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Is There a Need for Legal Reinforcement in Norway – to Protect and Preserve the Marine Environment From Offshore Petroleum Activities?

Master´s thesis, Law of the Sea

JUR – 3910

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Lastly, I want to dedicate this thesis in commemoration of my mentor, Dr. Onishi, who is unfortunately no longer with us today.

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List of Abbreviations

ABNJ – Areas beyond national jurisdiction

LOSC – United Nations Convention on the Law of the Sea

NCS – Norwegian continental shelf

CBD – Convention on Biological Diversity

GAIRS – Generally accepted international rules and standards

EU – European Union

EEA – The Agreement on the European Economic Area

UN – United Nations

ICJ – International Court of Justice

VCLT – Vienna Convention on the Law of Treaties

ITLOS – International Tribunal for the Law of the Sea

PCA – Permanent Court of Arbitration

MARPOL – The International Convention for the Prevention of Pollution from Ships

IMO – International Maritime Organization

CHAPTER 1: INTRODUCTION

1.1 The offshore oil industry in Norway

Norway´s petroleum era started in the late 1950s, with the notion that the general consensus was that a minority quantity of individuals believed that the NCS filled with rich oil and gas deposits[1]. At one point, the Geological Survey of Norway wrote to the Ministry of Foreign Affairs in 1958 that finding coal, oil or sulphur in the continental shelf off the coast of Norway could potentially be discontinued. However, the discovery of the Groningen gas field in the Netherlands in 1959 re-introduced the idea that there could be valuable hydrocarbons under the North Sea[2].

The key term in relation to the topic of this thesis is comprehensiveness. Comprehensiveness of the legal apparatus´ that is required to provide some form of protection of the oceans due to heavy involvement from human activities. The greatest challenges that are apparent today in relation to protection and preservation of the marine environment, in the opinion of the author, is a balance between economic and environmental interests in light of activities at sea.

The Norwegian Government proclaimed sovereignty over their continental shelf in May 1963, and a new Act was established comprising of any natural resources found in the continental shelf – belonged to the Norwegian State[3]. Naturally, the State of Norway additionally needed to conduct negotiations due to delimitation prospects in claiming subsequent areas in the North Sea, Norwegian Sea and Barents Sea[4].

Looking at the timeline from the beginning of this century, the NCS was opened up to more companies in addition to the big international companies already in its existence. This was a

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[1] Norwegian Petroleum «*Norway´s Petroleum History*» https://www.norskpetroleum.no/en/framework/norways-petroleum-history/ accessed 06.06.2023. Ref. Lov om petroleumsvirksomhet [petroleumsloven] LOV-1996-11-29-72 (Petroleum Act 1996).

[2] Ibid.

[3] Ibid.

[4] Agreement between Denmark and Norway relating to the delimitation of the continental shelf 1965 & Agreement between the Government of Norway and the Government of Iceland concerning the delimitation of the continental shelf beyond 200 nautical miles in the area between the Faroe Islands, Iceland, Mainland Norway and Jan Mayen 2019.

way of ensuring sound resource management by the Norwegian government – and has arguably led to a significant deal of diverse competition[5]. Additionally, Norway as a State has allowed the implementation of a solid welfare system[6] which is arguably one of the best in the world, because of the revenue that comes from the offshore oil industry. The rationale behind including the information with regards to a solid welfare system is outside the scope of this thesis, and arguably not too relevant to this thesis, but worth mentioning due to highlighting the aftermath of a positive notion as a result from the offshore oil industry. When sufficiency and reasonableness is the centre of discussion, the scales must arguably be filled with both the positive and negative aspects.

However, the offshore oil industry in Norway has had its negative effects as well. In 1977, the *Ekofisk Bravo* incident was the first ever serious uncontrolled oil-blowout in the North Sea. During maintenance work on the production site, a well started to blow out oil in the sea. For eight consecutive days, oil and gas spewed upwards of 25 meters in the air, and into the sea. The immediate cause of the incident was determined to be that a down hole safety valve had not been locked as intended, and the well itself was not properly pressure stabilized. The oil spill was estimated to be around 9000 tonne, and the whole incident revealed that there were major shortcomings in Norwegian oil spill preparedness, even though the spill did not have any implications in the sense of future oil extraction in the North Sea. Nonetheless, the requirements of training and education of oil personnel were reinforced as a result of the accident[7].

The incident created massive media attention in the international community. Furthermore, the *Ekofisk Bravo* incident additionally laid the foundation and arguably became a stepping stone for the requirement of environmental-friendly conduct on the NCS[8]. Even though the incident had significantly less environmental impact than what was first considered[9], mainly

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[5] Ibid. Footnote 1.

[6] Matilda Helmann «*How is the Nordic welfare state doing? Contemporary public constructs on challenges and achievements*» Nordic Welfare Research, pp. 160-179. https://www.idunn.no/doi/10.18261/issn.2464-4161-2021-03-04 accessed 06.06.2023.

[7] Marie Smith Solbakken ´*Bravo-ulykken*´ SNL https://snl.no/Bravo-ulykken accessed 20.06.2023.

[8] Ibid. Consequences.

[9] A.M Jones ´*The Environmental impact of North Sea Oil*´ Science Progress (1933-), Vol. 73, No. 4 (292) (1989), pp. 457-468.

due to the fact that the weather was favourable and more than half of the oil that was spilled evaporated – the primary area of concern was the effect the incident had on seabirds, as surface oil can cause major mortality of those type of birds[10]. This type of incident is arguably a significant factor in what seems to be comprehensive environmental considerations embedded in the judicial system of Norway – both domestic and international.

1.1.2 Environmental impacts of offshore oil activities

In addition to discharges from ships, offshore oil activities remain the largest source of oil released into the Norwegian Seas[11]**.** Moreover, the marine and coastal ecosystems are undoubtedly affected, and there is also a risk that offshore oil activities will hurt the rich and varied flora and fauna that is supported in Norwegian waters[12]. Overall, subsequent activities at sea are jeopardizing the marine environment by pressure that might result in habitat destructions, biodiversity loss and risking the environment of already vulnerable species[13].

The whole proportion of rationale behind this thesis is discussing and analysing laws pertinent to the aforementioned issues, and whether they are, in the opinion of the author, reasonable to minimize these potential damages to the marine environment.

1.2 Objective of this thesis

This thesis shall seek to address the comprehensiveness of the legal instruments implemented with the objective to protect and preserve the marine environment from the offshore oil industry, and determine in the concluding remarks whether there is need for legal reinforcement – in which environmental regulations from EU law will be utilized for reference to a certain extent. The State of Norway being a non-Member State to the European Union, but simultaneously a significant part of the organization by virtue of the EEA Agreement – this thesis will additionally seek to address whether there is a need for the implementation of the EEA Agreement[14], with its environmental regulatory provisions,

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[10] Ibid. Footnote 7 & 9.

[11] Lisbet Jære «*Environmental impact of oil and gas activities*» 2012-2016 https://www.barentswatch.no/en/articles/environmental-impact-of-oil-and-gas-activities/ accessed 27.06.2023.

[12] Environment Norway https://www.environment.no/topics/marine-and-coastal-waters/ accessed 27.06.2023.

[13] Ibid.

[14] Agreement on the European Economic Area (EEA Agreement) 1993.

beyond the territorial sea of Norway, amongst other regulations derived from EU Law, to protect and preserve the marine environment from the offshore oil industry in Norway.

There is undoubtedly stigma around the notion of the EU´s position in Norway being further strengthened. However, this composition will endeavour its discussion beyond that, and investigate from a legal point of view – in exploring domestic and international law, to determine whether existing laws that are in place are reasonable and sufficient in relation to protection and preservation of the marine environment – in which the LOSC[15] will be the primary focus, with its regulatory provisions concerning the protection and preservation of the marine environment. The rationale embedded in this notion is that an analysis shall be made in recollection of Norway being an adamant Member State to the LOSC[16], and whether this agreement that acts as a pedestal for the law of the sea, can possess a decisive factor in determining whether Norway needs subsequent legislative reinforcement in protecting and preserving the marine environment from its remarkable offshore oil activities.

More precisely, this thesis has the objective to discuss, analyse and arguably determine whether there is a need for the EEA Agreement, and its environmental regulations, being applicable beyond the 12nm limit in the State of Norway. Art. 126 (1) EEA Agreement states the geographical scope of the treaty:

«*The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway*».

The State of Norway interprets this provisional regulation in the sense that the EEA Agreement applies to mainland Norway, internal and territorial waters[17] - illustrating that the

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[15] United Nations Convention on the Law of the Sea 1982.

[16] United Nations Treaty Collection, list of participants https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en accessed 08.06.2023.

[17] Norwegian Ministry of Foreign Affairs «*The EEA Agreement and Norway's other agreements with the EU*» Meld. St. 5 (2012–2013) Report to Parliament p. 13 https://www.regjeringen.no/globalassets/upload/ud/vedlegg/europa/nou/meldst5_ud_eng.pdf accessed 07.06.2023.

EEZ and continental shelf are excluded from the geographical scope of the EEA Agreement, and purely applying the EEA Agreement beyond 12nm on a voluntary basis[18].

The main legal framework governing the petroleum industry in Norway is the 1996 Petroleum Act. This thesis will additionally analyse whether this piece of legislation, with its environmental regulatory provisions, is adequate and reasonable when it comes to protection and preservation of the marine environment from the offshore oil industry. Consequently, this thesis shall additionally analyse and discuss other laws, domestic and international, pertinent to protection and preservation of the Norwegian marine environment as a whole.

1.3 Methodology

The methodology that will be utilized in this thesis is a traditional doctrinal legal analysis. This approach is rooted in the involvement of analysing and interpreting legal sources such as international treaties, customary international law, domestic law, jurisprudence and legal commentaries such as journal articles in order to gain a comprehensive understanding of the doctrinal framework that is governing the area that concerns protection and preservation of the marine environment from the offshore oil industry[19].

Accordingly, the doctrinal legal analysis in this thesis will also allow for benefits due to the demonstration of a coherent understanding of the principles and rules in that area of law governing the petroleum industry in Norway – which is arguably quintessential in the context of this thesis composition, by virtue of the expectation that comprises of significant legal knowledge and understanding. Furthermore, a doctrinal legal analysis will arguably contribute to identifying inconsistencies or gaps in legal frameworks responsible for governing and providing a memento on the legal conduct of what responsibilities companies have, in exploring and exploiting offshore natural resources. This thesis will be based on the notion that such gaps might potentially exist, and the way that the author plans to identify subsequent potential holes is to, in addition to analysing the legal sources, synthesize the idea that there might be uncertainties in relation to how comprehensive the legal tools are, and whether they are theoretically extensive to protect and preserve the marine environment from offshore oil

[18] Ibid.

[19] S.N. Jain «*Legal Research and Methodology*» Journal of the Indian Law Institute, Vol. 14, No. 4 (October-December 1972), pp. 491.

activities. Thereupon discovery of such, the author of the thesis will suggest legal reform, if appropriate.

Additionally to the legal doctrinal analysis, an empirical approach will also be utilized in this thesis. This will arguably allow for the author to take a step back from the traditional approach of legal research, and create space for an approach that will allow for an investigation in a broader context that is based on a social and psychological point of view. In essence, this entails providing a perception, based on the legal research, in determining whether there is a need for further legal instruments being adopted by Norway, in order to protect and preserve the marine environment from offshore oil activities.

