - legality

In principle, expropriation right is not disputed but it has its limits. Specifically, the expropriation must be legal.[189] Pursuant to the traditional expropriation law model an expropriation is lawful if four conditions are fulfilled, it must be: *for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and against compensation*.[190] One can find these requirements for instance in Article 6 of the US Model BIT 2012.[191]

7.4.1 Public purpose

The public purpose requirement is a very broad condition and thus it is of no surprise that foreign investors only very rarely question it. Nevertheless, in the ICSID case *ADC v.*

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[187] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 22.

[188] Manuel A. Abdala and Pablo T. Spiller, 'Damage valuation of indirect expropriation in international arbitration cases' [2003] 4(3) American Review of International Arbitration, pp. 454-459.

[189] *Supra at* 187, p. 31.

[190] August Reinisch, 'What is International Investment Law? - Presentation' (University of Vienna - Faculty of Law), 10 October 2016.

[191] *Supra at* 187, p. 31.

Hungary the Tribunal held that there must be a specific link between the general community interest and the public purpose:[192]

"[a] treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."[193]

7.4.2 Non-discrimination

As regards the non-discrimination requirement, the expropriated subject has to show that he or she received less favourable treatment under similar conditions, in the host State in which he or she invested, than a national of that host State. Another option is that the expropriated foreign investor must prove that the investment was subject to discriminatory treatment because of the nationality or origin of the foreign investor or investment. This condition is rather difficult to proof as, in the absence of any other evidence, it is demanding for the Tribunals to make a decision that the foreign investment expropriation was discriminatory "only" because there was no other domestic investment expropriation in the same economic field.[194]

7.4.3 Due process of law

When it comes to the due process of law condition, the practice of Tribunals, mainly of the ICSID Tribunals, developed the characteristics of this principle in detail.[195] For instance the *ADC v. Hungary* case very well describes what is actually required by the due-process of law condition:

"[...] "due process of law", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make

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[192] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 32.

[193] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* [2003] No. ARB/03/16 (ICSID Case), para. 712.

[194] *Supra at* 192, p. 33.

[195] *Ibid*.

such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."[196]

7.4.4 Compensation

The final requirement of compensation is a well-established rule in international investment law which states that a property cannot be seized by a State without compensation.[197] This rule was basically found already in 1936 by Cordel Hull, the US Secretary of State, in his reaction to nationalisation of US companies by Mexico.[198] The rule is known as the Hull formula:

"[...] no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore."[199]

Hence, to put it simply the compensation must be prompt, adequate and effective. What is more, the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment are very clear on the matter that uncompensated expropriation is prohibited:

"A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation."[200]

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[196] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* [2003] No. ARB/03/16 (ICSID Case), para. 435.

[197] Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010), p. 445.

[198] Anna Kuprieieva, 'Regulatory Freedom and Indirect Expropriation: Seeking Compatibility with Sustainable Development in New Generation Bilateral Investment Treaties' (University of Ottawa, Faculty of Graduate and Postdoctoral Studies), February 2015, p. 7.

[199] Jean Monnet Program, 'The Hull Rule' (*Jean Monnet Program*, 2017) <http://www.jeanmonnetprogram.org/archive/papers/97/97-12-III.html> accessed 7 July 2017.

[200] The World Bank, 'World Bank Guidelines on the Treatment of Foreign Direct Investment' (*The World Bank*, 25 September 1992) <http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf> accessed 3 July 2017, part IV.

7.5 Expropriation vs. breach of contract

Not all State actions lead to expropriation, in fact one has to differentiate between expropriation and breach of contract by the State. The State's role at the time of the alleged unlawful action is crucial in order to determine the difference. This is because a State can operate either as a public or private operator. In the situation when the State acts in commercial capacity as a private operator then the act is more likely to be characterised as breach of contract. If the State acts in sovereign capacity as a public operator then the act very likely constitutes expropriation.[201] The distinction between acting in commercial and sovereign capacity was made by the Tribunal in the ICSID case *Waste Management v. Mexico*:

"The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts [...]."[202]

Nevertheless, naturally, every governmental involvement does not constitute exercise of sovereign power. Therefore every act must be assessed in context of the circumstance of the case so that it can be rightly decided whether it is a consequence of public policy of the State or a contractual agreement consequence.[203]

It can be that a host State decides to willingly breach the contract with the foreign investor. Why would a State do that? It very much depends to which law is the contract subject to, but in essence a State could decide to take such step because there are different, usually more beneficial, remedies for the breach of contract than for expropriation.[204] However, the research question of this thesis does not operate with the idea of contract breach. Frankly, the author of this thesis believes that if the Norwegian Government would lose the lawsuit, it is very implausible that Norwegian Government would take such steps and somehow breach the production licence contracts. This is because Norway has a very good reputation in the international investment law area and such conduct would be very suspicious as well.

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[201] Rudolf Dolzer, *Principle of international investment law* (2nd edn, Oxford University Press 2012), p. 90.

[202] *Waste Management, Inc. v. United Mexican States* [2000] No. ARB/00/3 (ICSID Case), para. 174.

[203] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 26.

[204] Jose Magnaye, 'Expropriation in International Investment Law - Presentation' (University of Vienna - Faculty of Law), 25 October 2016.

7.5.1 Remedies

There are different types of remedies that are used in investment law. These are restitution, satisfaction and abovementioned compensation. Restitution of the situation which existed before the wrongful act took place is a rare remedy in the field of investment law as it is not used very often. One of the examples where it was actually applied is the famous *Enron case*.[205] Another rather rare remedy is satisfaction. Satisfaction in investment law means that one gets decision in his or her favour. It is more of a symbolic act which goes back to old-fashioned rituals. The most used form of remedy in investment law is compensation. In addition, when it comes to breach of contract the main legal remedy are damages.[206]

7.5.1.1 Damages and investor's negligent behaviour

The basic principle for calculating damages is the *"as if principle"* which was introduced in the *Chorzów case*.[207] This principle states that if wrongful act has been committed then the victim should be put back in the position as if the act had never happened. This principle should also contain lost profits. Lost profits are awarded only in situation of concrete and realistic prospect of having profit, and it is essential to show a record of profitability in the past.[208]

Interestingly, there are also situations where a Tribunal said that the host State, where the investor invested, behaved indeed incorrectly but investor should have been more careful. This was for instance the situation in the case *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*.[209] A country risk plays a role in evaluating whether there was a negligent behaviour from the investor.[210] Nevertheless, this situation is very likely not applicable to the present Norwegian case, *inter alia*, because the country risk in Norway is, as was discussed above, very low.

[205] *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* [2001] No. ARB/01/3 (ICSID Case).
[206] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 16 May 2017.
[207] *Factory at Chorzow (Germ. v. Pol.)* [1927] No. 12 (P.C.I.J.).
[208] *Supra at* 206.
[209] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* [2001] No. ARB/01/7 (ICSID Case).
[210] *Supra at* 206.

