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Country Report: Norway

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Recent Policy Developments

Norway to Fulfill its Commitments under the Kyoto Protocol

Norway is in a good position to fulfill its Kyoto commitment of 101 per cent of its 1990 emission level, corresponding to 50,1 million tons CO2 eqv. on average 2008-2012. In 2009 the emissions were 50,8 million tons - the lowest emission figure since 1995. This was at least partly due to the finance crisis. Norway is party to the EU-ETS emission trading system, and the Norwegian state is active in the CDM market. It is envisaged that Norwegian companies will buy allowances in the European market, which will cover the possible gap between its actual emissions and the Kyoto obligation. In addition, the Norwegian state will buy CDM CERs in order to more than fulfill its Kyoto obligation.

The measures to be taken in order to reduce domestic emission towards 2020 are still a controversial issue under discussion. A white paper is foreseen in 2011. In 2010 the State Pollution Control Authority under the Ministry of the Environment got an extended mandate and became Norway's Climate and Pollution Agency - the

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central government agency for climate change issues. However, many important climate policy instrument rest with the various sector ministries.

Waste Reduction for the First Time in Norway's History

At last, for the first time in history, there was a reduction in total waste production in Norway. In 2009, the amount was 5 per cent less than in 2008, while the BNP fell by only 1 per cent. Household waste was reduced by only 2 per cent and now corresponds to 21 per cent of the total waste. 78 per cent of the waste – hazardous waste excluded – was recycled. In spite of the fact that Norway already in the 1990s developed several new instruments with the purpose of reducing waste production, waste production has increased by 41 per cent since 1995 – roughly corresponding to the 40 per cent increase in GNP.

Two Important Environmental Battles on the Political Front

During 2010, two of the most important, hottest and most controversial political issues in Norway have been in the environmental field.

The first is the question of whether the continental shelf outside the Lofoten islands in northern Norway shall be opened to petroleum exploration and exploitation. The sea surrounding the Lofoten islands are known as a major spawning area for the very important stock of North Atlantic cod. Every winter since time immemorial huge stocks of North Atlantic come to this area to spawn and the Lofoten fishery has always been of economic importance for the people and communities along the northern coast of Norway. This makes the area particularly vulnerable to possible pollution from petroleum activity. In addition, the nature in the Lofoten area – and along the entire coast of this part of Norway – is spectacular and attracts huge numbers of tourists every year. Therefore, this area has been protected from petroleum activities until now.

The petroleum industry, with the state owned oil company Statoil in a leading role, argues strongly in favour of opening the area for petroleum exploration. The main argument is that Norway's petroleum production most likely faces a marked decline

in a few years, and it is essential to find new sources. The industry maintains that the risk of serious pollution is minimal. Apparently, the geological conditions around Lofoten seem quite promising. In addition, petroleum industry will create economic development and new jobs, which are needed in this part of Norway. On the other hand, environmental NGOs and a good part of the public are clearly against. As the continental shelf in the area is very narrow, petroleum activity will be carried out quite close to the coast. A major accident and oil spill may thus have disastrous consequences. Needless to say, the 'Deepwater Horizon' accident in the Gulf of Mexico has made the industry's 'no risk' assertions somewhat less convincing.

At the base of the discussion is a thorough political document called *Management Plan for the Barents Sea and Lofoten*. Adopted by the Norwegian parliament in 2006, this model plan for sustainable management of marine resources protects the Lofoten area until 2011. But now the issue is reopened. At present, the coalition government seems to be split on the issue, which is to be decided in the course of the coming winter.

Another hot political issue is the planned construction of a major new power line through the beautiful fjord area of Hardanger on the western coast of Norway. The line will consist of very major masts placed in otherwise pristine areas. Its purpose is to transport hydroelectric power to the Bergen area, as well as to petroleum installations on the continental shelf. The fjords of Norway have a very special scenic beauty and some parts are on the World Natural and Cultural Heritage List. The local population, partly dependent on the tourist industry, protests strongly against the power line, and is supported by a good part of Norwegians. In august, the government made the decision to go ahead with the line, but the massive protests forced it to postpone parts of the project. The alternative - to transport the power partly by sea cable - is now subject to a detailed assessment, and a final decision is envisaged in spring 2011.

