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Local Content and Sustainable Development in Norway

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1 INTRODUCTION

The chapter reviews the use of local content requirements (LCRs) in the Norwegian oil and gas legislation. Looking at the evolution of the regulation of LCRs over time, it reviews, successively, the legal design of the overall model for LCRs in Norway, as elaborated before the country's accession to the European Economic Area (EEA); and the legal framework for local content under liberalised and integrated energy markets after Norway joined the EEA. The ultimate purpose of the chapter is to answer the question raised by the book as to best practice in terms of a sustainability framework for LCRs with a transferable value.

When Norway discovered petroleum on the continental shelf near the shoreline of the country, its government had no petroleum legislation in place, and no local content requirements governing the sector. As a consequence, and because it was seen as a necessary step, the authorities had to both elaborate a dedicated local content policy (LCP) and adopt the associated legal requirements that would secure its implementation. And because Norway was not yet bound by any relevant European or international agreements (besides the GATT), it remained free to design its LCP regime. While pursuing those tasks, the Norwegian authorities have managed to maintain a clear line as to what was the ultimate objective of their regulatory model, that is, the maximisation of national value creation and efficient resource management.[1] Local content legal framework was in place until Norway joined the EEA and the WTO. There are currently no local content requirements per se in Norwegian legislation applicable to the petroleum industry. The fact that local content measures have been (and should be) temporary has been another key lesson from the Norwegian petroleum policy. The competences acquired by the Norwegian industry and authorities during the phase of implementation of LCRs have enabled the emergence of an internationally competitive Norwegian petroleum sector, which today competes without a national LC policy.

[1] See F. Al-Kasim, *Managing Petroleum Resources. The 'Norwegian Model' in a Broad Perspective* (Alden Press, 2006), chapter 8: Value Creation: A Common Objective.

If the Norwegian model is often described as a successful example of petroleum policy, this is largely due to a particular national context. First, when Norway discovered petroleum on its continental shelf, the country was already self-sufficient in energy supply due to rich hydropower resources. This allowed the successive governments to elaborate the national petroleum policy step by step, at a moderate pace but in a dynamic manner. The exploitation of the petroleum resources followed the same pattern. Second, Norway was already well developed before the discovery of oil and gas, and had a transparent and stable governance framework. It had high technical skills relevant for offshore petroleum operations, such as shipping expertise, advanced methods of numerical analysis, building and providing oil tankers.[2] Norway benefited from an efficient system of administrative governance with stable institutions,[3] supported by a legislative framework reflecting key principles of administrative law (rule of law, legality principle, case handling procedures, public consultation requirements, etc.). It also benefited from some more general cultural values inherent to a social democracy, such as cohesion, solidarity, accountability/responsibility of decision-makers and transparency. The population benefited from a high level of education and had a good basis for research and development (R&D) competence and learning capacity. The context may not be transferable per se to another jurisdiction,[4] but it nevertheless helps to identify some fundamental conditions that benefited the Norwegian implementation of local content measures and may inspire other national regimes.

Beyond those specific national circumstances, the core research question of the present chapter is to identify the key components of the regulatory approach adopted by Norway in terms of LCRs which successfully prepared it to compete internationally on liberalised energy markets. In doing so, it aims to identify which legal mechanisms adopted in Norway can be used in other jurisdictions to ensure a sustainable local content policy.

This chapter answers those questions following a chronological approach, structured around four main sections. After this introduction, Section 2 discusses the primary phase of the development of the Norwegian petroleum sector (1970s to mid-1990s), during which the national legislation included explicit LCRs. In the subsequent phase, the use of LCRs has been constrained by the obligations deriving from the entry into force of the European Economic Area (EEA) Agreement in 1994 (including the Licensing Directive 94/22/EC and internal market rules), and the application of the relevant WTO Agreements after Norway joined the WTO in 1995 (notably the TRIMs agreement and GATS). Norway has also entered into a series of

[2] Ibid., p. 58.

[3] P. Heum, 'Local Content Development – Experiences from oil and gas activities in Norway', SNF Working Paper No. 02/08, 2008, pp. 4–7.

[4] J. W. Moses and B. Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (Oxford University Press, 2017), p. 14. The authors describe in chapters 2 (Norwegian context) and 3 (The Norwegian Petroleum Administration) of their book the foundations of the Norwegian model and what they deem as 'non-transferable features'.

Bilateral Investment Treaties (BITs) which can restrain the country's ability to include LCRs. In Section 3, the chapter will review the changes introduced by Norway's accession to the EEA, to the WTO and the implementation of certain BITs for Norwegian practices. Section 4, the final section of the chapter, draws conclusions in terms of a sustainability framework for LCRs and the lessons that can be drawn from the Norwegian experience and that can serve as effective transplants – both prerequisites and barriers – in other jurisdictions. Innovative legal approaches to promote such strategies are cited when applicable.

2 PRIMARY PHASE (1970S TO MID-1990S): EXPLICIT LCRS FOR SUSTAINABLE RESULTS

The local content policy of the Norwegian authorities has been developed progressively, consolidated around some core principles (Section 2.1) which were accompanied by specific legal requirements (Section 2.2). The Section ends with some comments on this approach (Section 2.3).

2.1 *Some Common Principles in Explicit Local Content Policy in Norway*

Because Norway had no previous knowledge of the petroleum operations, attracting a diverse group of competent international companies was a key goal for government authorities that needed to secure both foreign capital and expertise.[5] The competence brought by international oil companies (IOCs) was instrumental in exploring and developing the fields and choosing the right technical solutions for enhanced recovery. The variety of IOCs present aimed to ensure competition among them and to foster efficiency, focusing on high oil and gas recovery. This competitive environment also contributed to keeping the costs low. Still today, attracting a diverse group of companies with high competences and innovative solutions is a key objective of Norwegian authorities, in particular in the context of maturing provinces.[6]

While IOCs have played a fundamental role, the Norwegian government, almost since the beginning, has planned to '*Norwegianise*' the national petroleum industry and make it capable of competing nationally and internationally.[7] Building national industry knowledge was a priority,[8] and it aimed to result in sustainable job creation,

[5] As stated in the Official Norwegian Report NOU 1979:43 (*Petroleumslov med forskrifter*, of 27 April 1979), at the start 'The Norwegian industry has been completely dependent on foreign capital and expertise'.

