The environmental law and property guarantee, Norway

1) Potential objects of "property", possibility of obtaining property / ownership on natural resources, private property as defence against environmental protection

Article 105 of the Norwegian Constitution contains the basic provision on protection of property as it states that: “If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.” As a starting point, the wording only covers ownership to physical objects and land. However, the wording has been interpreted broadly to include user rights in such objects, as well as immaterial rights. Nevertheless, the concept remains rather narrow. Concessions to exploit natural resources or permits to carry out environmentally harmful activities will not be considered as property under this provision unless there are clear indications that they should be so considered in the underlying legislation. Currently, there are discussions of whether fishing concessions, which are tied to fishing vessels, shall attain the status of property in this sense. There are particular regimes for property rights to certain natural resources:

- Petroleum resources on the continental shelf belong to Norway according to section 1-1 of the Petroleum Act (1996);
- Metals with a specific gravity of 5 grams/cm^3 or greater as well as four other minerals belong to the state according to section 7 of the Minerals Act (2009);
- Hydropower resources belong to the public according to section 1 of the Industrial Licensing Act (1917);
- Section 57 of the Nature Diversity Act (2009) states: “Genetic material obtained from the natural environment is a common resource belonging to Norwegian society as a whole”;
- Section 2 of the Marine Resources Act (2008) states: “Wild living marine resources belong to Norwegian society as a whole”. This also applies to marine genetic resources.

In addition to article 105 on expropriation, the Norwegian Constitution contains a general prohibition on retroactive legislation in article 97: “No law must be given retroactive effect”. Finally, according to the Human Rights Act (1999), the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is incorporated as Norwegian law, and article 1 of Protocol 1 is thus part of Norwegian law. Consequently, articles 97 and 105 of the Constitution and article 1 of the Additional Protocol to the ECHR may be used as defences against environmental protection. However, the practice of the courts indicates that such defences are unlikely to succeed in almost all cases. In particular, article 97 has in essence been interpreted as not prohibiting public restrictions on existing rights (with possible exceptions based on reasonableness) and article 105 has been interpreted as not being applicable to indirect expropriation.

2) Definition of expropriation as related to the environment or environmental friendly investments

The general rule is that only expropriation understood as transfer of ownership triggers a right to compensation. Otherwise, the general rule is that public authorities may restrict the freedom to enjoy property rights without having to pay compensation. There are two exceptions to this starting point. The first is a general customary rule that significant restrictions on property rights may generate a right to compensation. According to case law, the threshold for a right to compensation in such cases is very high, and the courts have

almost never accepted claims for compensation on this basis. Relevant considerations are the extent to which the owner may still benefit from the property rights, whether the restrictions are aimed at one particular owner or a limited group of owners, and whether the restrictions are reasonable (e.g. whether they were to be expected and the extent to which enjoyment of the property rights would lead to environmental damage).

The second exception is specific entitlements to compensation set out in legislation. The most important such provisions from an environmental perspective are sections 50 and 51 of the Nature Diversity Act (2009), which state that: "A landowner or a holder of rights in property that is wholly or partly protected as a national park, protected landscape, nature reserve, habitat management area or marine protected area is entitled to compensation from the state for financial losses incurred when protection makes current use of the property more difficult." According to the Act, all these categories of protected areas may be established on private property. Compensation is restricted to current use. Expectations regarding future use will only be compensated when right holders have obtained permits to carry out the relevant activities and the permits were acquired prior to the announcement about establishment of protected areas. The threshold for access to compensation would be rather low, as there is only a requirement that current use be made difficult. Minor difficulties would not qualify, and the owner must be willing to adjust the use in ways that would minimize the need to compensate. Other provisions of interest can be found in chapter 15 of the Planning and Building Act, according to which owners can claim compensation in cases where land is designated for certain purposes in municipal master plans or zoning plans. The condition for compensation is that the property can no longer be "utilized profitably". Here, as well, it is assumed that the owner must be willing to adjust the use to minimize the need to compensate.

According to Norwegian law, there is no general power for public authorities to expropriate in order to establish protected areas. Hydropower plants has a special legal position in Norway, as the plants are transferred to the state without cost after termination of the concession, normally 60 years after the concession was provided. This arrangement was challenged before the EFTA Court and found to violate articles 31 and 40 of the EEA Agreement on the basis that it discriminated between private and public owners of hydropower plants, see judgement in case E-2/06E/.