7.5.1.2 Compensation and market value

As was previously mentioned, there are certain conditions in order to conduct a lawful expropriation. One of those conditions is compensation, respectively adequate and effective compensation as was established by the Hull formula. How does one establish an adequate and effective compensation? This depends on the market value of the expropriated object. Market value is an objective value but it may be in the end more or less than the actual damage suffered. There is one problem with calculating the market value, namely that some expropriated objects do not have a market.[211]

How to calculate market value? One method for calculation is so called Discounted Cash Flow (hereinafter DCF) method which looks at market conditions, past profits, and other value drivers, and from that it projects future profits and consequently establishes theoretical market value. Provided that the DCF method does not work then one looks at the liquidation value which is however typically much less.[212]

7.5.1.3 Interest

Compensation and damages usually contain interests. There are three important elements in order to calculate interests. Firstly, it is the date from which the interest is to be calculated. The right to interest starts from the date from which the sum was due. In case of expropriation it is from the date of expropriation and in case of illegal act it is from the date of illegal act.[213] Secondly, it is the interest rate which is expressed in percentage. Thirdly and finally it is the simple interest or compound interest. Simple interest is a fixed percentage of the respective amount, and a compound interest is basically an interest on interest.[214]

7.5.1.4 Appropriate compensation and lost profits

Besides compensation for the costs of the production licence itself, the investors in the 23rd Norwegian License Round will also very likely demand compensation for lost profits. The following section discusses the case *Kuwait vs. Aminoil* because it illustrates well how

[211] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 23 May 2017.
[212] *Ibid*.
[213] *Ibid*.
[214] Steven Nickolas, 'What is the difference between compounding interest and simple interest?' (*Investopedia*, 8 May 2017) <http://www.investopedia.com/ask/answers/042315/what-difference-between-compounding-interest-and-simple-interest.asp> accessed 21 July 2017.

demanding it is to determine the appropriate compensation, especially when lost profits are claimed.

7.5.1.4.1 Kuwait vs. Aminoil

Aminoil, a US oil company, was granted a sixty year oil concession from Kuwait in 1948. The concession price was based on a fixed royalty for every ton of oil recovered. A stabilisation clause was included in the Agreement on Concession in order to prevent Kuwait from unilaterally annulling or changing the Concession Agreement terms.[215]

The fixed royalty principle in the Agreement on Concession was supplemented with a fifty-fifty profit sharing arrangement in 1961 upon mutual consent between Aminoil and Kuwait. Another set of changes regarding the Concession Agreement which further increased the profit for Kuwait was agreed upon in 1973. The 1973 Agreement was not ratified by the parliament in Kuwait but the parties agreed to apply the Agreement as if it was ratified. Later on Kuwait demanded to further increase its profit under the Abu Dhabi formula but Aminoil did not agree and consequently Kuwait nationalised the concession with an envisaged payment of “fair” compensation.[216]

Based on a separate arbitration agreement, Aminoil started arbitration proceedings in order to contest the nationalisation, arguing that it was contrary to the stabilisation clause. Both 1973 Agreement and Abu Dhabi formula were challenged by Aminoil, and the US oil company claimed damages of almost three billion US Dollars, which included lost profits until 2008. Kuwait counterclaimed and requested the sums allegedly owed to it by Aminoil under the Abu Dhabi formula and the 1973 Agreement.[217]

It was found by the Tribunal that both Abu Dhabi formula and 1973 Agreement were valid an applicable to the Aminoil’s concession. The Tribunal also held that the nationalisation was lawful and that it did not violate the stabilisation clause because this clause only prevented

[215] Sergey Ripinsky and Kevin Williams, 'Case summary: The Government of the State of Kuwait v The American Independent Oil Company (‘Kuwait v Aminoil’)' (*BIICL*, 2017) <https://www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf> accessed 21 July 2017, p. 2; *The Government of the State of Kuwait v. The American Independent Oil Company* [1982] 21 ILM 976 (Ad hoc Arbitral Tribunal).
[216] Sergey Ripinsky and Kevin Williams, 'Case summary: The Government of the State of Kuwait v The American Independent Oil Company (‘Kuwait v Aminoil’)' (*BIICL*, 2017) <https://www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf> accessed 21 July 2017, p. 2.
[217] *Ibid*.

confiscatory nationalisations. Furthermore the Tribunal determined that Aminoil was entitled to appropriate compensation pursuant to the 1962 UN resolution on the Permanent Sovereignty over Natural Resources (hereinafter PSNR). The Tribunal calculated the appropriate compensation on the basis of Aminoil's assets valued using their replacement cost and Aminoil's value as a going concern estimated on the basis of Aminoil's legitimate expectations of a reasonable rate of return. The resulting amount was then decreased by the debt of Aminoil to Kuwait and hence the final figure was 83 million US Dollars in compensation for the US oil company. The amount was adjusted to account for inflation and the compound interest was awarded as well.[218]

"The Tribunal considers that the determination of the amount of an award of "appropriate" compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. [...]"[219]

This case suggests that it will not be easy for the investors in the 23rd Norwegian License Round to claim lost profits from the Norwegian Government, and that even if the investors will be somehow successful with the lost profits claim it can be assumed that they will probably not get as much as demanded.

8. Lawsuit against Norway – to expropriate or not?

The content of the contracts between the Norwegian Government, represented by the Ministry of Energy and Petroleum, and domestic or foreign investors regarding production licences are not available to the public.[220] It means that it is also not publicly known which law or laws govern the contracts. Therefore, in order to tackle the issue of possible production licence expropriation, the author of this thesis will work with several premises, which will be scrutinised, and thereby the author will try to estimate the most probable content of the contract, respectively what law or laws govern it. The first premise is that the contract is governed by Norwegian law. Second premise is that the contract will follow one of the UN resolutions, either PSNR or Charter of Economic Rights and Duties of States (hereinafter

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[218] Sergey Ripinsky and Kevin Williams, 'Case summary: The Government of the State of Kuwait v The American Independent Oil Company ('Kuwait v Aminoil')' (*BIICL*, 2017) <https://www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf> accessed 21 July 2017, p. 2.

[219] *The Government of the State of Kuwait v. The American Independent Oil Company* [1982] 21 ILM 976 (Ad hoc Arbitral Tribunal), para. 144.

[220] Sandroos Advokatfirma, 'Contracts in the oil and gas industry in Norway' (*Sandroos Advokatfirma*, 2017) <http://www.wsco.dk/dk/download/Contracts-in-Norway1.pdf> accessed 6 July 2017.

Charter). Third and fourth premise is that parties to the contract on production licence agreed to use the services of either the ICSID or the MIGA and their conventions.

For the production licence contract between Norway and the Russian Lukoil could be applicable the BIT from 1998 between Norway and Russia but the author of this thesis decided not to consider any of the BITs that Norway concluded because this investment instrument is, as was discussed above in the text, not preferred by the Kingdom of Norway. The author would also consider the ECT but Norway did not ratify this treaty and hence it will be omitted in the analysis as well.