[6] Attracting a diverse group of companies with innovative solutions is a key objective of the licensing rounds system in predefined areas, so-called APA-rounds for Awards in Predefined Areas. The APA-round system relates to mature areas, while the numbered licensing rounds relate to frontier parts of the Norwegian continental shelf.

[7] St. meld. Nr. 76 (1970–1971) *Undersøkelse etter og utvinning av undersjøiske naturforekomster på den norske kontinentalsokkel m.m.*, p. 20.

[8] T. Gormley, Norway, in E. Pereira and T. Gormley (eds.), *Local Content for the International Petroleum Industry* (PennWell, 2018), pp. 393–395.

contributing to industrial and economic growth and social policies in the long term. Local content measures and preferential treatment were central to achieving those goals, as they required a necessary transfer of competences from the IOCs to local workforce and companies. This principle of Norwegianisation led to the establishment of national champions. Already in 1972, the government envisaged the creation of three Norwegian oil companies operating independently of one another on the Norwegian continental shelf (NCS).[9]

Government leadership was another principle applied from the start. It entailed a national steering of the direction and pace of petroleum operations, as well as wide discretion given to the government. Because governments may not always follow the same logic as private companies, assurance of government leadership was seen as a fundamental factor in enabling good resource management and in maximising local benefits. As a consequence, petroleum activities have since the beginning been subject to strict state control. This has applied to field development decisions, but also to the ability to look at the wider effects of the economic signals sent by the petroleum industry to the rest of the industry. For example, already in 1979, the government was concerned about the effects that a preferential arrangement within the upstream petroleum industry on the NCS would have for the incidental cost development in the country, as it would put pressure on prices for goods and services (local cost pressure).[10] Another manifestation of this approach has been a tradition of state participation in and state ownership of some key companies. In addition, to show sustainable leadership, Norway had to develop 'able institutions', notably through capacity building programmes.[11] National authorities should be able to promote the host country's interests but should also act in a balanced manner to maintain the interest and confidence of experienced international companies.[12]

Finally, good resources management has been and remains a mantra in Norwegian petroleum policy. It is multifaceted and is reflected in many provisions of the currently applicable 1996 Petroleum Activities Act.[13] Historically, one of the first official formulations of the good petroleum resources management policy in

[9] Those three oil companies were: Statoil, which was fully state-owned at its creation in 1972, and later on partly privatised; Hydro, which was part government and part privately owned; and Saga, which was fully privately owned.

[10] As mentioned in NOU 1979:43, note 5, p. 38: 'A preferential arrangement will affect the prices that the industry sets for its goods and services. In turn, this can lead to an increase in the salary levels in these businesses and in the industry in general. Businesses that do not enjoy preferential treatment but that are exposed to the full effects of international competition could struggle to cope with this higher salary level. It is hard to fully foresee the consequences for Norwegian economy of such a development'.

[11] T. Gormley, note 8, p. 388.

[12] This has been demonstrated recently by the Gassled tariff dispute in Norway concerning the competence of the Ministry of Petroleum and Energy (MPE) to amend the tariffs for the transportation of gas in the Norwegian upstream gas pipelines network (Gassled). After the MPE changed the pipeline tariffs, some shareholders in Gassled challenged the legality of the decision, which affected their revenues. The case was referred to the Supreme Court which ruled in favour of the State (HR-2018–1258-A, case no. 2017/1891, 28 June 2018).

[13] See, in particular, 1996 Petroleum Activities Act, section 1–2 (Resource management).

Norway is found in the so-called 'Ten Oil Commandments'. Those commandments have been submitted by the Standing Committee on Industry in a Storting White Paper dated 14 June 1971, and represented, in the words of the Government,[14] a clarification of what was needed to make sure that the oil activities would 'benefit the entire nation'. Commandments no. 1, 3, 6, 7 and 8 are of particular relevance for local content policy. No. 1 requires the 'national supervision and control of all activity on the Norwegian continental shelf'. No. 3 requires that 'new business activity must be developed, based on petroleum'. No. 6 requires that 'petroleum from the Norwegian continental shelf must, as a main rule, be landed in Norway'. No. 7 requires that the State develops 'an integrated Norwegian oil community with both national and international objectives'. And no. 8 requires that 'a state-owned oil company [must] be established to safeguard the State's commercial interests, and to pursue expedient cooperation with domestic and foreign oil stakeholders'.

2.2 *Local Content Requirements and Associated Legal Measures*

2.2.1 Evolution of the Legislative and Regulatory Framework

The Norwegian petroleum legislation has evolved progressively, structured around a few key acts supplemented by implementing rules and licensing and commercial agreements.

A prerequisite for any offshore operation in Norway was the adoption of the 1963 Royal Decree that established sovereignty over the Norwegian continental shelf.[15] Further delimitations of jurisdiction were set through bilateral treaties with Denmark and the United Kingdom.

The same year, 1963, an initial, brief (six paragraphs) framework petroleum law was adopted.[16] The law established the State's exclusive right to subsea natural resources and laid the foundation of the licensing system for the exploration and exploitation of offshore petroleum resources. Increasing interest from foreign IOCs for the resources contained in the NCS forced authorities to adopt a more complete legal framework. A committee on the continental shelf (*Kontinentalsokkelutvalget*) was established with the objective of establishing new rules for the exploration and exploitation of the submarine natural resources. In 1965, a Royal Decree implementing the 1963 framework petroleum law was adopted (hereinafter 1965 Royal Decree).[17] The first licence was awarded in September 1965, and the first big

[14] Storting White Paper 28 (2010 – 2011), 'An industry for the future – Norway's petroleum activities', chapter 1, Box 1.1.