Recent Statutory Developments

Nature Diversity Act (2009) Comes into Practice

In 2009, Norway got a new comprehensive *Nature Diversity Act* and 2010 saw the first major decisions pursuant to this act. The purpose of this Act is 'to protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture' (section 1).

The Act is administered by the Ministry of the Environment and its Directorate of Nature Management. It lays down objectives, principles and framework rules for: protected areas; the sustainable management of flora, fauna and other organisms; the import of alien species; and access to genetic resources (bioprospecting) in Norway. With regard to its geographical scope, the Act applies to Norwegian land territory, including river systems, and to Norwegian territorial waters. In the EEZ outside territorial waters, the management and protection of living marine resources is regulated pursuant to the *Marine Resources Act* (2008) under the Ministry of Fisheries and Coastal Affairs. This illustrates one of several political conflicts in connection with this new Act.

The Act lays down several important principles for the management of nature diversity, including the principle of knowledge-based management (section 8), the precautionary principle (section 9), and the ecosystem approach: pressure on an ecosystem shall be assessed on the basis of the cumulative environmental effects on the ecosystem now or in the future (section 10). These principles shall serve as guidelines not only in the application of the *Nature Diversity Act* itself, but also when other Acts are applied. Hence, the Act is meant to play a cross-sector role. However, the extent to which these principles are actually applied in individual cases is decided by the sector administration in question within the substantive framework of its legislation. It remains to be seen to what extent these principles actually will be taken into account in these other fields of law.

Radioactive Substances under the Pollution and Waste Control Act

From 1 January 2011, radioactive pollution and waste will be regulated and controlled pursuant to the general *Pollution and Waste Control Act* (1981) instead of the special *Act on Radiation Protection and Use of Radiation* (2000). In spite of the fact that Norway has no nuclear power plants, emissions of radioactive substances and radioactive waste have increased during the later years, in particular in the petroleum industry and other industries, and hospitals. The *Pollution and Waste Control Act* provides an integrated system of pollution control, covering air, water and soil pollution and noise, as well as treatment of all types of waste. With some exceptions, it lays down a general prohibition to pollute and dispose of waste without a permit.

As a consequence of the reform, radioactive substances will be treated similarly to other types of substances that may be hazardous to the environment. This will broaden and strengthen the legal basis for regulation of radioactive substances and connected activities on the basis of environmental considerations in addition to the health aspects. General environmental principles will apply to the treatment of radioactive substances, such as the principles of prevention, polluter pays and the use of best available technology. It is particularly important that all release of radioactive substances will require a permit.

Recent Cases

In 2010, Norway's Supreme Court made several decisions of principle that are seen as positive from an environmental perspective.

The Hempel Case: Mother Company's Responsibility for Soil Pollution

In this case, a Danish mother company, Hempel, was found responsible for carrying out investigations about the level of soil pollution on two sites that had been owned by a daughter company, the stock company Hempel Coatings AS, which produced paint. Hempel owned 100 per cent of the shares in Hempel Coatings. The pollution had not been caused by Hempel Coatings, but earlier, by a company that produced

paint on the site before, and which was taken over by Hempel Coatings. After some years, Hempel Coatings AS was closed down and liquidated by Hempel, and the properties were sold to a third party without financial means.