8.1 Norwegian law

It was stated in section 3 of the thesis that Petroleum Act and Petroleum Regulations in its Chapters 3 regulate production licence. Nevertheless these legal instruments do not provide any provisions on expropriation of such licence.[221] In general, in the Kingdom of Norway are licences subject to Norwegian constitutional and administrative law, and these two legal instruments provide provisions on expropriation. Hence under Norwegian law, Norwegian constitutional and administrative law govern expropriation of production licences for petroleum activities.[222]

8.1.1 Legal basis

The right to expropriation is enshrined in Article 105 of the Norwegian Constitution.[223] However, the actual authorisation of expropriation is provided by the Act no. 704 of 2009 - the Expropriation Act[224] which falls among the Norwegian administrative law acts. The Expropriation Act lists totally 55 purposes for a legal expropriation.[225] Applicable to the lawsuit against Norway might be the last purpose which is enshrined in section 55, namely conservation of nature.[226] The general conditions for expropriation under the Expropriation

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[221] Norwegian Ministry of Petroleum and Energy, 'Facts 2013 - The Norwegian Petroleum Sector' (March 2013) <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf> accessed 1 July 2017, p. 14.

[222] Alvik I, 'Petroleum law – lecture 2: Host government agreements' (*University of Oslo - Scandinavian Institute of Maritime Law*, 6 March 2015) <http://www.uio.no/studier/emner/jus/jus/JUS5411/v15/presentasjoner/petroleum-law---host-government-agreements.pdf> accessed 1 July 2017.

[223] *The Norwegian Constitution*, 17 May 1814, Article 105.

[224] *The Expropriation Act* - Act 19 June 2009 No 704.

[225] Håvard Steinsholt, 'Some Aspects of Norwegian Expropriation - Input to Comparative Study of Chosen Expropriation Issues: Germany, Norway and Poland' [2010] FIG Congress, p. 2.

[226] *Supra at* 224, para. 2, section 55.

Act are that expropriation must be necessary and that the positive effects of the expropriation must exceed the negative effects.[227] To these conditions are added requirements from the Norwegian Constitution that the expropriation must be for public use, meaning public purpose, and it must be against full compensation.[228]

The typical question of whether these conditions are fulfilled is rarely a matter of dispute in Norway.[229] The author of this thesis is of the opinion that it would not be problematic for the Norwegian Government to justify expropriation of production licences. Whether the expropriation is necessary and whether its positive effects prevail over the negative ones that will be only up to the respective court or Tribunal to decide as these conditions are rather subjective.[230] Nevertheless, these requirements should not impose any particular challenges when one takes into account the discussed arguments of Norwegian academics and environmental organisations Greenpeace and Nature & Youth. The public purpose condition should not be an issue too as it is broadly interpreted in Norway[231] and again the argumentation of the legal scholars and the applicants to the case provide solid basis for fulfilling the requirement of public purpose. The only issue that is always questioned in expropriation procedure under Norwegian law, and not only under this law, is the proper amount for compensation.[232] Provided that Norway will lose the lawsuit and thus will have to expropriate the oil companies, it is very likely that the amount of compensation will be a big issue. This is because once the production licence will be taken away, the oil companies will not be able to drill in the Barents Sea and thus will not be able to get the expected revenue from the drilling. The author believes that Norway will compensate the oil companies for the costs connected with getting the production licence but it can be expected that Norway will refuse to compensate the investor for possible lost profits. Therefore can we expect another Vattenfall case?

The issue of compensation and the way it is calculated is further discussed in the subsection expropriation procedure.

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[227] Helle Tegner Anker and others, *Legal systems and wind energy: a comparative perspective* (Kluwer Law International 2008), p. 104.

[228] *The Norwegian Constitution*, 17 May 1814, Article 105.

[229] *Supra at* 227.

[230] Håvard Steinsholt, 'Some Aspects of Norwegian Expropriation - Input to Comparative Study of Chosen Expropriation Issues: Germany, Norway and Poland' [2010] FIG Congress, p. 4.

[231] *Ibid*.

[232] *Supra at* 227.

8.1.1.1 The Petroleum Act expropriation

Section 5-6 of the Petroleum Act is concerned with "takeover by the State", which basically refers to expropriation:

"The State has a right to take over the licensee's fixed facility when a licence expires, is surrendered or revoked, or when the use of such facility has been terminated permanently. The King decides with binding effect if and to what extent compensation shall be paid for the takeover. […]."[233]

This is the only provision on expropriation in the entire Petroleum Act. It however refers to expropriation of fixed facilities and there are no such facilities in the Barents Sea areas that were designated for petroleum activities as part of the 23rd Norwegian License Round. In this round the oil companies were "only" awarded production licences which would subsequently allow them to build such facilities in order to exploit oil and gas. Hence the Section 5-6 is of no use for the present case Greenpeace and Nature & Youth vs. Norwegian Government as it only concerns production licences.

8.1.2 Expropriation procedure

The expropriation procedure under Norwegian law starts with an expropriator bringing a case before a Norwegian Court. The expropriator must provide the court with all relevant information and justify why he or she takes such steps. Furthermore, there is a need to investigate and document the consequences for the affected right holder and therefore the expropriator must be in contact with him or her. The parties must first try to reach an agreement and then consequently public hearing takes place.[234]

The task of the court before which the matter was brought is not only to scrutinise whether the necessary steps in expropriation procedure were taken and if the qualitative law standards were fulfilled,[235] but also to decide on the amount of compensation. The appropriate compensation is calculated pursuant to the Act no. 17 of 1984 on Compensation in Cases of

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[233] *The Petroleum Act* - Act 29 November 1996 No 72 relating to petroleum activities, section 5-6.

[234] Håvard Steinsholt, 'Some Aspects of Norwegian Expropriation - Input to Comparative Study of Chosen Expropriation Issues: Germany, Norway and Poland' [2010] FIG Congress, p. 6.

[235] *Ibid*, p. 5.

Expropriation.[236] This Act in its Section 10 stipulates that the compensation must be determined in accordance with the market value of the expropriated property or investment on the date when the expropriation takes place.[237] The market value is established on the current use of the investment or other usage that may be reasonably anticipated.[238] The decision of the Court on compensation can be appealed. Once the decision is final, the expropriator is allowed to acquire the property only after paying the agreed compensation, including all procedural costs.[239]

8.1.3 Norway - expropriation unfriendly?

Generally, expropriation is not very much used in the Kingdom of Norway. The preferred form is a voluntary agreement. Norwegians argue that expropriation is controversial, time consuming and expensive. Norwegians admit that there are many agreements which are signed under a threat of resorting to expropriation.[240]

8.2 The UN resolutions

The probability that any of the contracts between Norwegian Government and oil companies will follow the UN resolutions, be it the PSNR or the Charter, is not very high. However, it is worth considering them, especially the PSNR as it deals with issues connected to natural resources of States and it reflects international customary law.[241]

8.2.1 The Permanent Sovereignty over Natural Resources

On the 14th of December 1962 the resolution 1803 (XVII) on the PSNR was adopted by the General Assembly (hereinafter GA) of the UN. The focus of the PSNR is on international law areas that relate to the exploitation of raw materials of one State by juridical persons or individuals that are nationals of another State.[242]

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236 Ole Kristian Fauchald and Kjersti Schiøtz Thorud, 'Protection of Investors against Expropriation' [2006] Universitetsforlaget, p. 136.
237 *Ibid*.
238 *Ibid*, pp. 134, 135.
239 Håvard Steinsholt, 'Some Aspects of Norwegian Expropriation - Input to Comparative Study of Chosen Expropriation Issues: Germany, Norway and Poland' [2010] FIG Congress, p. 6
240 *Ibid*, p. 5.
241 Jose Magnaye, 'Expropriation in International Investment Law - Presentation' (University of Vienna - Faculty of Law), 25 October 2016.
242 Legal UN, 'Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII)' (*Audiovisual Library of International Law*, 2017) <http://legal.un.org/avl/ha/ga_1803/ga_1803.html> accessed 2 July 2017.