[15] Royal Decree of 31 May 1963 No. 1 Relating to the Sovereignty of Norway over the Seabed and Subsoil outside the Norwegian Coast (*kgl. resolusjon av 31. mai 1963*).

[16] Act of 21 June 1963 no. 12 relating to Exploration for and Exploitation of Submarine Natural Resources (*Lov av 21. juni 1963 nr. 12 om utforskning og utnyttelse av undersjøiske naturforekomster*).

[17] Royal Decree of 9 April 1965 (*kgl.res. av 9. april 1965 om utforskning og utnyttelse av undersjøiske petroleumsforekomster*). It can be noted that the legal form of a Royal Decree was chosen for two main

discovery was made at the Ekofisk field in 1969. To consolidate the regime, a new Royal Decree was adopted in 1972 (hereinafter 1972 Royal Decree).[18] Building on the foundations of the 1972 Royal Decree, a more consistent legal framework was established by the 1985 Petroleum Act.[19] Several regulations were adopted based on this Act. Following a further evolution of the legal framework and, not least, the entry into force of the EEA Agreement, the Petroleum Activities Act No. 72 was adopted on 29 November 1996 (hereinafter 1996 Petroleum Activities Act), and remains today the main piece of legislation.[20] The Act is supplemented by a series of implementing regulations.

This legislative framework is supplemented by highly standardised agreements between licensees. The content of these agreements is based on requirements defined in the legislation. The conclusion of those agreements, such as the Joint Operating Agreement (JOA), is also mandatory for the licensees. Finally, the agreements are negotiated by the industry representatives and are subject to the approval of the Ministry of Petroleum and Energy.

As a consequence of this regulatory tradition, the LCRs have been defined in the legislation itself (both acts and implementing regulations), in the licensing requirements and in the JOA, and are reflected in contractual arrangements between parties.

2.2.2 Review of LCRs and Legal Measures

Designing a successful local content policy requires a careful balance between incentives and constraints, or in more popular terms, between carrots and sticks. In the case of Norway, the incentive for IOCs was clearly to make profits. However, looking at the legislation, most of the LC provisions put constraints on IOCs. There were not many requirements and the following sections review them successively.

(i) DUTY TO SET UP OPERATING SUBSIDIARY IN NORWAY. To be granted a production licence, the legislation required the companies to set up fully operating subsidiaries in Norway, where their principal seat of business must be located.[21] Norwegian authorities also encouraged the recruitment of Norwegian employees.[22]

reasons: first, a decree is quicker to adopt than a law which requires parliamentary discussions; second, because it was uncertain that there were any petroleum resources on the NCS, a temporary legal framework would have been easier to adapt to any new circumstances. See T. Meland, 'De første konsesjonsreglene fastsatt', Kulturminne Frigge, www.kulturminne-frigg.no.

[18] Royal Decree of 8 December 1972 relating to Exploration for and Exploitation of Petroleum in the Seabed and Subtrata of the Norwegian Continental Shelf, as amended (*Kongelig Resolusjon av 8. desember 1972 om undersøkelse etter og utnyttelse av undersjøiske petroleumsforekomster*).

[19] Act No. 11 of 22 March 1985, Petroleum Act (*Lov om petroleumsvirksomhet*, 1985).

[20] Act No.72 relating to petroleum activities of 29 November 1996.

[21] 1965 Royal Decree, section 10 (production licence); 1972 Royal Decree, section 11; 1985 Petroleum Act (original version), section 8 (production licence) and section 48.

[22] P. Heum, note 3, p. 9.

Although this requirement has been removed, today's legislation still contains requirements as to the domiciliation of companies. For survey licences, it is sufficient that the physical person to which the licence is granted is domiciled in an EEA state.[23] However, production licences may only be granted to a corporate body established in conformity with Norwegian legislation and registered in the Norwegian Register of Business Enterprises (insofar as other requirements are not applicable pursuant to international agreements). Production licences may also be granted to a physical person domiciled in an EEA state.[24] The Ministry may set special requirements regarding the licensee's organisation in Norway, with the purpose of ensuring that the licensee's organisation in Norway has a structure and size that enables the licensee, at all times, to make informed decisions about its petroleum activities.[25]

(II) PREFERENCE TO NATIONAL COMPANIES IN LICENSING ROUNDS, INCLUDING OPERATORSHIP. Licensing rounds became an increasingly powerful tool in LC policy by prioritising Norwegian companies, including state-owned, and developing Norwegian competencies by preparing them to compete internationally. This was done through the following legal requirements:

- *mandatory state participation* – As of 1967, the government equity participation in production licencing was required or, at least, could be imposed by the ministry as a condition for granting the licence[26];
- *establishment of National Oil Companies (NOCs)* – The most common means to secure local content is through the establishment of a NOC. It enables the state to secure national participation in the petroleum industry, pursue national policy objectives and develop national competences in addition to direct revenues. Norway did not derogate to the rule, and the Norwegian State Oil Company (*Den Norske Stats Oljeselskap A/S* – Statoil), renamed Equinor in 2018, was founded as a private limited company owned by the Government of Norway on 14 July 1972;
- *preferences given to Norwegian companies, including state-owned, when awarding licences* – NOCs are more likely than IOCs to employ local workers and use local suppliers, with long-term benefits for the national economy.[27] Therefore, Norwegian companies – in this case mainly Statoil, but also Norsk Hydro and Saga Petroleum[28] – were given preference in