Consequentially, the empirical approach to the legal analysis will additionally assist the research in a manner that arguably confirms or disproves whether there are sufficient laws and regulations in place[20]. This already existing idea is the notion that Norway is a State that has implemented stringent rules and regulations, domestic and international, in order to ensure the environmental safety from subsequent activities.

1.4 Sub-questions and outline of the thesis

The structure of this thesis will begin with a comprehensive analysis on Norwegian domestic legislation around the petroleum industry, and then moving onto international legal instruments of significance in this discussion. Respectively, this will lead to determining whether there is a need for legal reform, and respective subsequent concluding remarks. Additionally, the author wants to bring attention to the fact that Norwegian academic commentary on these particular legal questions pertinent to this thesis are limited, and therefore not as present and utilized as one would hope.

The main thesis question is, as aforementioned; how comprehensive are the legal instruments governing the offshore oil industry with respect to protection and preservation of the marine environment and whether there is a need for further legal reinforcement, such as the environmental provisions of the EEA Agreement being applicable beyond the territorial sea of

[20] Stuart Nagel «*Testing Empirical Generalizations in Legal Research*» Journal of Legal Education, Vol. 15, No. 4 (1963), pp. 365-381.

Norway, in order to ensure protection and preservation of the marine environment from the offshore oil industry. Naturally, there will be sub-questions that follow.

Subsequent sub-questions include whether Norway does, in fact, possess and practice environmentally-friendly laws due to the general consensus of the perception that it is a State with high standards in relation to such activities. The Norwegian Environment Agency require companies operating in activities on the continental shelf to carry out environmental monitoring, in order to gain an understanding on the actual environmental consequences of subsequent activities – which is also provided to the authorities[21]. These regulations will be analysed throughout this thesis, cross-referenced with the notion that Norway has high standards for the implementation of environmentally-friendly laws and arguably determine whether they are sufficient and adequate in protecting and preserving the marine environment.

In addition to the analysis of the domestic legislation and the legal international obligations that Norway have, the following step is to determine whether those subsequent laws are adequate, in terms of how general or comprehensive they are. What is also arguably quite captivating, in terms of the potential implementation of the environmental regulatory provisions in the EEA Agreement if there is a need for additional legal reinforcement to protect and preserve the marine environment from the offshore oil industry, is the sovereignty issue, which is conceivably an issue leaning towards the political side rather than the legal – and therefore outside the scope of this thesis.

The discussion in this thesis will additionally provide, towards the end of the composition, the relationship between domestic and international law in terms of protection and preservation of the marine environment from offshore oil activities. Naturally, it has to be addressed whether domestic law is in line with the international obligations Norway have, by virtue of treaties and arguably customary international law.

1.5 Treaty interpretations in accordance with international law

[21] Norwegian Environment Agency «*Guidelines for Environmental monitoring of petroleum activities on the Norwegian continental shelf*» 2015 (2020 revised) https://www.miljodirektoratet.no/globalassets/publikasjoner/M408/M408.pdf

This thesis shall be consistent with Art. 33 of the UN Charter[22]; synthesizing that any form of legal analysis of subsequent sources will be discussed in a manner that constitutes peaceful means and interpretations.

Furthermore, the discussion thread in this thesis shall additionally hold its ingenuity within the legal framework of Art. 38 of the ICJ Statute[23], meaning that relevant parts of the thesis shall be in the form of international conventions, customs as evidence of general practice accepted as law and the general principles of law recognized by civilized nations.

Consequentially, to ensure that this thesis aims to maintain consistency with Art. 31 VCLT[24] which provides the guidelines for treaty interpretation – this analysis and interpretations therein shall be conducted in such a manner that is in conformity with the principles enshrined in Art. 31 VCLT, with the aim to assure a compendious and explicit understanding of the provisions stemming from the LOSC, and other treaties. Additionally, it is paramount to establish that this regulatory provision from the VCLT is considered to be customary international law[25] - and therefore treaty interpretation in this thesis shall be consistent with Art. 31 VCLT.

CHAPTER 2: NORWEGIAN DOMESTIC LAW

This chapter shall aim to include the relevant Norwegian domestic laws pertinent to protection and preservation of the marine environment, and analyse how extensive they are, in the opinion of the author, to carry out its aims. Legislation and jurisprudence will be the primary sources of law, which will inevitably allow for a discussion in relation to comprehensiveness, and conformity with international law in the concluding remarks of this thesis.

2.1 The Constitution of the Kingdom of Norway 1814

[22] Charter of the United Nations 1945.

[23] Statute for the International Court of Justice 1945.

[24] Vienna Convention on the Law of Treaties 1969.

[25] Katharina Berner «*Judicial Dialogue and Treaty Interpretation: Revising the ´Cocktail Party´ of International Law*» Archiv des Völkerrechts, 54. Bd., No. 1 (März 2016), pp. 67-90.

Art. 112 of the Norwegian Constitution[26] is under the Human Rights section, and emphasizes the notion that every individual has the right to live in a natural and diverse remaining productive environment that is healthy. Consequently, this regulatory provision stipulates that Norwegian natural resources shall be managed on the basis of extensive long-term considerations that needs the foundational basis of safeguarding this right for future generations too. Conclusively, citizens are entitled to information regarding the management of natural resources, and the effect of any environmental intrusions[27].

Conservation of the environment being enshrined in the Norwegian Constitution arguably illustrates the significance of protection and preservation. The Constitution is the highest legal authority in Norway, and this regulatory provision emphasizes the idea that environmental prospects, by virtue of implementing them into the legal system, are neither downplayed, nor non-consequential.

Case law in the Norwegian Supreme Court has provided valuable insight on Art. 112 of the Norwegian Constitution, in which the respective court explained in *Greenpeace and others v Ministry of Petroleum and Energy*[28] the following;

Art. 112 of the Norwegian Constitution only gave individual citizens rights to invoke this regulatory provision in a domestic Norwegian courtroom to a limited extent. The respective judges constituted that the main responsibility of Art. 112 is up to the respective government to implement, in deciding what environmental procedures shall take place within the legal pool. Furthermore, Art. 112 must additionally be able to be invoked in a corresponding domestic court in the event of an issue where the legislation yet has to take a stand, i.e. the law is unclear on a particular environmental problem. The Supreme Court also emphasized how this could work in practice, with the political side of things, which means that Art. 112 of the Norwegian Constitution must work as a safety valve, in which the respective courts can set a legislative decision aside, if Parliament has set aside its duties under Art. 112[29].

[26] The Constitution of the Kingdom of Norway 1814.

[27] Ibid. Article 112.

[28] *Greenpeace and others v Ministry of Petroleum and Energy* HR-2020-2472-P (Supreme Court).

[29] Ibid.

What this essentially entails, is that the respective courts have extensive powers in dealing with environmental issues, whether such issues are dealt with by the legislation or not. Whether this is just, is arguably outside the scope of this thesis. However, it means in practice that the Supreme Court has full jurisdiction to go against the Norwegian legislative body, if they deem certain legislation put forward that has not taken Art. 112 into consideration – which is arguably a just perception, in the opinion of the author, because it creates checks and balances in the judicial system.

2.2 Petroleum Act[30] 1996

The petroleum industry in Norway is the largest and arguably most important sector with respect to the Norwegian economy – by virtue of governmental revenues, value of import & export and the sheer division of roles and responsibilities concerning the sector[31]. In order for an extensive analysis of the Petroleum Act, an overview of some of the relevant legislative chapter regulations shall be provided;

This piece of legislation from 1996 provides a general legal basis for proper resource management, including a licensing system that provides companies rights to engage in and conduct such activities of petroleum operations[32]. Most importantly, s. 1 (1) Petroleum Act establishes that the State of Norway possesses the proprietary right to subsea petroleum deposits on the NCS.

Chapter 2[33] of the Petroleum Act concerns the exploration phase, in which the Ministry of Petroleum and Energy officially has declared an area open for exploration, after carrying out an impact assessment that comprise of economic, social and environmental prospects – a comprehensive overview of the area in question is apparent.

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[30] Lov om petroleumsvirksomhet [petroleumsloven] LOV-1996-11-29-72 (Petroleum Act).

[31] Norwegian Petroleum «*The Petroleum Act and the Licensing System*» https://www.norskpetroleum.no/en/framework/the-petroleum-act-and-the-licensing-system/ accessed 12.06.2023.

[32] Ibid.

[33] Ibid. Footnote 30. s. 2 (1-2).

Chapter 3[34] of the Petroleum Act lays out the legal steps concerning the grant of licenses, and also regulates other rights and duties of the licensees. Applicants to these licenses are chosen by the Norwegian Ministry with the awards consisting of the notions of non-discrimination and objectiveness. Licensees then become an owner of a share of the oil and gas produced in proportion with their share of ownership, which is set out in s. 11 (1) Petroleum Act.

Subsequently, chapter 4[35] of the Petroleum Act demonstrates the legal framework of the development and operational phase. This part of the legislative framework governing offshore oil activities also reiterates the significance of taking into account the environmental prospects in the operational phase, additionally taking into account fisheries.

What is certainly of remarkable significance to this thesis as well, is chapter 7[36] of the Petroleum Act. This part of the legislation governing Norwegian offshore oil activities illustrates the legal framework concerning liability for pollution damage, and has arguably eight comprehensive regulatory provisions that demonstrates the legal recourse of subsequent incidents of pollution of the marine environment.

2.2.1 Petroleum Act Jurisprudence

Greenpeace v Norwegian Ministry of Petroleum and Energy[37] 2020;

This is the aforementioned case[38] in an appeals court before it was dealt with by the respective Supreme Court, and it is included to provide some insight on how the case was dealt with along the way in terms of an underlying environmental agenda.

In 2016, the Norwegian Ministry of Petroleum and Energy issued exploitation licenses in the Barents Sea, by virtue of s. 3 (1) Petroleum Act, which states the following:

«*Prior to the opening of new areas with a view to granting production licences, an evaluation shall be undertaken of the various interests involved in the relevant area. In this evaluation, an assessment shall be made of the impact of the petroleum activities on trade, industry and*

[34] Ibid. Footnote 30. s. 3 (1) – s. 3 (15).

[35] Ibid. Footnote 30. s. 4 (1) – s. 4 (13).

[36] Ibid. Footnote 30. s. 7 (1) - s. 7 (8).

[37] LB-2018-60499 Borgarting Lagmannsrett Dom 2020. (Court of Appeals).

[38] Ibid. Footnote 28.

the environment, and of possible risks of pollution, as well as the economic and social effects that may be a result of the petroleum activities».

The case was brought forward by Greenpeace Nordic, challenging the validity of the conduct by the Norwegian State in relation to the subsequent regulatory provision. The Norwegian Court of Appeals provided for valuable remarks and interpretations of subsequent regulatory provisions in the Petroleum Act concerning the environmental aspects. The respective Court stated that s. 3 (3) Petroleum Act does not impose a requirement for an investigation on climate effects. However, if there are findings during the process, an environmental impact assessment will normally be carried out in coordination with an application for approval – in accordance with s. 4 (2) Petroleum Act, which states the following concerning the environmental prospect;

«*The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased*».

This would essentially instigate that an environmental agenda has to be present, in terms of avoiding potential pollution of the marine environment. Moreover, the Court of Appeal additionally provided that in the event of an environmental impact assessment being implemented, it has to follow certain criteria, which is set out in an additional legislative framework to the Petroleum Act[39]. This includes the legal notion that an environmental impact assessment in a plan for development and operation of petroleum activities must take into account environmental prospects that may be affected, and take into account emissions to the sea[40] - which demonstrates the underlying gravity of protecting and preserving the marine environment.