8.2.1.1 The PSNR - history

It was in the 1952 when the GA requested the Human Rights Commission to prepare recommendations regarding international respect for peoples right to self-determination. It was recommended by the Commission on Human Rights to establish a separate commission that will conduct a survey on the peoples and nations right to permanent sovereignty over their natural resources. The Commission on Human Rights noted that the latter right represents a basic constituent of the self-determination right. Based on the Human Rights Commission's recommendation, the GA established on the 12th of December 1958 the UN Commission on Permanent Sovereignty over Natural Resources under resolution 1314 (XIII). Consequently, this Commission adopted then in 1961 a draft resolution which outlined principles regarding permanent sovereignty over natural resources. Following consideration of this draft resolution by the Second Committee of the GA and the Economic and Social Council, the GA finally adopted resolution 1803 (XVII).[243]

8.2.1.2 The PSNR - scope

The PSNR obliges both international organisations and States to respect sovereignty of nations and peoples over their natural resources and wealth in accordance with the UN Charter and the principles of the resolution on PSNR. Those principles are embodied in totally eight Articles. Pursuant to PSNR's Articles one, two and three the States have control over its natural resources and all activities that are connected to it, such as regulating foreign investor admission, granting concessions on exploitation of a particular natural resource, etc.[244] Other provisions of the PSNR deal with issues such as, *inter alia*, foreign investment,[245] expropriation and compensation, and settlement of disputes that arose out of compensation.[246]

8.2.1.3 The PSNR - expropriation

With granting licences to investors for exploitation of natural resources the State hands over a certain control over some of its most important assets.[247] Therefore, as the State wants to have a word in the exploitation and development of its natural resources, it is important that it

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[243] Legal UN, 'Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII)' (*Audiovisual Library of International Law*, 2017) <http://legal.un.org/avl/ha/ga_1803/ga_1803.html> accessed 2 July 2017.
[244] 'Permanent Sovereignty over Natural Resources' [1974] 68(2) American Journal of International Law, p. 382.
[245] *Supra at* 243.
[246] *Supra at* 244.
[247] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997), p. 235.

enjoys freedom to regulate investment and thus have the right to expropriate investors, of course only under certain conditions.[248] The act of expropriation is present in Article 4 of the PSNR:

"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[...]."[249]

To put it simply, for expropriation there are basically two requirements, it must be for a public purpose, security or national interest, and it must be against compensation. For assessing compensation both national law and international law are of importance. The latter fact is especially important as regards compensation under the Charter of Economic Rights and Duties of States, as will be seen in the upcoming subsection.

When applying the facts of the lawsuit against Norway to the expropriation conditions of the PSNR then it is clear, pursuant to the thesis's author, that there should be no problem with the first condition of public purpose but again the compensation requirement will be an issue. The reasoning for this view of the author is underpinned by what was argued in the section on expropriation under Norwegian law.

8.2.2 The Charter of Economic Rights and Duties of States

On the 12th of December 1974 the GA adopted resolution 3281 (XXIX) on the Charter of Economic Rights and Duties of States. The Charter put a great emphasis on trade and the support of developing countries.[250] When the vote on the adoption of the resolution was conducted 115 countries voted in favour, 6 countries against and 10 countries abstained.[251] The reason why some countries voted against or abstained will be elaborated further in the text.

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[248] Jane Hofbauer, 'The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications' (University of Iceland, Faculty of Law), August 2009, p. 19.

[249] UN General Assembly, *Permanent sovereignty over natural resources*, 17 December 1973, para. 4.

[250] Joseph Vanzant, 'Charter on Economic Rights and Duties of States: A Solution to the Development Aid Problem?' [1974] 4(2) Georgia Journal of International and Comparative Law, p. 441.

[251] Legal UN, 'Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)' (*Audiovisual Library of International Law*, 2017) <http://legal.un.org/avl/ha/cerds/cerds.html> accessed 1 July 2017.

8.2.2.1 The Charter - history

Former Mexican president Luis Echeverría proposed the adoption of the Charter at the third sessions of the UN Conference on Trade and Development which was held in Santiago, Chile from April to May in 1972. The Conference adopted on the 18th of May 1972 a resolution 45 (III) with which it decided to establish a Working Group on the Charter of the Economic Rights and Duties of States and its task was to draft the Charter. In 1974 at the fourth and last session of the Working Group the final draft of the Charter emerged. It was then sent to the Trade and Development Board for suggestions and comments and after some time, on the 12th of September 1974, the Trade and Development Board subsequently forwarded the draft, together with its remarks, to the GA. The GA then adopted the abovementioned resolution 3281 (XXIX).[252]

8.2.2.2 The Charter - scope

The Charter of Economic Rights and Duties of States focuses on international economic, political and social problems that stem from growing commercial gaps between less-industrialised developing countries and industrialised developed countries. Through the Charter the developing countries seek a legally binding commitment that the developed countries will make a good faith effort, measured by the Charter's standard, in order to ensure more equal distribution of rewards and profits from global trade.[253]

The Charter itself contains a preamble, three chapters and 34 provisions in total. Chapter I deals with fundamentals of international economic relations, chapter II tackles economic rights and duties of states, and the final chapter III lists common responsibilities towards international community.[254]

8.2.2.3 The Charter - expropriation

The act of expropriation is enshrined in the subsection (2)(c) of the Article 2 of the Charter:

"Each State has the right: To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such

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[252] Legal UN, 'Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)' (*Audiovisual Library of International Law*, 2017) <http://legal.un.org/avl/ha/cerds/cerds.html> accessed 1 July 2017.

[253] *Ibid*.

[254] *Ibid*.

measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. […].”[255]

Article 2(2)(c) of the Charter of Economic Rights and Duties of States was heavily disputed. It even led the majority of western countries to vote against the Charter or absent. As was mentioned above 6 countries voted against and 10 countries abstained. What was the reason? Article 2(2)(c) still refers to appropriate compensation in case of expropriation like the PSNR but the Charter states that *“relevant laws and regulations”* must be taken into account while assessing the appropriate compensation. The phrase *“relevant laws and regulations”* means only domestic law and regulations of a particular State, hence no international law applies.[256]

Some interpreted the wording *“all circumstances that the State considers pertinent”* as a possible reference to international law. However, when it comes to expropriation under the Charter of Economic Rights and Duties of States then international law is regarded only as a circumstance and not as a legally binding instrument. Therefore the questions on compensation controversy under the Charter shall be settled under domestic law of the expropriating State and its courts. This is the core reason why majority of the capital exporting countries decided to vote against the Charter. Unlike the Charter, the PSNR offers also the possibility of international adjudication.[257] Therefore it is clear, at least in the opinion of the author of the thesis, that the parties to a contract on production licence for petroleum activities in the Barents Sea would definitely not follow the Charter of Economic Rights and Duties of States. However, the PSNR sounds like an interesting and viable option which could satisfy the demands of both Norwegian Government and foreign investors.