[23] 1996 Petroleum Activities Act, section 2-1.
[24] Ibid., section 3-3.
[25] Ibid., section 10-2.
[26] 1972 Royal Decree, section 31.
[27] J. W. Moses and B. Letnes, note 4, p. 148.
[28] Statoil was a fully state-owned company when it was established in 1972, and was partly privatised and made a public limited company in 2001. Norsk Hydro is partly state-owned and had a separate oil and

licensing award decisions, getting an increasing number of blocks in general and blocks with the most promising profiles in particular. This preferential treatment in favour of Norwegian NOCs was reflected in a series of provisions, primarily included in the state participation agreements with the IOCs.[29] First, the rules for state participation were progressively strengthened. Already during the second licensing round in 1969, the government announced that it would include a clause of state participation with carried interests until commercial discoveries were made. As of the 1973 licensing round, the state participation agreements with the IOCs were amended to reflect a new obligation to automatically award the newly established Statoil 50 per cent holding in every block.[30] Second, a system of 'sliding scale' (*glideskala*) of increasing state control within the licensing group was introduced.[31] Having a state-owned company like Statoil in the licence group, often with the majority of shares and consequently voting rights, was an extremely effective tool to influence decisions and defend national policy objectives, whether in terms of economic return or maximum recovery of field resources. The award of production licences to Norwegian oil and gas companies has eased Norwegian suppliers' access those markets.[32] It also ensured quick growth to Statoil. A third tool introduced in favour of NOCs was the obligation for the foreign IOCs in the licence to cover the exploration costs for the state-owned companies (*bæring*).

- *operatorship given to Norwegian companies* – Based on the discretionary powers given to the Ministry in setting up the licensing group per block and nominating the operator, Norwegian authorities forced IOCs to enter into joint venture (JV) agreements with Norwegian companies. They also progressively gave operatorship to the Norwegian licensees within the JV. This forced collaboration was an effective tool in learning out the business and building the competence of the Norwegian companies, which became qualified and competitive operators.[33]

gas division (*Hydro Oil & Gas*, merged in 2007 with Statoil). Saga Petroleum was private-owned, and was acquired by Norsk Hydro in 1999.

[29] On the state participation agreements, see K. Kaasen, 'Statsdeltagelsesavtalen i norsk petroleumsvirksomhet : kontraktsrettslig form, konsesjonsrettslig innhold – eller omvendt?', Tidsskrift for rettsvitenskap (1984) p. 372.

[30] D. H. Claes, 'Statoil: between Nationalisation, Globalisation and Europeanisation', ARENA Working Papers WP 02/34, 2002.

[31] J. W. Moses and B. Letnes, note 4, p. 157.

[32] This is clearly recognized in the Official Norwegian Report NOU 1979:43, note 5, p. 38. The influence that Statoil had on the choice of suppliers – in favour of Norwegian ones – in the Statfjord field is often mentioned as example.

[33] J. W. Moses and B. Letnes, note 4, p. 156.

It should be noted that the Norwegian authorities today still exercise an important influence when putting together the licensing group per block and nominating the operator.

(iii) PREFERENCE ON THE USE OF NORWEGIAN GOODS AND SERVICES ON A COMPETITIVE BASIS. A common feature of LC policies is the requirement for IOCs to use local suppliers, provided the local suppliers retained are qualified and price-competitive. A similar obligation was defined in Norwegian legislation.

At the beginning, the obligation to use Norwegian goods and services was formulated in very general terms, mirroring the fact that Norwegian authorities did not yet have an elaborated LC strategy. A reference was included in the first licensing round in 1965 that the extent to which the winning licensee will be 'contributing to the Norwegian economy' will be seen as a plus in the award procedure.[34] The explicit reference to this ad hoc criteria is to be found in a press conference declaration by the then Minister of Industry announcing the results of the first licensing round. He admitted that, while they 'had emphasised the applicant's financial strength and practical experience with oil exploration', they 'also considered the degree to which the applicant has considered marketing in Norway, building refineries in Norway, using Norwegian ships or other ways in which the applicant has or will contribute to strengthening Norway's economy in general'.[35] What happened during that period was that the IOCs entered into a 'gentlemen's agreement' with the authorities where they committed to carry out their activities from a base in Norway, to use Norwegian industry and to employ a Norwegian workforce.[36] The announcement of the second licensing round made the criteria of use of Norwegian suppliers even more explicit in the licensing award decision,[37] but one had to wait until 1972 for the introduction of an explicit LCR provision in the legislation.

The motivation for increasing the level of local content in the Norwegian petroleum policy and reinforcing LCRs in the legislation was first the need to secure long-term effects on the national economy and the wish to build a national petroleum industry able to compete internationally in the long run. It also answered criticisms from mainly two large Norwegian companies (Aker and Kværner) about how little they were called on to help in the Ekofisk project. The strengthening of the LCRs was also a reaction to the crisis the shipping industry went through in the aftermath of the 1973 OPEC oil boycott, which resulted in cancellation of orders for tankers and ships, including in Norway.[38]

[34] St. meld. Nr. 76 (1970–1971), note 7, p. 21.

[35] S. Kvendseth, *Funn! Historien om Ekofisks første 20 år*, Tananger: Phillips, 1988, p. 16.

[36] The practice of the 'gentlemen's agreement' is mentioned in a Government White Paper preceding the adoption of explicit legal basis for that LCR in the legislation. See St. meld. Nr. 76 (1970–1971), note 7, p. 23.

[37] The requirement was included in point 8 of the Production licences awarded in 1969. Ibid., p. 23.

[38] The effects of the international context were reported in the Official Norwegian Report NOU 1979:43, note 5, pp. 20, 38. Moses and Letnes also report that 'The Norwegian government felt an obligation to

As a result, the principle of the mandatory use by licensees of Norwegian goods and services when those were competitive enough was formally introduced as section 54 of the 1972 Royal Decree. The provision was re-conducted more succinctly in section 54 of the 1985 Petroleum Act, until the Act was amended, and the provision was removed in order to harmonise the Norwegian legislation with the newly signed EEA Agreement. As mentioned in the introduction, the currently applicable legislation, the 1996 Petroleum Activities Act, does not contain LC provisions.