Pursuant to section 51 in Norway's *Pollution and Waste Control Act,* the pollution control authority 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 arrange or pay for any investigations or similar measures that may reasonably be required'. Such investigation may be required in order to determine whether and to what extent the activity results in or may result in pollution, or ascertain the cause of or impact of pollution that has occurred. The question in the case was whether the mother company was a 'person that possesses, does, or initiates anything that results in or that there is reason to believe may result in pollution'. On the basis of the preparatory works of the Act and other sources, the Supreme Court unanimously answered yes.[1]

It was not disputed that the daughter company Hempel Coatings AS would have been responsible for carrying out investigations if it had still existed. Since Hempel had full control over its daughter company and had chosen to close it down, it was found to be responsible. The issue was not treated as a question of 'piercing the corporate veil' in company law, but solely as an issue of interpretation of section 51 regarding possible responsible subjects. Nevertheless, the case raises the question of whether the traditional limitation of shareholders liability has come under pressure in Norwegian law, in particular where mother companies have full control of daughter companies. In such cases, the reasons for a limited shareholder liability are clearly not always evident.

The Loevenskiold Case: The Right to Environmental Information from a Private Company

This is a case about the right to environmental information from private companies. According to section 17 in Norway's *Right to Environmental Information Act* (2003) any person has the right to get environmental information from private companies and other undertakings 'concerning factors related to the undertaking, including factor inputs and products, which may have an appreciable effect on the

[1] Norsk retstidende (2010), at 306.

environment'. There are some exemptions to this. One exemption is information that concerns 'technical devices and procedures or operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns' (section 18).

In this case, the Oslo branch of Norway's Nature Conservation Association had requested information about the status of the forest around Oslo. It was particularly interested in areas with old and pristine forest that - presumably - would be rich in biodiversity and therefore important to protect from logging. It asked a major private forest owner, Løvenskiold-Vækerø, about such information. Initially, the company was not willing to give it out. After several legal rounds the issue before the Supreme court was whether the association had the right to get detailed maps of the forest areas in question, altogether 2,500 small and bigger areas. In a unanimous decision the court agreed with the nature protection association and ordered the forest company to disclose the maps.[2]

This was the first case concerning the interpretation and application of the *Right to Environmental Information Act* and thus of considerable interest. The court found that the concept 'environmental information' covered information about the age and status of the various parts of the forest. Furthermore, it found that this information concerned 'factor inputs ... which may have an appreciable effect on the environment'. The reason was that there was a risk of logging in these areas, and such logging would have a negative environmental effect. The information was thus essential in order to be able to protect the biodiversity. The court did not agree with the forest company that this information could and should be kept secret for competition reasons.

[2] Norsk retstidende (2010), at 385.

A Critical Consideration of Recent Domestic Developments

In the course of 2010, there were no major developments in Norway's environmental law, but some elements such as the two mentioned Supreme Court cases, marked a positive trend.

The new *Nature Diversity Act* is in itself a major step forward. It provides the authorities with important new instruments to protect biodiversity. It is undisputed that loss of biodiversity is still going on in Norway in spite of the political objective to halt this development within 2010. Infrastructure and urban development are important reasons for this. Also, aquaculture along the coast - in particular salmon farming - is increasingly under scrutiny for its environmental effects due to diseases and escape. It remains to be seen whether the present government in fact will use the new Act to significantly strengthen biodiversity protection. This depends to a large extent on how various sector authorities and local planning authorities - with objectives and mandates, which are different from and even in conflict with biodiversity protection - chose to take biodiversity protection into consideration when they apply their legislation.

Identification of Possible New Research Agenda's for the IUCNAEL

It seems desirable to broaden the "traditional" research agenda in environmental law. The policy and law in such sectors as transport, energy production, agriculture, forestry, fisheries, public procurement, and defence, as well as in regional planning, urbanization and land use planning in general, is at the end of the day at least as important as the environmental policy and law in the strict sense The legal framework for these various sector authorities to take environmental considerations in their decisions, and in particular take biodiversity protection into account, and how this legislation is applied, should be made subject to more research. Such studies could also be extended to such areas as tax law, important parts of private law such as company law, and parts of property and contract law. Here, both common methodological discussions and comparative studies might be fruitful as part of the research agenda of IUCNAEL.