8.3 The ICSID and the MIGA

Domestic courts are not very friendly to foreign investors. In fact there is an abundance of reasons why a foreign investor should not choose to use the services of national courts in case of any discrepancies with regards to his or her investment. Primarily one can expect lack of impartiality. Additionally, the domestic court will naturally apply national law of a particular host State which will very likely disadvantage the foreign investor. Finally, national courts do not have sufficient expertise in order to deal with international investment disputes and its

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[255] UN General Assembly, *Charter of Economic Rights and Duties of States*, 17 December 1984, Article 2 (2)(c).
[256] Jose Magnaye, 'Expropriation in International Investment Law - Presentation' (University of Vienna - Faculty of Law), 25 October 2016.
[257] *Ibid*.

challenges.[258] Therefore if a foreign investor can choose between going to a national court or going to one of the international institutions concerned with investment protection then the investor will always go for the second option.[259] Both the ICSID and the MIGA are the main international organisations dealing with investment protection.[260]

8.3.1 The ICSID

The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was initiated by the Executive Directors of the World Bank. The Convention was signed on the 18th of March 1965 and consequently entered into force on the 14th of October 1966. The ICSID Convention provides for the ICSID's mandate, core functions and organisation.[261]

One hundred and sixty-one States are Contracting States to the ICSID. The main goal of this institution is to serve as an impartial international forum providing facilities for solving investment legal disputes through arbitration procedure.[262] The ICSID is regarded as the leading international arbitration institution focusing on resolving disputes between States and foreign investors.[263] The UN Conference on Trade and Development publication from 2009 stated that more than 65% of all investment cases worldwide are dealt by the ICSID.[264]

8.3.1.1 Advantages of the ICSID institution

The ICSID provides many advantages for investors and that is the reason why they prefer it. This institution provides investors with a direct route to neutral dispute resolution which lowers commercial risk, facilitate confidence in international investment and it also helps to avoid political sensitivity that is usual in a State to State adjudication.[265] What is more, an investor does not need to ask its own State to take action under the head of diplomatic

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[258] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 7.
[259] Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 23 May 2017.
[260] Vaughan Lowe, 'Changing Dimensions of International Investment Law' [2007] University of Oxford Faculty of Law Legal Studies Research Paper Series, p. 32.
[261] *Supra at* 258, p. 5.
[262] *Ibid*.
[263] The World Bank, 'About ICSID' (*The World Bank*, 2017) <https://icsid.worldbank.org/en/Pages/about/default.aspx> accessed 8 July 2017.
[264] *Supra at* 258, p. 5.
[265] Susan Franck, 'The ICSID effect? Considering potential variations in arbitration award' [2011] 51(4) Virginia Journal of International Law, pp. 898-914.

protection.[266] On the contrary, the investors can present their claim directly before a Tribunal established by the ICSID.[267]

8.3.1.2 Advantages of the ICSID award

A prerogative of an ICSID award is that it is directly executable in other Contracting States.[268] Article 54 of the ICSID Convention holds that:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[269]

Hence the ICSID Convention requires all Contracting States, regardless of the fact whether they are parties to the dispute or not, to recognise and enforce arbitral awards rendered under the ICSID Convention.[270] It constitutes a violation of the Convention if a Contracting State does not follow the award.[271]

8.3.1.3 The ICSID criticism

In general it is acknowledged that the ICSID creates a favourable investment climate for both States and foreign investors.[272] Nevertheless, there are some critics who argue that arbitration under the ICSID provides more pro-investor interpretations and is contrary to States. Furthermore the critics claim that the ICSID constitutes the inequities of international investment system as it is biased against developing countries.[273] This criticism is however rather weak and unfounded as the statistics show that States won almost 60% of the ICSID cases.[274] Moreover the statistics also prove that ICSID is not a forum where the outcomes of arbitral awards would be predetermined.[275]

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[266] To exercise diplomatic protection means that a State takes an action against another State on behalf of its national whose rights were violated by the other State.
[267] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 7.
[268] *Ibid*.
[269] *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, Article 54.
[270] *Supra at* 267, p. 6.
[271] *Ibid*, p. 7.
[272] *Ibid*.
[273] *Ibid*.
[274] *Ibid*.
[275] Susan Franck, 'The ICSID effect? Considering potential variations in arbitration award' [2011] 51(4) Virginia Journal of International Law, pp. 898-914.

8.3.1.4 Alternative to the ICSID?

An alternative to the ICSID arbitration could be an ad hoc arbitration under the United Nations Commission on International Trade Law (hereinafter UNCITRAL) rules. However, again the ICSID trumps the UNCITRAL rules with its advantages. The main advantage is that the ICSID arbitration rules are specifically tailored to arbitration where a government party is involved.[276] Whereas the UNCITRAL rules are much broader as they are designed primarily for commercial arbitration.[277]

The downside of non-ICSID arbitral awards is the fact that a judge may set these aside in the domestic judicial system of the State in which the arbitration occurred. The non-ICSID arbitral awards are vulnerable to judicial review.[278]

It is not very plausible that a contract between Norwegian Government and an investor on production licence for petroleum products would have a clause on submitting the matter in case of dispute to the UNCITRAL arbitration, as it is primarily focused on commercial arbitration and it does not have the advantageous of the ICSID arbitration. Therefore the ICSID is more viable option as it already counts with the participation of a State and is specifically tailored for the type of dispute that is likely to appear on the horizon as a result of the lawsuit against Norway for the 23rd Norwegian License Round.

8.3.1.5 The ICSID and expropriation?

The ICSID Convention does not have any provisions on expropriation. Nevertheless, under the supervision of the ICSID Tribunals were decided many cases on the issue of expropriation. The lawsuit against Norway has certain similarities with the famous *Santa Elena* case.[279] Therefore it is worth analysing it.

8.3.1.5.1 Santa Elena case

The ICSID case *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* was a culmination of a twenty-two year long dispute which involved expropriation by the Costa

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[276] Christopher Dugan, *Investor-State Arbitration* (Oxford University Press 2008), p. 45.

[277] Francesco Gelmetti, 'Indirect expropriation under international investment law' (Universita Degli Studi di Milano, Facolta di Giurisprudenza), September 2013, p. 8.

[278] Diana Wick, 'The counter-productivity of ICSID denouncement and proposals for change' [2012] 11(2) Journal of International Business and Law, p. 241.

[279] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* [1996] No. ARB/96/1 (ICSID Case).