The main components of the LC regime defined by section 54 of the 1972 Royal Decree were as follows:

- The licensees were required to ('shall') use Norwegian goods and services as long as they were competitive in terms of quality, service, delivery time and price.
- The Norwegian contractors 'shall' receive invitations to participate in a call for tenders as long as they produced goods and rendered services as required. They must be given 'real opportunities' (*reelle muligheter*) to compete and supply.[39] Pursuant to the preparatory works, this went together with an obligation imposed on tenderers to assess the Norwegian market in detail before the call for tenders can be launched.[40] It also implied that the terms and conditions of the call for tenders, the type of tender, the contracts, the size of the tenders, the standards chosen, etc. would not make it unnecessary difficult for Norwegian suppliers to participate.[41] In the original text of the 1985 Petroleum Act, applicants for the production licence were also required to submit a plan describing how they foresee collaboration with Norwegian industrial suppliers[42] (collaboration plan) in order to give the Norwegian industry 'real opportunities' to compete and supply goods and services.[43] The obligation to communicate the collaboration plan is a codification in law of a practice introduced in the fourth licensing round, based on purchased goods and services.[44] A similar obligation to disclose information on the use of local goods and services was defined in section 23 in relation to the Plan for Development and Operation (PDO) of petroleum deposit. The PDO, subject to approval by the Ministry, 'shall' include a description of the existing or planned

keep Norwegians employed and wanted to encourage the Norwegian shipbuilding industry to adapt in order to service the growing petroleum industry'. J. W. Moses and B. Letnes, note 4, p. 155.

39 As mentioned in the Preparatory Works, the provision aimed to tackle the problems met by the Norwegian suppliers. The market was dominated by IOCs with established relationships with foreign suppliers and little or no knowledge about the qualifications of the Norwegian companies. Preparatory works, Ot.prp.nr.82 (1991–1992), changes to section 54 1985 Petroleum Act.

40 Preparatory works Ot.prp.nr.72 (1982–1983) *Lov om petroleumsvirksomhet*, commentary to section 54.

41 Ibid.

42 In other words, not for non-petroleum related supplies, such as catering, which historically was indeed the first type of goods that the Norwegian companies supplied to the IOCs on the Norwegian Continental Shelf.

43 1985 Petroleum Act in its original version, section 8.

44 In the bidding invitation of the fourth licensing rounds, the applicants who already possessed a survey or production licence were required to inform the authorities of the nature of the suppliers from Norwegian industrial suppliers. See also Official Norwegian Report NOU 1979:43, note 5, p. 38.

cooperation with Norwegian suppliers that will ensure the latter opportunities to supply goods and services in the construction, operation and maintenance phases of the project.[45] All those practical obligations – assessment of the available suppliers on the Norwegian market, cooperation plan, cooperation on product development, description of current and future cooperation – aimed to comply with the requirement of giving 'real opportunities' to Norwegian suppliers.[46]

- When assessing contract offers, the licensees were required to ('shall') 'take into account' the extent to which the bidders would use Norwegian goods and services.
- The licensees were made responsible for the observation of those provisions by their contractors and sub-contractors.

In this strategy on the use of local goods and services, the government has always argued that the goal was to develop local supply of competitive goods and services required by the petroleum industry, and not to demand a discriminatory use of local suppliers. What was introduced in section 54 of the 1972 Royal Decree was a requirement to give preference to Norwegian goods and services to ensure fair treatment of Norwegian suppliers.[47] At the same time, several Norwegian authorities expressed the view that the provisions should not be practiced in such a way as to exclude competitive foreign bidders and suppliers.[48] Therefore, the competitive nature of the Norwegian suppliers have been a key criterion to ensure that they gain access to the market. A slight change in the wording of the requirement was introduced in the 1985 Petroleum Law. While the 1972 Royal Decree requires licensees to use Norwegian goods and services in their activity 'as far as they are competitive with regard to quality, service, schedule of delivery and price' (section 54), the 1985 Petroleum Law requires that 'competitive Norwegian suppliers shall be given real opportunities to achieve deliveries of goods and services' (section 54).[49] This change was justified by the wish to have a more flexible wording – and application – of the requirement. Based on the 1972 wording, the competitiveness of the Norwegian suppliers was assessed on each criteria separately and cumulatively, and it happened that Norwegian suppliers were competitive enough on quality and schedule of delivery, but not on price, and were not selected on this ground.[50] The 1985 wording ensured a more general but also a more discretionary assessment of the competitiveness of the Norwegian suppliers, based on further criteria if relevant. The purpose was not to derogate from the principle of competitiveness, but to be able to take into account other relevant considerations if necessary.

[45] 1985 Petroleum Act in its original version, section 23, first paragraph.
[46] Official Norwegian Report NOU 1979:43, note 5, p. 97.
[47] Ibid., p. 38.
[48] Preparatory works Ot.prp.nr.72 (1982–1983), note 40, p. 145.
[49] Own translation.
[50] Official Norwegian Report NOU 1979:43, note 5, p. 97.

In order to supervise compliance with the previously mentioned purchase requirements, a Goods and Services Office was established within the Ministry of Industry in 1972. The main task of the Office was to control and monitor the IOCs' contracting and procurement procedures. It closely monitored the IOCs' procurement practices. To do so, the Office reviewed the tender schedule and the list of companies to be invited that the IOCs operating in Norway were required to submit. By reviewing this, the Office made sure that qualified Norwegian companies were included on the bidder's list. The Office was also entitled to set and review targets for local participation measures in personnel and monetary terms.[51] Finally, the Office also made sure that the local supply industry was stimulated through joint venture.