3) Distinctions between allowable restrictions and allowable restrictions with compensation: criteria for such distinctions and issues of sector specificity
One main distinction is between acts that require a permit or concession and other acts. In the latter cases, where acts are generally allowed, there must be a legal basis for limiting the freedom of action. If such legal basis exists, it will depend on the legislation in question whether compensation needs to be paid. The general starting point, as indicated above, is that no compensation is due.

Where permits and concessions are required, the question that arises is whether they can be revoked or amended to benefit environmental concerns. The general rule which is laid down in section 35 of the Public Administration Act (1967) is that such permits or concessions can be revoked or amended to the disadvantage of the private party only in a very limited range of situations. However, some environmental acts extend this possibility significantly. Section 18 of the Pollution Control Act (1981) opens for revising pollution permits to benefit the environment on certain conditions, and 10 years after the permit was adopted public authorities have full freedom to revoke or amend it. Section 67 of the Nature Diversity Act contains a very similar provision.

In other cases, essentially where private parties have obtained the right to exploit natural resources, the right to revoke or amend concessions or permits is made part of the system of sanctions against improper or unlawful acts of the concessionaire or permit holder (e.g. section 65 of the Mineral Act (2009), section 10-13 of the Petroleum Act (1996) and section 11 of the Act relating to the Right to Participate in Fisheries (1999)). Other laws on natural resource exploitation do allow more extensive revision of concessions and permits, for example section 9 of the Aquaculture Act (2005), section 25 of the Water Resources Act (2000) and section 10-4 of the Energy Act (1990). The restrictive rule of the Public Administration Act (1967) applies to some important sectors, including the forestry sector (Forestry Act, 2005), hunting (Wildlife Act, 1981) and construction permits (Planning and Building Act, 2008).

In sum, the possibility of revoking or amending concessions and permits vary significantly in the Norwegian legal system. It seems that environmental legislation provides for most flexibility. Otherwise, no clear pattern emerges. The issue seems to be resolved on an ad hoc basis where negotiation between relevant ministries probably is an essential factor. Where the revocation or amendment of a concession or permit is in accordance with the legislation, no compensation would be required. Otherwise, revocation or amendment would simply not be allowed, and the only possibility would be to seek agreement with the concessionaire or permit holder.

4) Public interests that can justify imposition of obligations regarding the use of property, the extent to which private parties can initiate such decisions

Environmental legislation generally provides broad discretionary power to public authorities to enforce requirements under the legislation, including the use of private property to ensure effective compliance. Public authorities shall have access to private property in order to examine whether unlawful pollution or waste deposit has taken place (section 50 of the Pollution Control Act). They can also use the property of third parties when cleaning up or dealing with the effects of pollution or waste, but will have to pay compensation (section 75). These powers rest with public authorities, and there is no possibility for private parties to force their hand.

Similar rules regarding access to property and compensation for the use of the property of third parties apply to measures under the Nature Diversity Act (sections 64 and 72) in order to protect biodiversity. In the context of protected areas, section 47 of the Act contains a special rule on management activities carried out on private property. Such management shall preferably be based on agreement with the property owner, but may also be carried out without such agreement. Economic benefits from such management measures must be transferred to the property owner, but the owner does not have any clear right of compensation for loss.

Chapter 3 of the Public Health Act (2011) concerns environmental health. This chapter provides the basis for powers of the municipal medical officer to take initiatives to prevent and remedy environmentally related health problems and risks, such as pollution or exposure to harmful chemicals. The chapter is also the legal basis for government regulations to control activities that "may have an impact on health" (section 10). The municipality may order that a situation be rectified provided that "the inconvenience caused by rectification is in a reasonable proportion to the health considerations" (section 14).

Other requirements concerning, inter alia, appearance of the property, energy efficiency and clean-up of contaminated sites, would have to be imposed as conditions in concessions or permits associated with new activities, such as construction or pollution permits.

5) Dissolution of vested rights without requirement of compensation
Whether rights can be withdrawn or revised without having to pay compensation depends on the legal nature of the rights. Rights based on concessions or permits may in most cases be modified or withdrawn through new legislation or through individual decisions where such decisions are authorized in the existing legislation (see number 3 above).

6) Defence of property holders' interests
Property holders can defend their interests through ordinary courts. There are special procedures and rules regarding the determination of compensation in cases concerning ordinary expropriation. Such cases are conducted at the public expense, even when cases are appealed to higher courts. Special rules have been set out to compensate for the establishment of protected areas in section 51 the Nature Diversity Act; the property owner is more likely to have to pay costs in appeal cases than in cases of ordinary expropriation. The rules regarding distribution of costs in cases concerning amount of compensation is a main reason why there have been many such cases before the courts.