The Ombudsman´s annual reports, complaint filed by Greenpeace[41] 1999;

Greenpeace filed two complaints to the Civil Ombudsman, with the legal basis in their complaint being that the Norwegian Ministry of Petroleum and Energy had not acted in a way

[39] FOR-1997-06-27-653 Forskrift til petroleumsloven (additional legal framework to the Petroleum Act).

[40] Ibid. S. 22 (a). Konsekvensvurdering i plan for utbygging og drift av en petroleumsforekomst.

[41] SOMB-1999-2 (1999 S 50) Sivilombudsmannens årsmelding. Referat av saker 1999. (Civil Ombudsman).

that was in conformity with their obligations under international law[42], especially with regards to environmental impact assessments in conducting exploration activities of oil and gas on the NCS.

The Ombudsman provided, in the processing of the complaint, that the Petroleum Act had to be interpreted in light of the conduct of the Norwegian Ministry of Petroleum and Energy, and additionally it had to be determined whether the Petroleum Act and its regulatory provisions were sufficient in protecting and preserving the environment. The Ombudsman had to 1) determine whether Greenpeace´s claim regarding the inefficiency of the Petroleum Act and 2) whether there is a missing link between the Norwegian Ministry of Petroleum and Energy´s conduct and Norway´s legal obligations under international law.

The Ombudsman stated that s. 5 (3)[43] Petroleum Act contained far more detailed regulation compared to predecessor-legislation, and in particular with respect to environmental impact assessments. This would include preserving the marine environment from ecological and environmental harm in a broader context in relation of offshore oil activities. Moreover, it was established in this case that Norway is an adamant State in international cooperation by virtue of participating in international conventions regarding protection of the environment – however, such Conventions might not necessarily always provide detailed instructions on how to proceed with its regulatory provisions, and therefore there has to be a notion present that is based on each individual legal dispute being dealt with accordingly, without being in violation of obligations under international law. However, that does not follow the idea that the Petroleum Act is, in any way, contradictory of international law. In fact, the Ombudsman argued in this case that the regulatory provisions regarding the environment in the Petroleum Act were arguably more progressive for this situation – and additionally that the legislative Act is, in absolute no way, in breach of Norway´s legal obligations under international law.

This case demonstrated that the Petroleum Act, with its environmental regulations, is arguably effective – especially when it comes to the requirement of environmental impact assessments

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[42] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) 1991.

[43] Ibid. Footnote 30: «*The Ministry shall make a decision relating to disposal and shall stipulate a time limit for implementation of the decision. In the evaluation on which the decision is based, emphasis shall, inter alia, be attached to technical, safety, environmental and economic aspects as well as to consideration for other users of the sea. The Ministry may stipulate specific conditions in connection with the decision*».

from the Norwegian Ministry of Petroleum and Energy in issuing licenses to engage in offshore oil activities. Furthermore, the notion of an appropriate nexus between domestic and international law, and its subjective application of those subsequent laws depending on an individual situation, is additionally apparent – arguably illustrating the solemnity of protection and preservation of the marine environment, that is rooted in law.

Greenpeace v Norwegian Ministry of Petroleum and Energy[44] 2018;

Respectively, this case is also derived from the Supreme Court decision[45] in the first instance of a district court. However, it is included as it demonstrates in the early stages, how the court dealt with particular issues such as interpretation of the Norwegian Constitution and the State´s licensing system.

Early 2018, Greenpeace brought another claim against the Norwegian Ministry of Petroleum and Energy to court, which was litigated in the District Court. This case was subsequently regarding the validity of the decision to grant permits in relation to the extraction of oil in the Barents Sea. The main argument brought forward by Greenpeace was that the Norwegian Ministry of Petroleum and Energy was in violation of §112 Norwegian Constitution in issuing the offshore oil extraction licenses in line with §3-3 Petroleum Act. The legal discussion in the aforementioned cases have too been subject to §112 Norwegian Constitution. However, this one is particularly interesting.

The counsel of Greenpeace argued that s. 1[46] of Art. 112 Norwegian Constitution is a provision of rights – meaning that it prohibits, amongst other things, against certain public decisions that entail a risk of negative or harmful effects on the environment, in which it can be utilized by domestic courts to apply to individuals. In retrospect, Greenpeace emphasized that they do agree with; in the event of sufficient measures being previously conducted in

[44] TOSLO-2016-166674 Oslo Tingrett 2018 (District Court).

[45] Ibid. Footnote 28.

[46] Ibid. Footnote 26, Art. 112, s. 1: «*Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well*».

accordance with s. 3[47] Art. 112 Norwegian Constitution, the action of granting extraction permits are then not prohibited. Consequently, Greenpeace stipulates that environmental agencies have alternatively asserted that if there is conducted a proportionality assessment in accordance with Art. 112 Norwegian Constitution based on environmental consequences and socio-economic prospects, the decision is to be considered not proportionate – which arguably is an interesting take, mainly due to the fact that it would be unjust to exclude socio-economic effects in consideration of subsequent issues. There is no doubt that consideration, and a significant one at that, must be given to environmental side of the ordeal. Nevertheless, socio-economic aspects cannot be excluded from that consideration, because an integral part of society is preserving social and economic interest too. A balance is required here.

The Ministry, on the other hand, argued that s.1 of Art. 112 Norwegian Constitution is not a provision of rights in itself, but rather it is an opener for the legal question that begs whether the duty to take measures according to this subsequent regulatory provision has been fulfilled. The principal opinion of the State has alternatively expressed that the respective court is additionally not in an authoritative position to decide on this specific matter. However, the Ministry argues, in any event of the respective court deciding that this regulation is a provision of rights, the threshold for this denomination must be of high nature. The Sate, conclusively, also argues that there is no legal basis for conducting a proportionality assessment, as the environmental agencies have stipulated.

The respective court held in its judgement; taking into account what provides a basis for justifiable consideration at the time, must be seen in light of the environmental impact assessment prior to the commencement of any operations – which is enshrined in s. 4 (2) Petroleum Act. Additionally, the court did not conclude with any findings constituting violation of the regulatory provisions in the Constitution, nor the Petroleum Act – and therefore the application set forth by Greenpeace was not successful. The rationale behind this decision is presumably based on the notion that Greenpeace´s legal counsel was not convincing in stipulating their arguments in relation to State activities being in violation of Art. 112 Norwegian Constitution. What this essentially entails is that both the Norwegian Constitution and the Petroleum Act work cooperatively. The court additionally did, in fact,

[47] Ibid. Footnote 26, Art. 112, s. 3: «*The authorities of the state shall take measures for the implementation of these principles*».

determine that s. 1 of Art. 112 Norwegian Constitution is a provision of rights. However, that right had not been infringed.

In the opinion of the author, this decision is arguably legally logical. However, there is some concern. Greenpeace argued throughout the case that this decision by the State to grant licenses to perform subsequent offshore oil activities is the most northern point granted, which is partly into the variable of the ice edge and polar front in that area. If this proves to be an issue in the future, with respect to severe impacts on the Arctic marine environment, the legal outcome of the case should arguably have looked different.

2.3 Impact Assessment Regulations[48] 2017

Aside from the legal obligations of environmental impact assessments the State of Norway arguably has under international law, in which this thesis will come to in subsequent chapters – there is also domestic law emphasizing this aspect.

The Norwegian Government stipulates that the purpose of the regulatory provisions on impact assessments is for the clarification of effects that the potential exploitation plans and measures have on the environment, but also on society in general. Furthermore, the impact assessment is intended to assist in ensuring that the effect of subsequent activities that entail of conduct subject to affecting the environment are taken into consideration in the whole process of decision making in relation to granting licenses or allowing for the implementation of projects. Conclusively, there is also this notion that impact assessments will allow for all potential affected parties to be heard, as it is supposed to be an open process[49].

S. 1 (1) Impact Assessment Regulations stipulates that the aim of this piece of legislation is to ensure consideration of the environment and society is taken into account during the preparational stage of plans and measures, and when a decision is made as to whether such conditions can be carried out.

Even though this Regulation is quite general, it is arguably supplementary to other regulatory provisions concerning environmental impact assessments, in which this thesis will come to in

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[48] Forskrift om konsekvensutredninger FOR-2017-06-21-854 (Impact Assessment Regulations).

[49] Norwegian Government, Impact Assessments https://www.regjeringen.no/no/tema/klima-og-miljo/innsiktsartikler-klima-miljo/konsekvensutredninger/id2076809/ accessed 15.06.2023.

the next chapter, in laying the legal foundation for the eminent gravity of protection and preservation of the environment. The rationale behind this statement is the fact that the Impact Assessment Regulation is, by virtue of Annex I[50], is providing that certain activities that shall, in every instance, consist of an environmental impact assessment – such as extraction of oil and natural gas and its transport in relation to commercial activities[51]. Furthermore, Annex I emphasizes that the Petroleum Act has its own regulatory provisions in relation to environmental impact assessments – which illustrates that the idea of taking environmental aspects into consideration in subsequent activities is embedded in and throughout several areas of law in the Norwegian legal system.

2.4 Pollution Act[52] 1981

During the 1960s in Norway, the discharge of effluent sewage water from private, municipal and agricultural & industrial parties rose noticeably. Noxious smelling water, soiled beaches and fish mortality were products of aftermath in these increasing discharges[53], and what was merited from this, naturally, was national and global environmental concern with respect to water pollution. Several pivotal moments, in relation to watershed events, led to significant changes in the way the Norwegian Government was handling this issue – which inevitably led to the creation and implementation of the legislative jurisdictional framework of the Pollution Act[54].

In an article from 2016, it was constituted from a survey for plastic in the stomachs of cod from the Norwegian coast, revealing that 3% of the fish that were sampled, contained plastics. This article additionally makes a reference to an author from the Norwegian Institute for Water Research, that such findings were similar to other fish in the North Sea[55]. Consequently, 19% of the plastic materials found in the fish were microplastic, which is

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[50] Ibid. Footnote 48. Annex I.

[51] Ibid. S. 14 & 16.

[52] Lov om vern mot forurensninger og om avfall (forurensningsloven) LOV-1981-03-13-6 (Pollution Act).

[53] Govindarajan Venkatesh ´*Wastewater treatment in Norway: An overview*´ Journal (American Water Works Association), Vol. 105, No. 5, International (May 2013), pp. 92-97.

[54] Ibid.

[55] Nancy Bazilchuk ´*Plastic found in Norwegian cod*´ Frontiers in Ecology and the Environment, Vol. 14, No. 8 (October 2016), p. 405.

remarkably small, and therefore reiterates the concern of being easily ingestible by marine beings and other organisms. The outcome of this can comprise of the potential release of chemicals and carry other marine pollutants[56] - which is presumably not something that should be ignored. However, this issue is being taken into consideration by the Norwegian Environment Agency, and even though this is not directly correlated with offshore oil activities, it is still paramount – mainly due to the fact that this thesis additionally analyses the Norwegian domestic legal system as a whole, in protecting and preserving the marine environment, which one could argue has an effect on how the Norwegian authorities transfer environmental laws throughout subsequent issues related to the marine environment.