(iv) TECHNOLOGY TRANSFER AND RESEARCH COOPERATION. Petroleum resources on the NCS are located in deep waters, which entails that most operations face the tough conditions of the North Sea. This means that at the beginning, it required the development of new methods, skills and technologies adapted to those demanding conditions.[52] This gave Norwegian authorities a unique opportunity to design local content requirements within R&D that required innovative solutions. The need to ensure a high level of protection of workers' safety and the environment was also used as argument in favour of new innovative technological solutions. A concrete example of how technical requirements defined in legislation, on safety grounds, have favoured Norwegian companies related to the obligation to build separate platforms for drilling operations and for workers' living quarters.[53]

The preference policy for Norwegian goods and services was associated with requirements regarding research cooperation and technology transfer.

First, concerning research cooperation, it was again during the fourth licensing round of 1978 that a requirement was inserted mandating that at least 50 per cent of R&D efforts related to field development on the NCS should occur in Norway. Thereafter, the licensing terms only contained general requirements in regard to technology transfer, and details were set out in separate R&D agreements entered into with Norwegian research institutions, so-called 50 per cent agreements or 'offer agreements'. Those agreements required companies to cooperate with Norwegian research institutions within defined areas, for defined amounts, as a condition to get a licence. The agreements varied in form, from general cooperative agreements with Norwegian R&D institutions to the allocation of funds for specific R&D projects to

[51] J. W. Moses and B. Letnes, note 4, p. 155.

[52] Ibid., p. 151. The authors notably describe the example of the Ocean Traveler, a semi-submersible platform drilling rig which was designed to perform operations in similar situations as those found in the Gulf of Mexico but encountered major operating challenges when operations started. As stated by the authors: 'it became immediately evident that something more substantial was needed for North Sea conditions' (p. 264).

[53] J. W. Moses and B. Letnes, note 4, p. 161. See as well H. Ryggvik, *The Norwegian Oil Experience: A Toolbox for Managing Resources?*, Report number 2, Oslo: Senter for Teknologi, Innovasjon og Kultur, TIK, 2010, p 59.

be carried out by selected Norwegian institutions.[54] In addition, Norway used non-binding 'goodwill agreements' where companies declared their intent to conduct their petroleum-related R&D in Norway as much as possible.

This strategy greatly benefited the Norwegian research communities. The introduction of those technology agreements triggered an impressive development in petroleum-related technology in Norway.

The Goods and Services Office was also in charge of encouraging R&D and technology transfer.

(v) OBLIGATION TO BRING PETROLEUM ASHORE IN NORWAY. Already in the very first pieces of petroleum legislation, an obligation to bring petroleum to shore was defined. Pursuant to the Royal Decree of 9 April 1965, the King could decide that petroleum products, partly or wholly, had to be landed in Norway, should national interests require it.[55] A similar requirement, with a slightly different wording (it refers to 'produced petroleum'), is to be found in the 1972 Royal Decree[56] and the 1985 Petroleum Act in its original version.[57] The purpose was to ensure that the processing and refinement of oil and gas would be carried out in Norway. This provision was quite challenging to implement, because of the initial lack of adequate pipeline infrastructure to transport oil or gas throughout the deep Norwegian trench. Therefore, the first field development projects – Ekofisk and Frigg – were given exemptions to this provision.[58] In addition, while oil was and is still for a part processed in Norway, natural gas has traditionally been transported directly to consumer markets abroad through the pipeline network called Gassled. This is also because there is almost no consumption of natural gas on land in Norway.

(vi) TRAINING OF LOCAL PERSONNEL AND GOVERNMENT OFFICIALS. Provisions in the petroleum legislation, production licences and additional agreements requested licensees to share industrial knowledge through training of local personnel and government officials. Licensees were requested to train officials from the Ministry of Petroleum and Energy, the Norwegian Directorate or other public entities. They were also asked to train teachers in school to teach petroleum-related topics. There is also a very common requirement in LC policies.

2.3 *Implementation and Compliance Strategy*

The LC policy conducted by the Norwegian authorities can be deemed as successful, even in the absence of strict enforcement mechanisms.

[54] J. W. Moses and B. Letnes, note 4, p. 160.
[55] 1965 Royal Decree, section 33.
[56] 1972 Royal Decree, section 34.
[57] 1985 Petroleum Act, section 26.
[58] Official Norwegian Report NOU 1979:43, note 5, p. 33.

As noted by Moses and Letnes with reference to the St.meld.nr.53 (1979–80), in only one decade, the net share of Norwegian deliveries to the petroleum industry in Norway had increased remarkably: 'by 28 percent in 1975, by 42 percent in 1976, by 50 percent in 1977, and by 62 percent in 1978'.[59]

This result is quite remarkable considering that there was no specific supervision and no enforcement mechanisms for compliance with LCRs. The manner prescribed to monitor implementation of the previously mentioned LCRs was primarily through reporting obligation and supervision by the Goods and Services Office. Oil and Gas companies were required to submit annual reports to the Ministry of Petroleum and Energy about their activities, including the amount of Norwegian local content that was utilised. On the basis of these reports, Norwegian authorities could measure the level of local content in the Norwegian petroleum sector. What was defined as 'local' in the Norwegian context was often situated at the national interest level. Some specific requirements have had and still have direct local benefits, but the primary objective is to serve national interests.

Another characteristic of the Norwegian LC strategy is that its design has been elaborated step by step by the national authorities. When IOCs showed signs of suspicion or even resistance, the Norwegian government could adjust LC policy.[60]

The LC policy was implemented in a transparent and predictable manner, which has remained a key characteristic of the Norwegian petroleum policy. All terms and conditions for both licensing and commercial framework were communicated to stakeholders in advance, even if they had been evolving to reflect increased LCRs during this first period.