If the property owner wants to contest the lawfulness of a decision to expropriate or a restriction on property rights, the ordinary rules regarding cost allocation apply. Hence, such cases are not as frequent, but there is still quite significant case law on such issues. Property owners may be likely to invoke protection under article 1 of the Protocol 1 to the ECHR in cases concerning indirect expropriation. Generally, Norwegian courts have been reluctant to apply ECHR in such cases. One famous case was brought to the European Court of Human Rights, Lindheim and Others v. Norway (judgment 12 June 2012). The case concerned state intervention in contracts regarding lease of property, and the ECtHR found that the Norwegian Supreme Court's decision to not award compensation to property owners whose contracts had been affected by new legislation was in violation of article 1 of the Protocol.

7) Exhaustion of primary legal protection
Access to courts is not dependent on exhaustion of administrative complaint procedures.

8) Who may be responsible for environmental damage?
The Pollution Control Act does in general assign responsibility to "the person responsible for the pollution" (see in particular section 7 and chapter 8). The issue of responsibility is partly a question concerning who is responsible for cleaning up the property. According to section 51, public authorities may order "any person that possesses, does, or initiates anything that results in or that there is reason to believe may result in pollution" to carry out investigations and similar activities. It is assumed that orders to clean up or pay associated costs can be directed to such persons. According to case law (Rt. 2010, p. 310), such responsibility may extend to foreign parent companies and to companies that previously were owners of a property that had been polluted during the ownership of former owners. Hence, public authorities are in specific cases free to choose among a broad range of persons when assigning responsibility for clean-up activities. Such persons would subsequently have the opportunity to redistribute responsibility.

In addition, there is the question of who may be liable to pay compensation for environmental damage. According to section 55, responsibility extends to "owner of real property, an object,

an installation or an enterprise that causes pollution damage". Such persons are subject to liability regardless of fault. In addition, section 55 extends liability to any person "that by supplying goods and services, carrying out control or supervisory measures or similar means has indirectly contributed to pollution damage" in cases of intention or negligence.

9) Effect of a state permit for the liability towards third persons
Section 56 of the Pollution Control Act states that:

> "Compensation for pollution that is permitted may only be claimed to the extent that the pollution is unreasonable or unnecessary pursuant to the provisions of section 2, second to fourth paragraphs, of the Act of 16 June 1961 No. 15 relating to the legal relationship between neighbouring properties.
>
> Even if pollution damage in itself does not provide grounds for compensation pursuant to this chapter, it may be taken into consideration in the event of a claim for compensation pursuant to the Neighbouring Properties Act."

The general approach in other contexts regarding state permits or concessions would be that those carrying out the activities would remain liable towards third persons regardless of the permit. In some cases, special rules apply, such as section 51 of the Minerals Act which authorizes mineral authorities to require financial security for clean-up costs.

10) National cases that take into account art. 8 or art. 1 of Protocol 1 to the ECHR
In addition to the case mentioned under number 6, there are numerous cases in which provisions of the ECHR have been invoked. There are approximately 20 Supreme Court cases that refer to art. 1 of the Protocol and that are of some relevance here. One case of interest is a case concerning the establishment of a nature reserve on Svalbard which prevented a concessionaire from exploiting a permit to search for petroleum resources (Rt. 2008 p. 1741). The Supreme Court did not support the claim for compensation.

There seems to be no case of importance that takes into account art. 8 of the ECHR.

11) Situations where indirect or direct expropriation may be caused by EU legal acts or their implementation
Not applicable.

12) References to ECJ
Not applicable.

Two cases:

1) A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.

What could be the obligation of the state?

The municipal medical officer would be authorized to take action according to Chapter 3 of the Public Health Act (2011). In this serious situation, it could be argued that there is a duty to act in light of section 112 of the Constitution. However, it remains unclear whether such a duty exists. Similarly, it can be argued that the pollution authorities have a duty to act under the Pollution Control Act: to carry out inspections (sections 50 and 51) and order the pollution to be stopped (section 7). Here, as well, there is no clear duty to act, but such a duty may be construed in light of section 112 of the Constitution.

Could the inhabitants rely on the public remedies procedure?

Inhabitants would have a right to bring a case to courts claiming that there is a duty to act.

If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

Provided that the permit is more than 10 years old, the public authorities would be free to revoke a pollution permit without compensation.

2) How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.

Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)?

The inhabitants would be entitled to compensation according to chapter 8 of the Pollution Control Act. The main rule is a one-time compensation, but there is a possibility of providing for payment in instalments.

Do they have to annul the operation permit first?

There is no requirement to annul any permit first.

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