The Pollution Act contain numerous regulatory provisions that prohibits pollution, both on land, and in the sea. S. 1 Pollution Act states the following;

«*The purpose of this Act is to protect the outdoor environment against pollution and to reduce existing pollution, to reduce the quantity of waste and to promote better waste management. The Act shall ensure that the quality of the environment is satisfactory, so that pollution and waste do not result in damage to human health or adversely affect welfare, or damage the productivity of the natural environment and its capacity for self-renewal*»[57] - essentially instigating that the purpose of this Act is protection and preservation of the environment, arguably by virtue of prevention and reduction as well.

There is also a notion of whether the Pollution Act regulates operating emissions from the offshore platforms, or the offshore oil industry in general, or if that is regulated through other legal instruments. The answer to this question can arguably be found in s. 4 Pollution Act, which states the following;

«*The provisions of this Act also apply, subject to any restrictions deriving from international law and from the Act itself (cf. Chapter 8), to exploration for and production and utilization of natural subsea resources on the Norwegian part of the continental shelf, including decommissioning of facilities*»[58].

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[56] Ibid.

[57] Ibid. Footnote 52. Translation from https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/ accessed 21.06.2023.

[58] Ibid. Footnote 52. Section 4 (1). (Own translation).

It would not be unjust to imply and interpret this regulatory provision to be applicable to the offshore oil industry, when it comes to pollution, or operating emissions. This is also arguably reaffirmed in academic commentary, by Hans Bugge, in which he states that the Pollution Act also applies to petroleum operations – with the exception that disposal of waste is not connected to offshore petroleum operations and the source being of foreign nature[59]. In essence, it can be argued that the Pollution Act regulates operating emissions from the offshore petroleum industry, as long as no limitations are apparent under international law.

2.4.1 Pollution Act Jurisprudence

Champion Shipping AS v The State/Ministry of Trade, Industry and Fisheries 2014[60]

The Norwegian Supreme Court, in processing an appeal from a lower court, gave its explanation on s. 7 Pollution Act[61], which emphasizes the duty to avoid pollution. Moreover, this section states that no person can initiate conduct that may entail a risk of pollution, unless it is subject to the limitations of the subsequent sections of the Act. In the event that a danger of pollution might take place, the person responsible shall ensure that measures are taken to prevent such pollution. There is also a duty to mitigate.

The factual background of the case was regarding a tanker that burnt outside the coast of Norway, and the ship eventually sank. On board, there was several hundred tonnes of bunker oil, diesel and lubricating oil. After comprehensive oil spill preparedness during the salvage operation by the Norwegian Coastal Administration, the State instituted legal proceedings against the company that owned the ship.

The Supreme Court raised a few rather interesting remarks, in processing the appeal, stating the duty to take measures as it is formulated in s. 7 Pollution Act must be seen in the context of the first section of the Act with respect to prohibition, emphasizing not the pollution itself in the first instance, but the element of risk. What this would entail is that being a shipowner who possesses a vessel with the potential of harming the environment, by virtue of the vessel being subject to potential pollution, is unlawful by itself – further strengthening the notion

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[59] Hans Christian Bugge *´Rettslige spørsmål ved CO_2 -deponering på norsk kontinentalsokkel´* Kritisk Juss 2005 s 132-145 – (KRJU-2005-132).

[60] HR-2014-208-U Høyesterett (Supreme Court).

[61] Ibid. Footnote 52. S. 7.

that shipowners must initiate measures to reduce the risk of pollution. This can be done by putting in place measures in relation to oil spill preparedness to significantly reduce the possibility of an oil leak.

The shipowner, on appeal to the Supreme Court, had interpreted this regulatory provision contradictory to the way that the respective court had, and therefore it was held that interpretation was an artificial one – mainly due to the fact that the wording the s. 7 Pollution Act is concise, and there is a huge focus on prevention, as stated by the Supreme Court. There are two major remarks in this case, that need to be highlighted, in the opinion of the author. 1) It is certainly paramount to have a high threshold of exemption, or not being liable for pollution by virtue of s. 7 Pollution Act. The trajectory of this case will presumably establish that the authorities will utilize s. 7 Pollution Act in the event of an incident, if there has been negligence on the shipowner´s side, and 2) it is legally prohibited to be in possession of a vessel that potentially has the capacity to cause environmental damage. These remarks illustrates the importance of preparedness that is embedded in the Norwegian legal system, which reinforces the idea that Norway´s domestic law is arguably comprehensive in dealing with such issues.

Dalnave Navigation Inc. / Avena Shipping & co. v The State/Ministry of Transport 2018[62]

In 2007, a Cypriot-registered vessel hit the ground in the sea due to harsh conditions, nearly causing an environmental catastrophe, as the impact was near a natural reserve. The incident caused the release of 80 tonnes of bunker oil spilling into the sea, and there was an estimated 3000 – 8000 seabird fatalities. The wreckage of the vessel was left in the sea.

An investigation was instituted against the Cypriot-registered vessel, by virtue of s. 51[63] Pollution Act – which stipulates that the authorities may order that a person be held liable for damages in relation to pollution activities. Furthermore, in addition to s. 7 Pollution Act, the Ministry also utilized s. 28[64] Pollution Act against the vessel causing pollution, which stipulates;

[62] LB-2017-29773 Borgarting Lagmannsrett (Court of Appeals).

[63] Ibid. Footnote 52. S. 51.

[64] Ibid. Footnote 52. S. 28.

«*No person may empty, leave, store or transport waste in such a way that it is unsightly or may cause damage or nuisance to the environment… Any person that has contravened the prohibition of the first paragraph shall arrange for the necessary clean-up measures*»[65].

The respective court provided an explanation consisting of the notion that the Pollution Act covers waste both on land, and at sea. S. 28 Pollution Act introduces a general prohibition against littering the environment, and in principle, leaving large pieces of wreckage in the environment will trigger the obligation that falls on the owner to remove them. There is a total ban on littering in a natural reserve, and dumping of waste into the sea is generally prohibited. This conception provided for by the court is understandable, in analysing the law.

The wreckage was ordered to be removed, by virtue of s. 28 and s. 37[66] Pollution Act. However, the interesting ordeal in this case was the wording of s. 28 Pollution Act, more precisely the term ´unsightly´. By legal definition of that provision, it is required for the waste to be unsightly, or unattractive if you will, in the foreseeable future. The respective court held, in its judgement, that the law is not clear on this particular issue in terms of the terminology in this regulatory provision, and therefore an assessment has to be made on a case by case basis, and it was established that due to potential infringement of the sight of the landscape in the future, this requirement has been fulfilled.

This case arguably illustrated the significance of the Pollution Act being comprehensive in nature, based on the fact that it does not give leeway for pollutants in any way, shape or form. Even if an incident has happened, and the oil preparedness conduct has been instigated, there is also a notion of virtual preservation of the environment – which is arguably a just judicial implementation.

The Public Prosecutor´s Office v Marine Harvest Norway 2015[67]

[65] Ibid. Translation from https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/ accessed 21.06.2023.

[66] Ibid. Footnote 52. S. 37: «*Orders to clear up waste, etc., or to pay for it to be cleared up*».

[67] TFJOR-2014-202384 (District Court).

Marine Harvest Norway, the defendants in this case, a huge fish farming company, were instituted legal proceedings against by the local prosecutor´s office for failure to comply with the Pollution Act.

The aforementioned regulatory provisions in the Pollution Act have been discussed in this case as well. However, the rationale behind including this specific case is based on the legality of the limitations or exceptions to the aforementioned laws with respect to pollution.

In analysing s. 11[68] Pollution Act; it is clear that the authorities can grant, in certain circumstances, permits for activities that may lead to pollution. There are conditions however, such as monitoring potential developments, which is laid out in s. 11 (4)[69] Pollution Act.

In this particular case, a reference was made to s. 11 Pollution Act, which is connected to the concession system – much like the concession system for petroleum activities, meaning that a permit has to be granted from the authorities. Consequently, this case was about whether Marine Harvest Norway had violated the agreement regarding the granted allowance of potential pollution, in which an extensive analysis of this is arguably outside the scope of this thesis. Nevertheless, what this case demonstrated the utilization of s. 11 Pollution Act – which arguably puts emphasis on the fact that in the event of pollution being inevitable, there are still legal regulations in place to control the output.

2.4.2 Pollution Act in accordance with international law

In examining the Pollution Act in relation to Norway´s legal obligations under international law, s. 3[70] Pollution Act stipulates the general provisions relating to its scope – in which the areas that this Act entail are subject to restrictions deriving from international law. When it comes to pollution activities on the NCS, s. 4[71] Pollution Act prescribes that the provisions of

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[68] Ibid. Footnote 52. S. 11: «*The pollution control authority may on application issue a permit for any activity that may lead to pollution... The pollution control authority may issue regulations requiring that any person wishing to engage in certain types of activities that by their nature may lead to pollution shall apply for a permit pursuant to this section*». Translation from https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/ accessed 21.06.2023.

[69] Ibid. S. 11 (4).

[70] Ibid. Footnote 52. S. 3. « *Subject to any restrictions deriving from international law, this Act applies*…».

[71] Ibid. Footnote 52. S. 4.

the Act additionally applies to the continental shelf, with the legal limitation being that the Pollution Act is, naturally, potentially subject to any limitations under international law[72].

Chapter 9 of the Pollution Act provides an explanation on the legal enforcement jurisdiction of the Act. S. 74[73] Pollution Act states that the authorities can, if the person responsible for pollution has not carried out their responsibilities, arrange for certain measures to be implemented. In analysing s. 74 Pollution Act further, the last section provides the following;

«*Intervention against acute pollution or the risk of acute pollution on the open sea and in outer Norwegian territorial waters shall take place in accordance with international agreements to which Norway is a party. The pollution control authority may issue regulations on such intervention and on the implementation of such agreements in Norwegian law*»[74].

In essence, this regulatory provision in the Pollution Act stipulates that in the event of dire pollution, intervention by the Norwegian authorities shall be conducted in a manner that is in conformity with international law – which essentially demonstrates that the international legal obligations subject to Norway are preserved, and naturally taken into account in exercising laws in relation to pollution of the marine environment.

In a letter from the Ministry of Climate and Environment, a request is made to the legal department of the Ministry of Justice and Public Security – to provide an interpretation of s. 74 Pollution Act. The legal department of Ministry of Justice and Public Security laid out some interesting remarks in its statement[75], emphasizing that the overall purpose behind s. 74 Pollution Act is to prevent pollution and littering, or to the very least mitigate the harmful effects, by virtue of giving the relevant authorities jurisdiction to implement certain measures if necessary. Moreover, it is also not relevant whether it is the person responsible implementing these measures, or the authorities. Nevertheless, if the person responsible has the necessary knowledge, tools and capabilities to implement subsequent environmental

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[72] Ibid. «*The provisions of this Act also apply, subject to any restrictions deriving from international law and from the Act itself...*».

[73] Ibid. Footnote 52. S. 74.

[74] Ibid. S. 74 (5). Translation from https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/ accessed 26.06.2023.

[75] JDLOV-2000-8016. (Interpretation by the Justice Department).

measures, it may be financially beneficial for him to do so. In retrospect, the owner has an obligation to reimburse the expenses to the authorities if the respective court finds that appropriate.

When measures have been set forth, and the authorities have started conducting them; The Ministry of Justice and Public Security also states that it is not favourable that the person responsible should take over at a later stage. The rationale behind this statement is that it can be both administratively and financially difficult for the pollution authorities to conduct their work if there is uncertainty on the fact that they are going to carry out the whole operation or not. Consequently, this uncertainty in predictability can ultimately also affect the scale of the issue at hand, mainly due to the fact that the environmental threat is imminent in nature. There is also an emphasis on the person responsible being passive, as they had the opportunity to comply with the necessary laws in the first place, and in some cases, the authorities might hire private contractors to carry out the necessary measures, and then there is a contract that needs to be fulfilled[76].