3 LCR CONSTRAINTS UNDER LIBERALISED AND INTEGRATED ENERGY MARKETS

The objective of the Norwegian authorities from the start has been to build an infant industry and prepare it to compete internationally, while maximising revenues from the continental shelf following good resource-management principles. This objective was attained by the end of the first period of explicit LCRs policy in the mid-1980s. This moment was marked by a drop in oil price (around 1986), which, given the high cost of production on the NCS, motivated a series of reforms, with the objective of remaining an attractive petroleum province.[61] Among those reforms was the revision of the local content regime, which would have been unsustainable in a tougher international competitive environment.

[59] J. W. Moses and B. Letnes, note 4, p. 156; St.meld.nr.53 (1979–80), p. 27.

[60] See, for example, the reactions among IOCs when the Norwegian government awarded the Gullfaks block 34/10 only to Norwegian companies (85 percent Statoil, 9 per cent Norsk Hydro and 6 per cent Saga Petroleum). B. V. Lerøen, 'Ettertraktet modell' (*Norsk Sokkel*, Norwegian Petroleum Directorate, 2012) p. 15.

[61] J. W. Moses and B. Letnes, note 4, p. 162.

In the subsequent phase, the use of LCRs has been constrained by the obligations deriving from the entry into force of the EEA Agreement in 1994 and the application of the relevant WTO Agreements after Norway joined the WTO. Norway has also entered into a series of Bilateral Investment Treaties (BITs) which restrain the country's ability to include LCRs. This section reviews the changes introduced by Norway's accession to the EEA, to the WTO and the implementation of certain BITs for Norwegian practices.

3.1 *EEA Constraints and Opportunities*

The entry into force of the EEA Agreement has entailed a series of amendments to Norwegian legislation on local content and associated measures.[62]

Preferential treatment in favour of national oil and gas companies, in all forms, had to be ended as a consequence of the application of EU/EEA internal market rules and competition law. The provisions of sections 8, 23 and 54 of the 1985 Petroleum Act had to be amended. The obligation for foreign IOCs to pay state-owned companies exploration costs had to be repealed. The requirement that Statoil should get at least a 50 per cent holding in each block was removed. The technology agreement requirements were dropped. The obligation to bring petroleum ashore in Norway had to be removed, although the 1996 Petroleum Activities Act preserved Norwegian authorities' discretion to decide 'where and in which way landing of petroleum shall take place'.[63] The Goods and Services Office was closed.

Indeed, any discrimination on grounds of nationality would infringe Article 4 of the EEA Agreement. Other relevant provisions of the Agreement in terms of equal treatment and free movement relate to the prohibition against any quantitative restrictions on imports/exports and all measures having equivalent effect (Art. 11, 12 and 13), rules on State monopoly (Art. 16), freedom of establishment for EU/EEA nationals and companies or firms (Art. 31–34), free movement of services and capital (Art. 36 and 40), participation in the capital of companies of firms (Art. 124), anti-trust and competition rules (Art. 53–60) and state aid rules (Art. 61).

The purchase of goods and services by publicly owned companies on a competitive basis has been rendered mandatory following the application of EU rules on public procurement. The application of public procurement rules to the petroleum sector was discussed in detail during the EEA Agreement negotiations, since the sector was the most important one covered by the public procurement rules in Norway.[64] The relevant legislative act is currently Directive 2014/25/EU on

[62] For an early assessment of the range of changes required to the Norwegian petroleum regime as a consequence of the entry into force of the EEA Agreement, see F. Arnesen, 'EØS-avtalens konsekvenser for praktiseringen av det norske petroleumskonsesjonssystemet', Lov og Rett (1992) pp. 456–77.

[63] 1996 Petroleum Activities Act, section 4-11.

[64] Preparatory works, Ot.prp.nr.82 (1991-1992) *Om endringer i energilovgivningen som følge av en EØS-avtale*, p. 3.

procurement by entities operating in the water, energy, transport and postal services sectors, as inserted into Annex XVI to the EEA Agreement.

Harmonised secondary legislation put also some new constraints on the use of LCRs. Although adopted after the signature of the EEA Agreement, the Hydrocarbons Licensing Directive 94/22/EC of 30 May 1994 on the Conditions for Granting and Using Authorizations for the Prospection, Exploration and Production of Hydrocarbons restricts the capacity to use laws or regulations to implement local content. Pursuant to the Directive, the award of licences shall be done based on objective criteria published in advance, according to the principles of equal treatment, and shall not discriminate based on nationality.

Despite these new constraints, and because the Norwegian petroleum industry was able to become competitive during the first phase of explicit LCRs, the accession to the internal market through the EEA Agreement was seen as a positive development. It gave new market opportunities for Norwegian goods and services to the petroleum industry in other EEA countries.[65] Through internal market and competition law rules, the EEA Agreement offers companies a level playing field. Accession to the EEA ensures 'real opportunities' to compete that the LCRs of the original sections 8, 23 and 54 of the 1985 Petroleum Act aimed to secure. Therefore, the requirements of the EEA Agreement were mostly seen as a prolongation of this principle.[66]

3.2 *WTO Constraints and Opportunities*

Norway has been a WTO member since 1 January 1995 and a member of GATT since 10 July 1948. A direct consequence of Norway's membership to the WTO is reliance on the 'national treatment' principle, providing that foreign companies must be given the same treatment as domestic ones, and so in accordance with the different WTO agreements (i.e. TRIMS, ASCM and GATS). Under the different WTO agreements, LCRs would be either prohibited, disciplined or allowed under precise conditions. The application of those agreements to local content measures is reviewed in Chapter 3 of this book. It is therefore sufficient to point out, for the purpose of this chapter, that most LCRs as originally practiced by Norway would be inconsistent with the WTO discipline.

Similarly to the EEA, the WTO represented new constraints for the Norwegian petroleum industry, but, first and foremost, new opportunities. When Norway joined the WTO, the Norwegian companies were able to compete internationally and were therefore interested in getting access to markets abroad where they could compete on a level playing field with other

[65] White paper on repeal of the local content requirements from the Petroleum Act (Instillst O. (1992–1993)); Preparatory works, Ot.prp.nr.82 (1991–1992), note 64, pp. 1–2.