Rica Government of a property called “Santa Elena” and the issue of compensation due for owners of that property as a result of the expropriation.[280]

Compania del Desarrollo de Santa Elena, S.A (hereinafter CDSE) owned *Santa Elena* property as it purchased it in 1970 in order to build a tourist resort and residential community there. Santa Elena comprised more than fifteen thousands of hectares of land, thirty kilometres of Pacific Ocean coastline, numerous springs, mountains, rivers, valleys, and a tropical dry forest. However, Costa Rica issued, on the 5th of May 1978, an expropriation decree for Santa Elena in order to convert the property into a national park. The controversial issue was that CDSE was not compensated by Costa Rica Government.[281] Therefore CDSE decided to institute ICSID arbitration proceedings against Costa Rica. The ICSID Secretary-General registered the request on the 22nd of March 1996.[282]

Costa Rica did not receive the title to the property until the Tribunal award, some 22 years after the 1978 decree.[283] On the 17th of February 2000, after written and oral pleadings, the arbitral Tribunal rendered its award ordering Costa Rica to pay compensation in the amount of sixteen million US Dollars for the expropriation of Santa Elena.[284] The Tribunal’s reasoning for such decision was:

“Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”[285]

Taking into account the very good reputation of the Kingdom of Norway in the field of international investment law, the author of this thesis does not believe that the Norwegian Government would refuse to compensate the oil companies for taking away the production

[280] Kenneth I. Juster, 'Arbitral & Judicial Decision: The Santa Elena Case: Two Steps Forward, Three Steps Back' [1999] 10(3) American Review of International Arbitration, pp. 371-381.
[281] *Ibid*.
[282] The World Bank, 'Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica (Case No ARB/96/1)' (*The World Bank*, 2000) <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C152/DC538.pdf> accessed 4 July 2017.
[283] *Supra at* 280.
[284] *Supra at* 282.
[285] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* [1996] No. ARB/96/1 (ICSID Case).

licences based on the argument that it is for environmental purposes. In the event that the Norwegian Government would refuse to compensate, well then the *Santa Elena* case can serve as a good indication how the dispute will end. Indeed, there must be a compensation for act of expropriation even if such act is initiated for environmental purposes. Admittedly, the approach of precedents, which works for instance in Common law countries, is not applicable to the decision making of the ICSID Tribunals. However, previous decisions are cited by the ICSID Tribunals and they like to rely on previous decisions, although not always.[286]

8.3.2 The MIGA

On the 11th of October 1985 the Convention Establishing the Multilateral Investment Guarantee Agency was submitted to the Board of Governors of the International Bank for Reconstruction and Development. Consequently the Convention went into effect on the 12th of April 1988 and with this the MIGA emerged.[287]

The goal of the MIGA is to promote foreign investment and international development. The MIGA's goal is achieved by its three main roles. Its first role is that it serves as an insurer against political risks.[288] The MIGA's second main role is to provide developing States with technical assistance in order to create environment that has favourable conditions for investment and is attractive for foreign investors.[289] The third main role of the MIGA is to function as an institutional mediator in case of investment disputes.[290]

8.3.2.1 The MIGA and expropriation

Article 11(a) of the MIGA Convention deals with risks that the Convention covers and it states that *"[...] Agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk."* One of these types of risks is Expropriation and Similar Measures which is enshrined in subsection (ii) of the Article 11(a). In other words, MIGA provides protection against losses caused by expropriation:[291]

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286 Christoph Schreuer, 'International Investment Law - Presentation' (University of Vienna - Faculty of Law), 16 May 2017.
287 *The Convention Establishing the Multilateral Investment Guarantee Agency*, 11 October 1985.
288 Vaughan Lowe, 'Changing Dimensions of International Investment Law' [2007] University of Oxford Faculty of Law Legal Studies Research Paper Series, p. 31.
289 *Ibid*, p. 32.
290 *Ibid*.
291 The MIGA, 'Investment Guarantees - Types of Coverage' (*The MIGA*, 2017) <https://www.miga.org/investment-guarantees/overview/types-of-coverage> accessed 1 July 2017.

“Any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.”[292]

This provision defines the expropriation risk and it covers measures attributable to the host State government such as confiscation, nationalisation, seizure, sequestration, attachment and freezing of assets. The measures that are normally taken by a government in order to regulate its economic activity, such as labour and environmental legislation, taxation, or measures for maintaining public safety, are not meant to be covered by this Article unless they discriminate against the guarantee holder.[293]

8.3.2.2 Is the MIGA a viable option?

Indeed, one of the main roles of the MIGA is to function as an institutional mediator in case of investment disputes. Nonetheless, it is apparent that the main focus of the MIGA is on developing countries and providing them with technical assistance in order to support investment in such countries.[294] Moreover, as regards expropriation, under the MIGA there is “only” the possibility to insure against the risk of expropriation, and it does not provide any conditions under which an expropriation can be carried out. Therefore, as regards the contract between the Norwegian Government and oil companies on petroleum production licence for mining in the Barents Sea, it is very unlikely that the parties to such contract would use the services of this institution.

9. Opinion of the author of the thesis

In this section of the thesis the author will provide his opinion on what most probably governs the contracts on petroleum production licences for drilling in the Barents Sea, who will be most likely the winner of the case Greenpeace and Nature & Youth vs. Norwegian

[292] *The Convention Establishing the Multilateral Investment Guarantee Agency*, 11 October 1985, Article 11 (a)(ii).
[293] The MIGA, 'Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency' (*The MIGA*, 14 November 2010) <https://www.miga.org/documents/commentary_convention_november_2010.pdf> accessed 9 July 2017, p. 9.
[294] Vaughan Lowe, 'Changing Dimensions of International Investment Law' [2007] University of Oxford Faculty of Law Legal Studies Research Paper Series, p. 32.

Government, and whether the Kingdom of Norway will expropriate and compensate the oil companies or not.

9.1 What governs the contracts?

Contracts on production licence concluded between Norwegian Government and the oil companies are not publicly available and hence their content is unknown. In general, petroleum activities in Norway are governed by both domestic law and international law. Therefore the opinion of the author is that the contracts on production licence are governed primarily by Norwegian law, both constitutional and administrative law, and international law figures in the contracts as an element of stabilisation because foreign investors are always rather reluctant to contracts being governed only by domestic law. The PSNR, which reflects customary international law, can be regarded as an international standard which the contracts on production licence will follow. This is because the PSNR emerged from a thorough analysis of bilateral and multilateral international agreements, national legislations, international adjudications and arbitrations, and it covers many aspects of permanent sovereignty and related property and exploitation rights.[295] Finally, the thesis's author believes that the production licence contracts have a clause that in case of a dispute the matter will be referred to the ICSID. This is because the ICSID is advantageous for both parties and specifically deals with investment disputes, and because the MIGA is not of relevance as it is mainly occupied with supporting developing countries, and because the UNCITRAL arbitration is primarily focused on commercial arbitration and has many disadvantages in comparison to the ICSID.

Therefore the author's view is that the production licence contracts are governed by Norwegian constitutional and administrative law, subject to PSNR as an element of stabilisation and with the clause on dispute settlement under the ICSID Convention.

9.2 Who will win the case?

It is very hard to predict an outcome of a case that has not even started but it is not impossible. The author believes that crucial will be how the Norwegian courts, mainly the Supreme Court, will interpret Article 112 of the Norwegian Constitution on the right of peoples to environment.

[295] 'Permanent Sovereignty over Natural Resources' [1974] 68(2) American Journal of International Law, p. 382.

As was discussed in section 4 of this thesis, whatever decision will be rendered by Norwegian courts of lower instances, neither of the parties to the dispute will be happy. Therefore the case will have to be decided very likely by the court of final instance, namely the Norwegian Supreme Court.[296]

The Norwegian Supreme Court Judge Arnfinn Bårdsen emphasised the amendment of the Norwegian Constitution in 2014 which strengthened Article 112. Judge Bårdsen states that with the amendment the Supreme Court should apply dynamic method of interpretation. Mr Bårdsen claims that *"[…]the Court has no choice but to recognise the dynamic nature of the interpretation of the Constitution and that the constitutional norms must be applied with a view to the societal conditions, values, legal opinions and needs of today – not of the past."*[297]

An interpretation of a provision is just a piece of a puzzle. Another task for the Norwegian courts, when deciding on the question of validity of the final license decision for awarding production licences, will be to balance between on the one hand jobs and profits that could come with the investments in the oil industry, and on the other hand the need for protection of environment and, possibly, constitutional order. What will prevail?