These are arguably the most interesting remarks on the interpretation of s. 74 Pollution Act in relation to protection and preservation of the marine environment, as it lays out the legal foundation in relation to the duties of a potential defendant, but also what steps the authorities can take under domestic law – which has to be in conformity with international law, as stipulated by the aforementioned regulatory provision[77].

2.5 Concluding remarks

The aforementioned legal sources set forth in the judicial system and in the respective courts, are interlinked with numerous agencies and ministries. There seems to be cooperation between the Ministry of Petroleum and Energy, Ministry of Climate and Environment, Norwegian Environment Agency and Ministry of Justice and Public Security – in tackling different issues related to environmental challenges, which is conceivably a comprehensive

[76] Ibid.

[77] Ibid.

system. The Norwegian Petroleum Directorate is also worth mentioning, due to their work being linked to management and making petroleum data available in relation to the NCS[78].

Even though all of the subsequent laws and regulations mentioned are not arguably directly related to protection and preservation of the marine environment from offshore oil activities in Norway, they are essential in this thesis, as they provide an overview of how environmental issues are dealt with, both on the mainland and in the sea – which is detrimental in deciding whether the State of Norway needs additional legal instruments in order to safeguard the marine environment from petroleum activities at sea. It sets the tone for the next chapter, in which Norway´s legal obligation under international will be analysed and discussed.

CHAPTER 3: INTERNATIONAL LAW

This part of the thesis shall discuss and analyse the legal obligations Norway have under international law, in the context of protection and preservation of the marine environment from the offshore oil industry.

For the purpose of discussion and analysis on this part of the thesis; there is an underlying notion that treaties that are legally binding to the State of Norway shall be an integral part of the analysis. Moreover, successive international law jurisprudence shall additionally be an essential part in the paper, which is not necessarily legally binding, but arguably provides valuable insight on the law, and therefore indispensable to the thesis.

3.1 The LOSC

The significance of the development of the LOSC for the State of Norway is not to be underrated in commemoration. The Convention on the Continental Shelf[79] commenced in 1958 laid the legal foundation for the right to rule over the continental shelf and its petroleum resources. Later down the line, in the 1960s, the sea borders with the neighbouring States to Norway were drawn in accordance with the median line principle in maritime delimitation.

[78] Norwegian Petroleum Directorate https://www.npd.no/en/facts/ accessed 26.06.2023.

[79] Convention on the Continental Shelf 1958.

Interestingly, the LOSC and its implementing agreements were utilized by virtue of having the legal foundation in numerous pieces of domestic legislation implemented by Norway[80].

The LOSC acts as a major legal tool for the framework for protection and preservation of the marine environment, which is additionally supplemented with an abundant amount of other agreements and legal instruments pertinent to marine environmental protection[81]. Rothwell and Stephens argue that as a result of the LOSC, and the development of other mutually supporting rules in international and regional agreements, there has been a significant shift in the LOSC in terms of the approach with respect to the regulation of marine pollution[82]. The shift, as argued, comprises of a differentiation in how the international community views pollution into the sea. The notion of approach transposed from the viewpoint that dumping is a permissible act subject to certain restrictions – to an arguably more holistic approach that comprises of the proposition that pollution that damages the marine environment is, or should be, prohibited[83]. This is, in the opinion of the author, a more just and comprehensive approach with respect to protection and preservation of the marine environment, mainly due to the fact that there are compelling amount of activities in and on the sea, and in order to keep up with subsequent activities, including oil extraction on the continental shelf and other oil-related comportment, there must be a rational way to conduct such activities that is backed and practiced by law. Furthermore, the LOSC additionally addresses vessel-source pollution, in which a reference is made to competent international organizations[84], which in this case is the IMO, that has the responsibility to establish international regulations and standards for the purpose of prevention, reduction and control pollution[85].

3.1.2 Part XII LOSC

The core regulatory provisions of the LOSC that are relevant to marine environmental protection is enshrined in Part XII. Art. 192 LOSC, the first provision, establishes the

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[80] Alf Håkon Hoel «*LOSC 40 years*» 2022 https://uit.no/nyheter/forskerhjornet/791728/havrettskonvensjonen_40_ar accessed 29.06.2023.

[81] Donald Rothwell & Tim Stephens «*The International Law of the Sea*» 2nd edn, Hart Publishing 2016 p. 564.

[82] Ibid.

[83] Ibid.

[84] Ibid. P. 572.

[85] Ibid.

fundamental duty to protect and preserve the marine environment. This legal duty is arguably elevated pursuant to the sovereign right of States to exploit their natural resources, as stipulated by Art. 193 LOSC.

Furthermore, Art. 194 (2) LOSC imposes an obligation on its Member States to take all measures necessary in ensuring that activities conducted within national jurisdiction are not to cause pollution. This provision entails that Norway, as a major offshore oil-country, has a legal obligation to take the necessary steps in avoiding the risk of environmental damage, by virtue of pollution, in engaging in their activities related to the offshore oil industry. This pollution cannot be transformed into another type either, as stated in Art. 195 LOSC.

The *South China Sea*[86] Arbitration provided some valuable insight on Part XII LOSC. In this case, it was argued that the general obligation on States to protect and preserve the marine environment under Art. 192 is considered to be customary international law, and the scope of that provision comprises of both areas within national jurisdiction and ABNJ[87] - which is presumably a just interpretation of the first provision in Part XII LOSC, mainly due to the fact that a general obligation to protect and preserve is arguably as much needed as more specific regulations. Consequently, the Tribunal in this case held that this general obligation extends to both ´protection´ of the marine environment from future damage, and ´preservation´ in the sense of maintaining[88]. Additionally, the respective Tribunal held that Art. 192 LOSC also imposes a legal obligation on States in the sense of being responsible for preventing, or at the very least mitigating environmental harm that is significant[89].

The legal obligation Norway has to protect and preserve the marine environment from its offshore oil activities under these subsequent remarks in the *South China Sea* Arbitration, and under Art. 192 LOSC, is that there is a general duty to ensure that following activities in the

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[86] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* 2016 [case number 2013-19] Permanent Court of Arbitration (PCA).

[87] Ibid. Para. 907: «*The Philippines recalls that the general obligation on States under Article 192 to ´´protect and preserve the marine environment´´- covers areas within national jurisdiction as well as beyond national jurisdiction*».

[88] Ibid. Footnote 86. Para. 941.

[89] Ibid.

sea related to oil must be in conformity with prevention and mitigation in relation to marine environmental harm.

While we are on the *South China Sea* case, the Tribunal additionally addressed Art. 206 LOSC, in which it is provided that States shall, as far as practicable, assess potential effects of activities that may have significant or harmful changes to the marine environment. The offshore oil industry will undoubtedly fall under that categorization, and the respective Tribunal held that the obligation under the LOSC to conduct an environmental impact assessment is a direct obligation, and additionally a general obligation under customary international law[90]. This would entail that Art. 206 LOSC is arguably an integral part of a presumably comprehensive system in relation environmental management, which was also the way it was described by the Tribunal[91]. However, the juxtaposition in what seems to be a rather comprehensive environmental aspect, is the terminology ´´as far as practicable´´ - which would indicate that the threshold to be at the discretion of the State, which was also addressed by the Tribunal. As far as case law goes for Art. 206 LOSC and environmental impacts assessments in general international law, the ICJ addressed this in the *Pulp Mills*[92] case. The main takeaway from this case, in the opinion of the author, is that an environmental impact assessment must be conducted ´prior to the implementation´ of said activity[93] - which is arguably a just statement from the respective court. This case essentially instigates that, in the case of Norway and its international legal obligations in relation to offshore oil activities, that a conception is existent in terms of conducting environmental impact assessments by virtue of international law and jurisprudence.

Art. 194 LOSC, as aforementioned, imposes a legal obligation on States to take the necessary steps to protect and preserve the marine environment within national jurisdiction. This notion can be found in international law jurisprudence as well. More precisely, it was held in the *Legality of the Threat or Use of Nuclear Weapons*[94], an advisory opinion from the ICJ, that:

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[90] Ibid. Footnote 86. Para. 948.

[91] Ibid.

[92] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 2010 (ICJ).

[93] Ibid. Para. 205.

[94] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion 1996 (ICJ).

«*The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*»[95].

Interestingly, this statement in the Advisory Opinion from the ICJ additionally imposes an obligation on States not to conduct activities that also entail potential risk of the environment in ABNJ – by virtue of including this notion in the entity of international law. What this case means for the State of Norway in offshore oil activities, in practice, is that international law imposes an obligation to thread in a manner that is in conformity with environmental protection both within national jurisdiction and ABNJ.

In further examining Art. 194 LOSC, the terminology in the provision must be discussed too. The term ´´ensure´´ must be viewed in the light of how respective international tribunals have interpreted this obligation. In *Responsibilities and Obligations of States*[96], and Advisory Opinion published by ITLOS, there are arguably some captivating remarks – as it was held that this specific term in Art. 194 LOSC imposes a legal obligation of due-diligence[97]. It would not be unjust to imply that ´´due-diligence´´ obligations are not effortlessly described in precise terms of the law, which is also argued by the tribunal[98]. This discussion is outside the scope of this thesis, so what will suffice for now is that ´´due-diligence´´ obligations entail an effort or process to analyse and collect information prior to making a decision, in order to mitigate risk[99]; which in this case would necessitate mitigation of environmental risk. The jurisprudence then suggests that Norway, as an oil-State, has a responsibility of due-diligence

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[95] Ibid. P. 242/20. Para. 29.

[96] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) 2011 (ITLOS).

[97] Ibid. Para. 113-115 (Reference to *Pulp Mills* case, para. 197: *Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party*).

[98] Ibid. Para. 117.

[99] James Chen «*Due Diligence*» 2023 https://www.investopedia.com/terms/d/duediligence.asp accessed 04.07.2023.

in terms of taking the necessary steps in ensuring marine environmental safety prior to the implementation of subsequent activities.

In Part XII LOSC, Section 2 emphasizes global and regional cooperation. Art. 197 LOSC stipulates that States shall cooperate in protecting and preserving the marine environment, through regional and global basis. This regulatory provision, in the opinion of the author, can be drawn a parallel to Art. 208 LOSC; which essentially instigates that coastal Sates shall adopt rules and regulations to prevent, reduce and control marine pollution through competent organizations, in activities subject to pollution from the seabed that is within national jurisdiction. The jurisprudence is arguably supportive of this, as stated in the *MOX Plant*[100] case by ITLOS:

«*Considering, however, that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law..*»[101].

These aforementioned regulatory provisions and the case law suggests that when engaging in an activity that is subject to potential pollution, in which the offshore oil activities of Norway certainly qualify as, the duty to cooperate is a fundamental principle in international law, in terms of ensuring the safety of the marine environment from a pollution prospect. It is also worth mentioning that Art. 208 (3) LOSC states that the laws and regulations adopted for the purpose of activities subject to pollution within national jurisdiction from offshore installations shall not be any less effective than those that are of international nature – meaning that there is a threshold for the domestic law to be 1) in conformity with international and, and 2) arguably more comprehensive than the international obligations from a legal point of view. The rationale behind this part of Art. 208 LOSC is arguably, in the opinion of the author, a further legal reinforcement as provisions from international law might not necessarily always be extensive in the way to approach subsequent issues relating to the subject matter. In other words, domestic law presumably allows for specific penalties, which

[100] *The Mox Plant Case (Ireland v. United Kingdom)* Provisional Measures [List of cases. No. 10] 2001 (ITLOS).