[66] Preparatory works, Ot.prp.nr.82 (1991–1992), note 64, on changes to sections 8 and 54 of the 1985 Petroleum Act, p. 15.

companies.[67] The multilateral regime provided by the WTO for trade in goods and services ensures minimum standards in terms of equal treatment and market access, which will facilitate entry into the foreign market for Norwegian petroleum companies.

3.3 *BITs Constraints and Opportunities*

In addition to trade agreements, reliance on LCRs may be constrained by investment-related agreements concluded between two or more contracting parties.[68] Those agreements may go further than WTO provisions on investment protection, prohibiting, for example, requirements for technology transfer and joint ventures. Like for the EEA and the WTO, an agreement like a bilateral investment agreement or treaty (BIT) will be instrumental in ensuring market access in foreign countries for the now-competitive Norwegian petroleum industry while it may prevent Norwegian authorities from putting LCRs in place at home. BITs may contain at least four types of provisions limiting the scope of LCRs policy: non-discrimination provisions, fair and equitable treatment provisions, measures to restrict performance requirements, and specific measures relating to nationality of board members and senior management.[69]

As of 2019, Norway has entered into eighteen BITs, but only fourteen are in force.[70] All those BITs were signed between 1966 and 1996. Norway has not concluded any new BITs since the mid-1990s. A rapid review of the agreements signed so far shows that the approach chosen with respect to LCRs is quite standard, reflecting some general common principles from other BITs such as the duty of non-discrimination (national treatment and most-favoured-nation treatment). As part of the mandate of a new coalition in 2015, the government planned to increase the use of BITs, where appropriate. Therefore, a new Norwegian model agreement for the promotion and protection of investments has been elaborated and subject to consultation.[71] The new model investment agreement,[72] which is still under

[67] White Paper, Meld. St. 28 (2010–2011), An industry for the future – Norway's petroleum activities, section 8.5.

[68] It should be noted that it has become more common over time to include provisions on investment protection in free trade agreements, including for agreements concluded between industrialised countries. In the case of Norway, one objective lately has been the definition of shared EFTA positions to be included in a separate chapter in future EFTA free trade agreements.

[69] I. Ramdoo, 'Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?' European Centre for Development Policy Management (ECDPM), Discussion Paper No. 205, December 2016, p. 26.

[70] For an overview, see the International Investment Agreements Navigator, UNCTAD, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/.

[71] Model investment agreement – public consultation, Royal Norwegian Ministry of Trade, Industry and Fisheries, 15 May 2015, www.regjeringen.no/contentassets/e47326b61f424d4c9c3d4708964926 23/consultation-letter.pdf.

[72] The draft version of the new model investment agreement, www.regjeringen.no/contentassets/e47326b61f424d4c9c3d4708964926 23/draft-model-agreement-english.pdf.

discussion, reiterates some general provisions found in BITs, as we have discussed.[73] Of particular relevance for LC policy are the reinforced provisions on investor access to markets, where, for example, investors must be granted national treatment in connection with establishment. Importantly, the draft model investment agreement foresees detailed provisions on performance requirements (Article 8) which cover most aspects of LC policy.

4 SUSTAINABILITY FRAMEWORK FOR LCRS BASED ON THE NORWEGIAN EXPERIENCE: CONCLUDING THOUGHTS

Without doubt, Norway offers an example of successful LC policy. There is a consensus that this achievement is due to a combination of external framework conditions and carefully designed and implemented legal requirements.[74] The Norwegian LC policy also developed in a particular context as described in Section 1. Beyond those specificities, there is a series of lessons that can be drawn from the Norwegian experience that can serve as effective transplant in other jurisdictions.

A first lesson is that the elaboration of a LC policy in the petroleum sector must take into account the general energy-generation mix and sources of energy supplies of the country, as well as structural regulatory elements like governance and legal systems. An efficient system of administrative governance with stable institutions and a transparent and predictable regulatory framework will be decisive for the implementation of LC policy for the benefit of both foreign operations/investors and local industries/population. This is due to the fact that the petroleum sector is only one sector in the economy of a country, and LCRs in that sector must align with the economic development of other sectors to have long-term benefits. In the case of Norway, the ultimate goal has remained efficient petroleum resource management and maximisation of national value creation.

The LCRs should be temporary and, as far as possible, performance based, as they aim to prepare the national industry to be competitive internationally and to adapt to international norms and standards. When designing their LC policy and associated legal requirements, states should conceive them as transitory measures towards a more competitive and open international market. Norway benefited from good timing in that respect. The country had sufficient time to develop national champions and indigenous energy service companies through the use of some key LCRs before joining the EEA and the WTO. Therefore, it can be argued that, in order to benefit fully from the opportunities of liberalised and integrated markets, the national industry should have sufficient time in advance to become competitive, notably through the use of LCRs.

[73] Such as national treatment (Article 3), most-favoured-nation treatment (Article 4), general treatment and protection (Article 4), draft model investment agreement (2015).

[74] T. Gormley, note 8, p. 385.

The adoption of LCRs in Norway has been very progressive, step by step, and adjusted over time. This adaptive and flexible approach to LCRs made it possible to assess their benefits on the national industry while keeping a balance between sticks and carrots with IOCs. This dynamic approach was dependent on a spirit of good cooperation and openness between the industry and public authorities. It was also dependent on the close monitoring by public authorities, with elements of national control at different levels of the value chain.

In terms of legal approach, the Norwegian regulation of LCRs can be characterised as a light-touch regulation in law. There was no law on local content, but some few key provisions inserted into the petroleum legislation. Those were supplemented by a well-integrated set of licensing and contractual requirements between parties. This made the LC policy more flexible and easy to adapt to sector developments until LCRs were removed.