It is not surprising that many contracts are awarded in Norwegian oil and gas projects. This is because the economy of Norway is heavily dependent on oil industry.[298] There are around two hundred and fifty thousand Norwegian jobs in this industry. [299] These jobs require high technical skills and they are extremely expensive and thus put pressure on national salary levels. It is interesting to note that manufacturing wages in Norway are 70% higher than average in the EU. For a small country like the Kingdom of Norway, with a population of over five million,[300] so many jobs in oil industry could lead to financial disaster.[301] This might

[296] Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 65.
[297] *Ibid*, p. 62.
[298] Santander trade, 'Norway: Foreign Investment' (*Santander Trade Portal*, June 2017) <https://en.portal.santandertrade.com/establish-overseas/norway/foreign-investment> accessed 1 July 2017.
[299] Sven Åke Bjørke, 'What If the Norwegian Oil Economy Is a Bubble?' (*United Nations University*, 25 September 2013) <https://ourworld.unu.edu/en/what-if-the-norwegian-oil-economy-is-a-bubble> accessed 5 July 2017.
[300] Worldometers, 'Norway Population' (*Worldometers*, 2017) <http://www.worldometers.info/world-population/norway-population/> accessed 2 July 2017.
[301] *Supra at* 299.

explain the reason why the country decided to allow oil exploration and drilling in areas where it would not allow such activity some ten or twenty years ago.[302]

The largest oil firm in Norway is Statoil which resides in Stavanger and hence the economy of this city is largely based on oil and gas industry. If the Norwegian courts will decide against the Norwegian Government, then this decision could represent a “dangerous” precedent for future petroleum drilling in Norway and have negative economic consequences for the entire Kingdom. Some said that Stavanger can become a new Detroit, referring to the city in US where the automobile industry profited very well before the city went bankrupt in 2013.[303]

There are also good arguments for environment protection. Large scale petroleum exploitation in the Arctic increases the risk of black carbon on the Arctic ice and thereby exacerbating ice melting. Researches done by scientists show that the temperature of Arctic surface is five times more sensitive to black carbon emitted from within the Arctic than to CO_2 emissions from midlatitudes.[304] Furthermore, petroleum exploitation carries the risk of increased melting of permafrost in the land that surrounds the Arctic, thereby animals and plants that were frozen in the ground will start to decay and will release methane and CO_2 to atmosphere. In addition, CO_2 is absorbed by the oceans which lead to acidification of oceans and this causes damage to, *inter alia*, corals and shellfish.[305] Importantly, one has to take into account the general environmental awareness that is typical for Norway and which was touched upon in the introduction section of the thesis. Another good argument is that the Kingdom of Norway does not have to rely only on oil and gas as the country has excellent conditions[306] for getting an abundance of environment friendly energy from water and wind by building more hydroelectric power stations and wind turbines.[307]

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302 Beate Sjåfjell and Anita Halvorssen, 'The Legal Status of Oil and Gas Exploitation in the Arctic: The Case of Norway' [2016] 2(15) Oil, Gas & Energy Law Journal, p. 65.

303 Hilde Lewis, 'Stavanger kan bli et nytt Detroit' (*Aftenposten*, 24 October 2014) <https://www.aftenposten.no/norge/--Stavanger-kan-bli-et-nytt-Detroit-76196b.html> accessed 7 July 2017.

304 Maria Sand and others, 'Arctic surface temperature change to emissions of black carbon within Arctic or midlatitudes' [2013] 118(14) Journal of Geophysical Research, pp. 7788–7798.

305 Yangmay Downing, 'Ocean Acidification and Protection under International Law from Negative Effects: A Burning Issue amongst a Sea of Regimes?' [2013] 2(2) Cambridge Journal of International and Comparative Law, pp. 242-273.

306 The Kingdom of Norway is surrounded by water and the coastline in Norway is characterised by windy weather.

307 Norwegian Ministry of Petroleum and Energy, 'Renewable energy production in Norway' (*Government*, 11 May 2016) <https://www.regjeringen.no/en/topics/energy/renewable-energy/renewable-energy-production-in-norway/id2343462/> accessed 2 July 2017.

There can be endless arguments for both sides. Nonetheless, the author of this thesis believes that by balancing the pros and cons of opening or not opening the Barents Sea for oil drilling, the Norwegian courts, the Supreme Court respectively, will decide in favour of the applicants – Greenpeace and Nature & Youth. The general environmental concern in Norway, the persuasive and scientifically proven arguments of negative consequences of mining in the Arctic, the recent amendment of the Norwegian Constitution strengthening Article 112, all these arguments are in the author's opinion stronger than economic benefits that would certainly come with allowing oil drilling in the Barents Sea. What is more, if Norway wants to retain its status of pro-environment country, it will have to decide contrary to the defendant. Admittedly, it can be expected that there will be a considerable political pressure from the Norwegian Government on the Norwegian courts to decide in a way that the oil companies could keep their production licences.

9.3 Expropriating investors?

Provided that the Norwegian Government will lose the case then, pursuant to the author's opinion, the production licences that were awarded as part of the 23rd Norwegian License Round must be taken away from the investors. The only way how to achieve this is through the act of legal expropriation. Admittedly, another "option" could be if the Norwegian Government would breach the contracts. However the likelihood of this happening is extremely small and it would be very suspicious indeed. Therefore the author believes that Norway will stand up to its good reputation in the international investment law and honour the contract.

As was seen in the analysis above, the conditions for lawful expropriation are basically the same regardless of the legal instrument under which the act of expropriation is conducted, and there should be no problem with fulfilling the expropriation requirements in the case Norway would lose the case and hence had to take away the production licences from the investors. The only expropriation condition that can be expected to be problematic in this case is the one on compensation and it can be assumed that it will lead the case before an ICSID Tribunal. The author believes that compensation for capital invested in the production licences will be unproblematic. However, it is probable that oil companies will demand compensation for lost profits because they expected that with buying a production licence they will profit from subsequent oil exploitation. One can assume that the Kingdom will have a very similar opinion on this matter as Germany in the Vattenfall case.

All in all, if the Norwegian Government will lose the case against Greenpeace and Nature & Youth, it can and actually will have to expropriate the production licence owners as it is the only option how to deal with the situation. Provided that Norway will follow the conditions for a lawful expropriation then there should be no problem. However the proper amount of compensation will presumably be a big issue.

10. Conclusion

Norway is one of the best and safest countries to invest in. In fact investing in petroleum activities in this Scandinavian country was until recent time considered as safe and unproblematic, especially because the Kingdom of Norway has never been involved in any case of disagreement concerning foreign investment and no international controversies with regards to Norway were registered. However, stability of the investment environment in Norway can decrease with the lawsuit that was brought against the Norwegian Government.