[101] Ibid. Para. 82.

is needed, because there is a need for clear and concise legal chastising of activities that lead to harm to the marine environment.

Puthucherril argues in his article, that the LOSC acts as a constitution for the ocean, and it lays down an umbrella of legal ´architecture´ to deal with most, if not all, aspects of ocean governance[102]. Furthermore, he additionally states that the LOSC establishes a positive obligation in relation to protection and preservation of the marine environment, as States are obliged to protect the ocean from all kind of degradation from various sources, adopting contingency plans and cooperate through competent organizations[103]. This statement can be broken down, and analysed in the sense of how much credibility it possesses. Describing the LOSC as the constitution of the ocean is not an overzealous statement, as it does possess enough regulatory provisions to govern the oceans. Moreover, it can also be argued that the LOSC is dynamic in nature, because it refers throughout the Convention to GAIRS and other relevant competent organizations in terms of cooperation. The part regarding the LOSC having positive obligations depend on the utilization of the regulatory provisions and the Convention itself. If the general consensus is that there is, in fact, a prudent utilization of the LOSC, it could be argued that the Convention does have a status of comprehensiveness. It would depend on the practice.

In retrospect, Boyle argues that GAIRS established through the international community via competent organizations will, in most cases, provide a minimum basis for attaining the duty of regulating pollution[104]. Consequently, Boyle additionally provides a view that comprises of the idea that a legal obligation imposed on States with respect to cooperation, assistance and monitoring may ensure that States are better rusted to counter pollution in an effective manner[105]. This is arguably a more cynical view on the regulatory provisions in the LOSC in relation to pollution. However, it would not be unjust to imply that he is not directly wrong for his view either. One can simply argue that both Puthucherril and Boyle have views that

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[102] Tony George Puthucherril «*PROTECTING THE MARINE ENVIRONMENT: UNDERSTANDING THE ROLE OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*» Journal of the Indian Law Institute, Vol. 57, No. 1 (January-March 2015) p. 57.

[103] Ibid.

[104] Alan Boyle «*Marine Pollution under the Law of the Sea Convention*» The American Journal of International Law, Vol. 79, No. 2 (Apr., 1985) p. 370.

[105] Ibid.

can be agreed with, but it inevitably comes down to how State conduct themselves in the utilization of the LOSC and its provisions. What can be taken out of this notion with respect to the legal obligations Norway have under international law, is arguably, irrespective of the opposing views from Puthucherril and Boyle – there is at least a minimum standard of procuring the duty to regulate pollution, as pollution is inevitable from the offshore oil industry off of Norwegian waters.

3.2 Sustainable development in international law

There is arguably miniscule imposition of objection that economic activities should proceed with sustainability in mind, as a general consensus. As the offshore oil industry imposes, as aforementioned in the previous parts of this thesis, an environmental threat – due to incidents and pollution. It would not be unjust to imply that the law, domestic and international, should take an approach that is developing in a sustainable manner. Unfortunately, this concept is regarded as a contemporary phenomenon[106].

Viñuales argues that the determination of the legal content of the concept of sustainable development in international law has a premise that it is viewed as a norm of international law[107]. The rationale behind this statement is based on the fact that this concept has been referred to in legal practice – in terms of treaties, in which this thesis will address in subsequent parts, but also in case law. The ICJ in the case of *Gabčíkovo-Nagymaros*[108], addressed this phenomena, stating that historically, mankind has, for economic reasons, constantly interfered with nature without consideration of the effects those activities have on the environment. In light of recent scientific insights, up to date norms and standards have been developed, and therefore must be given consideration. This needs to reconcile economic development with protection and preservation of the environment in light of the concept of sustainable development[109]. What the respective court is expressing here, in the view of the author, is that the international community is more advanced now in a lot of areas, and obtaining insight on environmental impacts from conducting certain type of activities now is

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[106] Jorge Viñuales «*Sustainable Development in International Law*» in L. Rajamani, J. Peel (eds.), The Oxford Handbook of International Environmental Law (Oxford University Press, 2nd edn. 2019) p. 4.

[107] Ibid. P. 7.

[108] *Gabčíkovo-Nagymaros (Hungary v Slovakia)* 1997 (ICJ).

[109] Ibid. Para. 140 paraphrased.

arguably easier than before – and therefore such consideration must be taken into account by States in relation to for example issuing different licenses and permits for different activities. Consequently, this notion from *Gabčíkovo-Nagymaros* can argued to be intrinsically supportive of Viñuales´ claim, that sustainable development in international law has become a norm – which is plausibly an equitable outcome in terms of protection and preservation of the marine environment, especially from offshore oil activities.

In further examining sustainable development in international law, a more recent case supervised by the PCA, provided some additional collectible insight in the *Iron Rhine*[110] case, where the respective tribunal stated that international law, today, requires the integration of appropriate environmental measures in the design and implementation of economic activities[111]:

«*Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that were development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the Tribunal, has now become a principle of international law*»[112].

This divulgence from the respective tribunal indicates that consideration of sustainable development in indulging economic activities is now a compilation of international law. In retrospect, Barral argues that if the general consensus is, as argued in other academic commentaries, that international law may not require development to be sustainable, it still requires development decisions to be the outcome of a process which promotes sustainable development[113] - which is feasibly an accurate representation of international law, as illustrated in the jurisprudence. Moreover, Barral additionally indicates that sustainable development, as an objective, must influence the decision-making process of legal subjects, in achieving a decision that is balanced, by virtue of taking into account environmental, economic and social aspects into the considerations[114]. This assertion is perhaps an

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[110] *Iron Rhine (The Kingdom of Belgium v The Kingdom of The Netherlands)* 2005 (PCA).

[111] Ibid. Para. 59.

[112] Ibid.

[113] Virginie Barral «*Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*» European Journal of International Law, Volume 23, Issue 2, May 2012 p. 391.

[114] Ibid.

unprejudiced field of vision in relation to sustainable development in international law. Conclusively, Barral emphasizes that sustainable development in law legitimizes dynamic interpretation of treaties and other rules of reference, and can potentially lead to individuals of judicial power to revise the treaty if necessary[115]. If that is the case, there is an underlying notion that allows for flexible interpretations of the law, which can potentially lead to legal reform, when necessary, and as the concept of sustainable development in law is conceivably a new one – flexibility and dynamic nature is undoubtedly needed.

Respectively, this conviction is relevant to Norway´s offshore petroleum industry in the sense that there has to be, under international law, a nexus between sustainable and economic development. It can be argued that, due to the relatively new concept of sustainable development in international law, the foreseeable future might potentially consist of additional principles or regulations favouring sustainable development to a greater context – which for the purpose of this thesis, it can be argued that legal reform in the context of international law might already be on its way, especially in this area. Consequently, it would not be inequitable to imply that States would interpret and establish the construct of link between sustainable and economic development differently, so it comes down to single-conduct discretion, which is arguably already the case in general when it comes to international law. However, establishing this conception of sustainable development in the theoretical sense is an exemplary start, at the very least.

3.3 Other instruments of international law

i. Rio Declaration[116]

The creation of the Rio Declaration was based on the perception that it was meant to be a concise and adorning document, establishing the principles that would govern the relationship between States and others that were concerned with the environment[117]. Its 27 Principles

[115] Ibid. P. 398.

[116] Rio Declaration on Environment and Development 1992 (Adopted by UN General Assembly Resolution 151/26).

[117] Foo Kim Boon «*The Rio Declaration and its Influence On International Environmental Law*» Singapore Journal of Legal Studies, (December 1992), p. 348.

arguably urges the demonstration of harmonization between States in environmental terms. For this part of the thesis, Principle 4 is particularly worth alluding:

«*In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*»[118].

This declaration arguably reaffirms the previous part in the thesis in relation to sustainable development. Consequently, the Rio Declaration is not a treaty, nor does is claim to codify customary international law, and thus not a legally binding instrument[119]. Boon argues that soft law is nonetheless important, as it allows for certain legal principles to be clarified and articulated[120] - which is arguably a fair comprehension on the matter. Soft law additionally allows for, one could argue, a less stringent attitude in law-making, i.e. since there are no legally binding effects, the soft law instruments allows for highly admirable goals that would not necessarily be attainable in the event of legally binding law-making that the subsequent parties have to agree to.

Norway was an adamant State in the involvement of the Rio Declaration[121], and it could be argued that such environmental policies, even from soft law instruments, are given the attention it arguably deserves, in terms of protection and preservation of the marine environment.

ii. OSPAR Convention[122]

The OSPAR Convention is arguably considered an upright Commission, with its Convention having 16 contracting parties, including Norway and the EU[123], and the Convention aims to

[118] Ibid. Footnote 116. Principle 4.

[119] Ibid. Footnote 117. p. 351.

[120] Ibid.

[121] Hans Bugge «Rio Conference under a legal light» https://doi.org/10.18261/ISSN1504-3061-1993-08-0 pp. 469-485.

[122] Convention for the Protection of the Marine Environment of the North-East Atlantic 1992.

[123] OSPAR Commission, Contracting Parties https://www.ospar.org/organisation/contracting-parties accessed 06.07.2023.

tackle dumping and marine pollution. There was also an annex added in 1998 to cover human activity outside the conduct of pollution that can have an adverse effect on the sea[124].

Art. 2 OSPAR Convention stipulates that the Member States of the Convention shall take all possible steps to eliminate and prevent pollution, and additionally take the necessary measures to protect the maritime areas against adverse effects of human activities. When it comes to protection and preservation of the marine environment from offshore oil activities, Art. 5 OSPAR Convention states that all possible steps must be taken for the prevention and elimination of pollution.

The question then begs of what these regulatory provisions, and subsequent ones in the Convention, mean for Norway as a substantial offshore oil-nation. The definition of pollution is articulated in Art. 1 (d) OSPAR Convention, stipulating that the term ´pollution´ means the introduction by individuals, directly or indirectly, of energy or substances into the maritime area that results in damage to the marine environment and humans. Practically, the State of Norway must ensure that offshore oil activities on the NCS and the installations comply with the notion of avoiding pollution in their maritime waters. There is arguably a general view that provisions from international law can potentially be vague in their expressions. However, Art. 5 OSPAR Convention stipulates ´all´ possible steps must be taken, meaning that legally there can be no shortcuts, and there has to be implemented measures that really take into account all possible measures to ensure the best outcome, which in this case is arguably the one that has the least possible effects on the marine environment, in conducting oil exploration and exploitation.

Interestingly, one of the decisions from the OSPAR Commission in a Ministerial Meeting in 1998, it was held in Decision 98/3[125] that offshore platforms can no longer be subjected to dumping – meaning that subsequent offshore platforms that are no longer in use must be taken away[126] - which is arguably also in conformity with Art. 60 (3) LOSC, subject to GAIRS. The decision by the OSPAR Commission arguably demonstrated that not only is the marine environment protected, by law, from offshore oil exploration and exploitation, it is

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[124] Ibid. ´About OSPAR´.

[125] OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations.

[126] Louise de La Fayette «*The OSPAR Convention Comes into Force: Continuity and Progress*» The International Journal of Marine and Coastal Law, 14(2) p. 270.

also protected from potential environmental harm in the sense of leaving offshore installations that are no longer in use.

There are several marine environmental concerns with Norway´s offshore petroleum activities, as stipulated by OSPAR[127]. The OSPAR Commission has put in compelling amount of measures with the aim to reduce emissions and discharges from the petroleum and gas industry within the OSPAR Maritime Area[128], which of course comprises of Norwegian waters. In addition to Decision 98/3, the OSPAR Commission has also set forth recommendations to assist in subsequent issues of discharges into the sea. By virtue of OSPAR Recommendation 2001/1[129], it has been put in place a recommendation in relation to the aim of limiting the concentration of dispersed oil. Furthermore, around 11 years ago, the OSPAR Commission additionally set forth Recommendation 2012/5[130] - which introduced the notion of calculating the environmental risk of Produced water for all offshore installations in the OSPAR Maritime Areas.

The aforementioned Decisions and Recommendations are merely a few examples, and demonstrates the underlying gravity of the work that is conducted by OSPAR to protect and preserve the marine environment from the offshore oil industry in Norway, amongst others – which inevitably indicates that supplementary laws in the international sense based on the foundation of cooperation are in place, in addition to the domestic laws Norway possesses with respect to protection and preservation of the marine environment from the petroleum industry.

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[127] OSPAR (Pressures on the marine environment from oil and gas activities) https://oap.ospar.org/en/ospar-assessments/quality-status-reports/qsr-2023/other-assessments/impacts-offshore-oil-and-gas-industry/#7 accessed 08.08.2023.

[128] Ibid.

[129] OSPAR Recommendation 2001/1 Requirement for the Management of Produced Water (PW) from Offshore Installations.

[130] OSPAR Recommendation 2012/5 Risk-Based Approach to the Management of Produced Water Discharges from Offshore Installations.

What is also additionally interesting, is that OSPAR has implemented a strategy for 2030[131] to combat issues concerning the marine environment stemming from climate change, but also economic related issues such as pollution and exploitation of living and non-living resources[132]. What this essentially expresses in the sense of cooperation within the legal framework of international law and laws pertinent to the protection and preservation of the marine environment from the offshore petroleum industry, is that even though there are arguably comprehensive laws in place, there seems to be an aim for further vision of betterment from OSPAR. One of the strategic objectives in this 2030 contingency plan is to ensure that uses of the marine environment are sustainable[133] - which arguably reaffirms previous arguments in this thesis concerning the focus on the future consisting of sustainable development in the legal sense of international law and cooperation. Conclusively, this will arguably demonstrate that Norway, amongst other OSPAR States, will set exemplary conduct in the future with respect to ensuring sustainable use of the oceans in relation to offshore oil, for other oil-nations as well, if conducted properly.

iii. MARPOL[134]

MARPOL is the central international convention covering the prevention of pollution from ships[135], and not offshore oil installations. However, it is arguably relevant in the broader context of the discussion with respect to comprehensiveness of existing laws in place to protect and preserve the marine environment from Norwegian offshore oil activities. Furthermore, MARPOL comprises of regulatory provisions that aim to prevent and minimize both accidental pollution from ships, and additionally pollution from routine operations[136]. As

[131] Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2030. (Agreement 2021-01: North-East Atlantic Environment Strategy (replacing Agreement 2010-03)) OSPAR 21/13/1, Annex 22.

[132] Ibid.

[133] Ibid. Strategic Objective 7.

[134] International Convention for the Prevention of Pollution from Ships (MARPOL) 1973.

[135] IMO (MARPOL) https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx accessed 06.07.2023.

[136] Ibid.

Norway is a Member State to the IMO[137], MARPOL provisions are supplementary to the international obligations Norway have in relation to protection and preservation of the marine environment from its offshore oil activities.

Curtis argues, in his academic commentary, that marine pollution from oil tanker discharges produces substantial damage to both the environment and commercial aspects[138]. Moreover, Curtis analyses MARPOL, its provisions and the challenges that come with it. However, his conclusion is that MARPOL contributed to strengthen port and coastal State´s ability to respond to operation discharges, and also recapitulated the global concern for the marine environment and the importance of pollution standards on an international level[139]. Conclusively, it can be argued that MARPOL is a significant supplementary convention for Norway´s international obligations in protecting and preserving the marine environment from offshore oil activities, and it is arguably a comprehensive one at that.

iv. CBD[140]

It would not be unjust to imply that conservation of biological diversity might not necessarily strictly be correlated with natural resources exploration and exploitation offshore. In retrospect, it could be argued that pollution from subsequent activities on the NCS and in the sea in general is arguably not favourable to biological diversity and the ecosystem in the water – and since Norway has ratified the CBD[141], the State is bound by the regulatory provisions. Therefore, the CBD is included in this thesis as a part of the international obligations Norway have, in consideration of environmental prospects whilst conducting offshore oil activities.

The main objectives in the CBD is to ´conserve biological diversity, naturally, sustainable use of the constituents in that biological diversity and equitable sharing of benefits that arise from

[137] IMO (Council Members) https://www.imo.org/en/OurWork/ERO/Pages/Council-Members.aspx accessed 06.07.2023.

[138] Jeff Curtis «*Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?*» Environmental Law, Vol. 15, No. 4 (Summer 1985) p. 680.

[139] Ibid. P. 709.

[140] Convention on Biological Diversity 1992.

[141] List of Parties https://www.cbd.int/information/parties.shtml accessed 07.07.2023.

the genetic resources in relation to access and information to the research and technology´[142]. It is argued that the CBD differs from other conventional international agreements in the sense that it sets goals, rather than specific objectives and targets[143], and there are certainly provisions in the CBD that promote sustainable economic conduct in terms of protection and preservation of the environment. Art. 11 CBD constitutes that the Member States to the Convention shall, as far as possible, adopt economically sound measures that act as incentives for the purpose of conservation and sustainable use. In terms of Norway´s international legal obligations in protecting and preserving the marine environment from its offshore activities, the CBD is arguably complimentary in those subsequent obligations.

v. London Convention[144] & Protocol[145]

Complimentary legal obligations on international level that Norway have can be further discussed in the London Convention, which is ratified by Norway[146]. Whereas MARPOL is mainly regulating pollution from ships, the London Convention´s purpose is to stimulate effective control of all sources of pollution to the marine environment by virtue of taking all ´practicable´ steps to prevent pollution of the sea by dumping of wastes and other matter[147].

The preamble of the London Convention imposes some general legal obligations on the State of Norway, in terms of protection of the marine environment from pollution by virtue of dumping and discharges. However, interestingly, the Convention does not arguably provide provisions on the prevention of pollution stemming from petroleum-extraction. Additionally, Art. 2 London Convention stipulates that States shall take effective measures to prevent marine pollution in accordance with economic capabilities. Such factors can arguably create some leeway in how States are operating offshore oil activities in terms of protection and

[142] Botanic Gardens Conservation News «*The Convention on Biological Diversity*» Vol. 3, No. 2 (June 1999) p. 29.

[143] Ibid.

[144] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972.

[145] 1996 Protocol To The Convention On The Prevention Of Marine Pollution By Dumping Of Wastes And Other Matter.

[146] Participant https://treaties.un.org/pages/showDetails.aspx?objid=08000002800fdd18 accessed 07.07.2023.

[147] IMO (London Convention) https://www.imo.org/en/OurWork/Environment/Pages/London-Convention-Protocol.aspx accessed 09.07.2023.

preservation of the marine environment, even though it could be argued that the Convention in general contain sound regulatory provisions due to the preventative notion of pollution.

To replace the London Convention, the 1996 London Protocol was agreed upon to further renovate its predecessor[148]. Kirk argues in her article, that the most recent Protocol to the Convention has a different approach in terms of placing more restrictions[149], which again clarifies ambiguities in the law. Moreover, Kirk argues that there has been a significant shift in notion in relation to pollution – from permissive to restrictive[150], especially with respect to dumping. It can be argued that the introduction of the Protocol was necessary and works as intended[151], mainly due to fact that its aim was to bridge any legal gaps inconsistencies with predecessor laws. What this means for the State of Norway in protecting and preserving the marine environment from its offshore oil activities can essentially be declared as 1) additional supplementary international law for the purpose of preventing marine environmental harm from dumping, and 2) a reconstructed legal framework with a swift from permissible to preventative – in which one could argue that it was the morally right thing to do in order to further protect the oceans due to exploration and exploitation that can potentially have adverse and strenuous effects on the marine environment.

vi. Espoo Convention[152]

In addition to Norwegian domestic laws concerning EIAs, Norway ratified the Espoo Convention in 1993[153], meaning that Member States must by ´aware of the interrelationship between economic activities and their environmental consequences´ in the sense of EIA in a transboundary context. The Espoo Convention has the aim to extend assessments across the borders between the Member States to the treaty, when an activity that is planned may

[148] Ibid.

[149] Elizabeth Kirk «*The 1996 Protocol to the London Dumping Convention and the Brent Spar*» The International and Comparative Law Quarterly, Vol. 46, No. 4 (Oct., 1997) p. 958.

[150] Ibid.

[151] Ibid. P. 963.

[152] Convention on Environmental Impact Assessment in a Transboundary Context 1991.

[153] UN, Participants https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-4&chapter=27&clang=_en accessed 09.07.2023.

potentially cause impactful unpropitious harm to the marine environment that are not stationary in one jurisdiction[154].

vii. Concluding remarks

Respectively, the nexus between economic activities and international regulations subject to Norway in terms of protection and preservation of the marine environment from offshore oil activities by law, are apparent. There seems to be several comprehensive international agreements with respect to protection and preservation of the marine environment from human activities for economic benefit, which speaks to the comprehensiveness of the laws pertinent to Norway´s offshore petroleum activities. In retrospect, it can also be argued that the aforementioned legal instruments of multinational function, are somewhat general, and arguably not heavily linked with the procurement of conduct in terms of protection and preservation of the marine environment specifically from the offshore petroleum industry – but rather provides an overview of how environmental issues are being dealt with in the eyes of international law, which is arguably still very relevant.

OSPAR seems to have the highest statues of extensiveness when it comes to the question of this thesis, which is natural, as it is specified to an area where Norwegian waters are in question and the existence of several offshore installations drilling for oil. The aforementioned analysis of the international legal instruments in this chapter will be decisive in the last chapter of this thesis, in deciding the sufficiency of existing laws to protect and preserve the marine environment in Norway from offshore petroleum activities.

CHAPTER 4: EEA & OTHER EU REGULATIONS

For the purpose of this thesis, in determining the adequacy of the current domestic and international laws subject to Norway, the regulatory provisions in the EEA Agreement in relation to environmental protection shall be discussed, in addition to other EU Law pertinent to protection and preservation of the marine environment from the offshore petroleum

[154] Transboundary environmental impact assessments: Espoo Convention https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/transboundary-environmental-impact-assessments.html accessed 09.07.2023.

industry – to further strengthen the basis in determining whether there is a need for legal reinforcement in the judicial system of the State of Norway.

As the State of Norway is not a Member State to the EU, but arguably heavily involved through the adaptation of directives, cooperation and by virtue of the EEA Agreement[155] - it shall be discussed what particular segments of the EEA Agreement that would potentially be beneficial for the protection and preservation of the marine environment if the EEA Agreement was to be implemented beyond the 12nm limit.

4.1 Relevant EEA regulations

Starting with the preamble of the EEA Agreement, it is stipulated that Member States are:

«*Determined to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken*»[156].