The process which allows an oil company to engage in petroleum activities in Norway is rather complicated but the most important part of the process is obtaining the production licence which allows the awarded investor to gradually start with oil and gas exploitation. With challenging the production licences awarded as part of the 23rd Norwegian License Round, the environmental groups Greenpeace and Nature & Youth, attempts to prevent petroleum mining in the Barents Sea. It appears, from the analysis in the thesis, that their effort will be successful.

General environmental concern of the public in Norway, scientifically proven arguments that drilling in the Arctic has negative consequences for the environment, a very recent amendment of Norwegian Constitution which strengthens the provision on the right of every person in Norway to a healthy environment and a liveable climate, these are the main arguments that are in the author's view stronger than economic benefits of mining in the Barents Sea. Therefore, although it is only an assumption, based on what was elaborated in this thesis, the author is of the opinion that the Norwegian Government will lose the case. Hence it will have to take measures in order to prevent petroleum exploitation in the designated area. This will be achieved by taking away the awarded production licences in the 23rd Norwegian License Round, and this taking will be conducted through the act of expropriation which is a prerogative of the State and to which the Kingdom of Norway is entitled pursuant to its Constitution under Article 105. Nevertheless, the author acknowledges no matter what the outcome will be in the case Greenpeace and Nature & Youth vs. Norwegian Government, it is clear that the decision of the Norwegian courts will be historical.

The content of the production licence contracts is unknown but from the analysis conducted above the most probable scenario is that such contracts are governed by Norwegian constitutional and administrative law, subject to PSNR as an element of stabilisation and with a clause on dispute settlement under the ICSID Convention.

According to traditional expropriation law model an expropriation is lawful if it is for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and against compensation. Under the PSNR expropriation must be for a public purpose, security or national interest, and it must be against compensation. The conditions under Norwegian Expropriation Act and Norwegian Constitution are that expropriation must be necessary, the positive effects of the expropriation must exceed the negative effects, and it must be for public purpose and against full compensation. In the opinion of the author, no matter which legal instrument will be primarily followed, there will be no problem with any of the conditions for lawful expropriation, except for the compensation condition. This is because there is a high likelihood that the oil companies will, once they will be compensated for the production licences costs, also demand compensation for loss of profit from subsequent oil exploitation that would have occurred provided that the production licences would not have been taken away by the Norwegian Government.

In conclusion, the research question of the thesis was whether the Norwegian Government can expropriate investors of the 23rd Norwegian License Round provided that the lawsuit against Norwegian Government regarding the Arctic oil exploration, brought by the environmental groups Nature & Youth and Greenpeace, would be successful? The answer is: provided that the Norwegian Government will fulfil the conditions for lawful expropriation then yes indeed the Norwegian Government can expropriate the investors as it is its sovereign prerogative underpinned by Article 105 of the Norwegian Constitution.

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Abstract

In June 2016, as part of the 23rd Norwegian License Round, the Norwegian Government awarded ten production licences to several oil companies which entitled them to conduct petroleum exploitation in an unexplored territory of the Barents Sea close to the Arctic. Greenpeace and Nature & Youth, two major environmental groups, argued that drilling oil and gas in such territory will have serious consequences for the environment and therefore they brought a lawsuit against the Norwegian Government.

The thesis presumes that the applicants will win the case because of its sound arguments. Therefore the Norwegian Government will have to take away the awarded production licences through the act of expropriation, which is a prerogative of the State and to which Norway is entitled pursuant to its Constitution under Article 105. Nevertheless, there are several conditions which must be fulfilled in order to conduct an expropriation lawfully. These conditions depend on the applicable legal instrument but in essence the act of expropriation must be for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and against compensation. Admittedly, the content of the production licence contracts between Norwegian Government and investors is unknown for the public but the analysis in the thesis suggests that such contracts are governed by Norwegian constitutional and administrative law, subject to the Permanent Sovereignty over Natural Resources Declaration as an element of stabilisation and with a clause on dispute settlement under the International Centre for Settlement of Investment Disputes Convention.

The author argues that regardless of the applicable instrument, there will be no problem with any of the conditions for lawful expropriation, except for the compensation condition. This is because it is very likely that the investors will naturally not only demand compensation for production licence costs, which should not be an issue, but will also demand compensation for loss of profits, and it can be expected that Norway will be reluctant to cover such losses. However, provided that the Norwegian Government will fulfil the conditions for lawful expropriation then it can expropriate the investors of the 23rd Norwegian License Round.

Zusammenfassung

Im Juni 2016 verlieh die norwegische Regierung im Rahmen der 23. Norwegischen Lizenzrunde zehn Produktionslizenzen an mehrere Ölgesellschaften, die sie berechtigten, die Erdölausbeutung in einem unerforschten Gebiet der Barentssee in der Nähe der Arktis durchzuführen. Greenpeace und Nature & Youth, zwei große Umweltgruppen, argumentierten, dass Bohröl und Gas in diesem Gebiet schwerwiegende Folgen für die Umwelt haben werden und erhoben deshalb eine Klage gegen die norwegische Regierung.

Die Diplomarbeit geht davon aus, dass die Beschwerdeführer den Fall wegen ihrer fundierten Argumente gewinnen werden. Deshalb wird die norwegische Regierung die verliehenen Produktionslizenzen durch den Enteignungsvorgang, der ein Vorrecht des Staates vorsieht und zu dem Norwegen gemäß seiner Verfassung nach Artikel 105 berechtigt ist, entziehen müssen. Dennoch gibt es mehrere Voraussetzungen, die erfüllt sein müssen, um eine Enteignung rechtmäßig durchzuführen. Diese Voraussetzungen hängen vom anwendbaren Rechtsinstrument ab, aber im Wesentlichen muss der Enteignungsakt für einen öffentlichen Zweck auf einer nichtdiskriminierenden Grundlage nach dem ordnungsgemäßen gesetzlichen Verfahren und gegen Entschädigung erfolgen. Zwar ist der Inhalt der Produktionslizenzverträge zwischen norwegischer Regierung und den Anlegern für die Öffentlichkeit nicht bekannt, doch die Analyse in der Diplomarbeit deutet darauf hin, dass diese Verträge durch das norwegische Verfassungs- und Verwaltungsrecht geregelt werden, vorbehaltlich der Erklärung über Dauerhafte Souveränität über Naturressourcen als Element der Stabilisierung und mit einer Klausel über die Streitbeilegung im Rahmen der Konvention über das Internationale Zentrum für die Beilegung von Investitionsstreitigkeiten.

Der Autor argumentiert, dass es unabhängig von dem anwendbaren Instrument kein Problem mit den Voraussetzungen für eine rechtmäßige Enteignung geben sollte, mit Ausnahme der Kompensationsbedingung. Denn es ist sehr wahrscheinlich, dass die Anleger natürlich nicht nur eine Entschädigung für Produktionslizenzkosten, was kein Problem darstellen sollte, sondern auch eine Entschädigung für den Gewinnverlust verlangen werden, und es ist zu erwarten, dass Norwegen zögern wird, solche Verluste zu decken. Jedoch unter der Voraussetzung, dass die norwegische Regierung die Voraussetzungen für eine rechtmäßige Enteignung erfüllen wird, kann sie die Anleger der 23. Norwegischen Lizenzrunde enteignen.