In examining this assertion, it can be broken down into a few points, and the first one being that protecting and preserving the quality of the environment – which is a rather general stipulation. Furthermore, this notion aims to ensure a judicious and sensible use of natural resources that is in line with sustainable development and the precautionary principle. The second part is arguably not as general as the first part, and can presumably be argued to have some effect. As aforementioned, sustainable development is a significant part of international law, especially through the jurisprudence, so it is favourable for a treaty to reiterate this notion. It can also be drawn a parallel to the EU in general viewing the precautionary principle as customary international law, as argued by the EU in the *EC Hormones*[157] case. What can be drawn from this particular statement from the EEA Agreement, and the fact that there is a view on the precautionary principle being of customary law status in international

[155] Norway and the EU 2022 https://www.norway.no/en/missions/eu/areas-of-cooperation/the-eea-agreement/ accessed 10.07.2023.

[156] Ibid. Footnote 14. p. 5.

[157] AB-1997-4 - Report of the Appellate Body European Communities — *Measures Concerning Meat and Meat Products* (Hormones).

environmental law, is that the EU is arguably concerned with sustainable use of natural resources and protection and preservation of the marine environment.

When it comes to action being taken in relation to environmental aspects, Art. 73 (1, 1a) EEA Agreement stipulates that those subsequent actions shall have the objective of preserving, protecting and improving the quality of the environment. Moreover, s. 2 of Art. 73 EEA Agreement states that such actions with respect to the environment shall be based on the principles of prevention, and that damage to the environment should be rectified.

What this essentially means for the State of Norway, is that in the event of the EEA Agreement being applicable beyond its territorial sea, these subsequent regulations in terms of protection and preservation of the environment would apply – and then one could argue whether those regulations are necessary to be supplementary to the already existing rules governing pollution and marine environmental harm from the offshore oil industry in general – in which this composition will address in the concluding remarks in the last chapter.

In addition to these subsequent regulatory provisions in the EEA Agreement concerning the environment, the State of Norway is also a Member State to Annex XX[158] of the Agreement, which is comprised of five chapters specifically tailored to the protection of the environment. In Chapter I of the annex, there are some general references that act to govern impact assessments, integrated control and prevention of pollution, and access to information relating to the environment[159]. The rest of the chapters are not necessarily heavily linked with protection and preservation of the marine environment in the sense of environmental protection from the offshore oil industry.

4.2 DIRECTIVE 2013/30/EU[160] (hereinafter Offshore Directive)

[158] EEA Agreement, ANNEX XX.

[159] EFTA, Environment https://www.efta.int/eea/policy-areas/flanking-horizontal-policies/environment accessed 11.07.2023.

[160] DIRECTIVE 2013/30/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC (Text with EEA relevance).

Since the position of Norway is that the EEA Agreement does not apply beyond the territorial sea, the Offshore Directive has not been implemented[161] - which initially was drafted by the European Commission as a reaction to the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.

The Offshore Directive focuses on the safety of offshore oil and gas from an operational perspective. It seems as the primary objective of the Directive is to secure high safety standards for drilling activities offshore, it additionally includes regulatory provisions to protect the marine environment. In what one could argue to be the preamble of the Offshore Directive, it is stated that the objective of the Directive is to reduce as far as possible the occurrence of major incidents relating to offshore petroleum operations, thus increasing the protection of the marine environment[162]. Furthermore, the Offshore Directive additionally stipulates that by reducing the risk of pollution, it should therefore follow the notion of ensuring marine environmental protection[163].

In examining the Offshore Directive, there are seemingly virtuous regulatory provisions with respect to oil spill contingency plans, risk assessments to identify potential threats and evaluate their impacts on the marine environment and environmental monitoring and reporting – which undoubtedly are dignified prospects in relation to protection and preservation of the marine environment from the offshore oil industry. In retrospect, the Directive still nonetheless set out only the minimum requirements[164] for preventing major accidents in offshore petroleum and gas operations. Consequentially, it can be argued that the regulatory provisions concerning the protection of the marine environment are somewhat general, and arguably not consistent throughout the Directive. In the opinion of the author, what is arguably a well-thought prospect is the submission of an annual report to the European Commission on safety and environmental impact, which is done by virtue of Art. 25 Offshore Directive. Not only will this prospect promote cross-border cooperation, which is

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[161] Alf Ole Ask *´EU vil ha mer makt over sikkerheten i Nordsjøen´* 2016 https://www.aftenposten.no/verden/i/6nWmz/eu-vil-ha-mer-makt-over-sikkerheten-i-nordsjoeen accessed 09.08.2023.

[162] Ibid. Footnote 160. Preamble of the Directive (2).

[163] Ibid. (3).

[164] Ibid. Footnote 160. Art. 1 (1): «*This Directive establishes minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents*».

favourable in the eyes of international law, but also it provides an overview of the statistical numbers of environmental monitoring in terms of for example minor or major accidents – which again can potentially contribute to better manoeuvring of subsequent issues related to offshore operations.

CHAPTER 5: CONCLUSIONS

5.1 Comprehensiveness of Norwegian domestic law

Respectively, the domestic regulations governing the offshore petroleum industry in Norway are seemingly of extensive nature, due to the fact that legislation covers the areas in which there is a need for environmental consideration. There are arguably prudent domestic regulations in place to protect and preserve the marine environment from the petroleum activities at sea by virtue of impact assessments, pollution control and cohesive cooperation between the different government agencies with respect to the legislative factors. Furthermore, the case law consistently suggests that an environmental agenda is absolutely necessary in conducting exploration and exploitation of natural resources on the NCS – which is an indication that the seemingly stringent laws pertinent to offshore petroleum activities are practiced in what seems to be a sensible manner.

Consequently, the academic commentary additionally confirms this notion of comprehensiveness of the Norwegian judicial petroleum model, as argued by Anchustegui and Glapiak[165]. It is argued that the domestic regulations in Norway concerning the offshore petroleum industry is labelled exceptional, even though the fact that the Petroleum Act is not necessarily exhaustive in nature[166]. What seems to be the rationale behind this conception is that even if the Petroleum Act is not particularly all-inclusive or detailed, as argued by Anchustegui and Glapiak, it is arguably still quite functional due to how it is utilized both in practice, but also in justification and reasoning in a courtroom – as suggested by the jurisprudence in the respective Norwegian courts. In addition to an arguably conditioned application, other domestic laws, such as the Pollution Act, are supplementary in the broad

[165] Ignacio Herrera Anchustegui and Aleksander Glapiak «*Wind of change: A Scandinavian perspective on energy transition and the 'greenification' of the oil and gas sector*» https://ssrn.com/abstract=3829455 accessed 10.08.2023.

[166] Ibid. Law as a tool for success and change (3.2).

legal context of protection and preserving the marine environment and complimentary to each other.

Moreover, it is argued that significant state intervention is additionally a remarkable part of the success of the Norwegian model in legal instruments governing the petroleum sector, by virtue of administrative supervision[167]. Whether one agrees with nationalization of natural resources or not, it is undeniable that Norway has a peculiar licensing system, because it is ensured that the most competent licensee is the operator in subsequent oil fields – unlike other petroleum jurisdictions, where the operational party is selected amongst the businesses of joint ventures who apply for the particular license, the operator and participants of the joint venture are selected by the state[168]. Additionally, this prerequisite has additionally allowed for the State of Norway to compress most of the oil in their fields[169], and what that leads to is arguably the perception of a well-rounded relationship between the economic and environmental link. In other words; the most amount of a natural resource is extracted for the benefit of the country, while simultaneously the conduct is within the legal framework that narrates a stringent requirement in taking into account environmental considerations. This conviction is what every petroleum jurisdiction should strive to achieve.

5.2 Comprehensiveness of international law

The legal obligations Norway have under international law, to protect and preserve the marine environment from the offshore petroleum industry seem to be, in the opinion of the author, less comprehensive, if one would compare them to the aforementioned national legislation – which arguably makes sense, in the broader context of comparison between domestic and international law. The LOSC regime, particularly Part XII has had its fair share of interpretation and perception of utilization in the respective international tribunals, which arguably has led to a more comprehensive understanding of the applicability of Part XII of the LOSC. However, as the academics have argued, the extensiveness of the LOSC and its regulatory provisions depend heavily on the utilization of each Member State, but it does

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[167] Ibid. Strong state intervention (3.2.1).

[168] Tina Soliman Hunter and Ignacio Herrera Anchustegui «*Ernst, are you kidding me? Reflections about Norwegian energy law by non-Norwegian energy lawyers*» https://ssrn.com/abstract=4388031 accessed 10.08.2023.

[169] Ibid. Licensing peculiarities (4.2).

possess the necessary regulations even if one would view it only as a legal foundation – because it does create room for the apprehension of competent organizations and referring to GAIRS throughout the Convention.

However, the bread and butter of comprehensiveness in relation to international law, in the opinion of the author, is OSPAR and its Commission. Embedded in this notion, is the conviction that the regulations stemming from OSPAR are arguably tailored to Norway´s offshore petroleum activities, which is necessary, due to the sheer size of Norwegian offshore operations. Without conducting another extensive dive into the regulations procured by OSPAR, what is worth mentioning is Annex III[170] of the OSPAR Convention, which stipulates in its Art. 1 (2)[171] that it has the aim to eliminate or prevent pollution from installations offshore, by virtue of demanding the best feasible application with respect to environmental practice – which indicates the comprehensiveness of OSPAR, its Commission and the regulations it provides to protect and preserve the marine environment from offshore petroleum activities. Conclusively, it is also paramount to establish the relationship between OSPAR and the LOSC. It is stated that «*The OSPAR Commission works under the umbrella of customary international law as codified by the LOSC*»[172], which signifies the presumption provided by the LOSC in terms of encouragement to cooperate, which is also a fundamental principle in international law in general[173].

When it comes to the environmental regulations from the EEA Agreement, one could argue that the necessity for the implementations of the Agreement and its environmental regulatory provisions being applicable beyond the territorial sea of Norway to ensure adequate protection and preservation of the marine environment from the offshore petroleum industry, do not supersede the complications it comes with in general. This notion will arguably follow the same prerequisite that the Offshore Directive falls under the same categorization, as it would by applicable via the EEA Agreement. The alignment of said regulations can additionally be argued to be too general, and therefore not of great supplementary conviction, with respect to

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[170] Annex III of the OSPAR Convention.

[171] Ibid. Art. 1 (2).

[172] OSPAR, Principles https://www.ospar.org/convention/principles accessed 10.08.2023.

[173] Seokwoo Lee ´ Chapter 2 UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation´ https://doi.org/10.1163/9789004396630_003 accessed 10.08.2023.

further strengthening the legal regime for marine environmental protection from offshore oil activities.

5.3 Final remarks

Respectively, the objective of this thesis was not to reinvent the wheel. The discussions based on the aforementioned legal instrument were discussed in order to determine whether there is need for additional legal reinforcement, by virtue of analysing the comprehensiveness of the existing legal regimes governing the offshore petroleum industry in Norway.

The existing legal regimes already in place are, by no means, flawless. However, that can arguably be said about a significant quantity of legal regimes in general. Nevertheless, it seems as the domestic laws in Norway are quite comprehensive in dealing with environmental issues relating to the offshore petroleum industry, whereas the international legal frameworks are in development, in which the author believes will always be the case. There is also nothing that suggests the domestic law in Norway is not being in conformity with the legal obligations under international law. What is rather interesting though, is how the legal regimes will adapt to greenification of the energy sector in the future.

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