German Report (Gerd Winter)

1) What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?

(1) Notion and objects of property

The notion of property is different in civil and constitutional law.[1] Property in civil law can only be related to things ('Sachen'). In constitutional law – which is more relevant in our context – property covers many more assets:

- civil law property (in things)
- claims based on contract or tort liability,
- intellectual property rights (patent, copyright)
- public law rights if they were obtained through the work and/or capital of the right-holder, such as
    - rights to retirement payment (but not rights to social aid payments)
    - permits/licences/authorisations (within the limits of what they warrant)
- an established business ('eingerichteter und ausgeübter Gewerbebetrieb'), i.e. not a market share but the real assets (land, buildings, machinery and their utilization)

It is important to note that according to the doctrinal conception of the Federal Constitutional Court (BVerfG) what can become the content of the property guarantee is not given by "pre-societal" natural law but framed by democratic legislation. However, the legislator is not absolutely free in that regard but must respect some essential requirements embedded in the constitution such as that individuals must be able to possess some property assets needed for a decent personal life. These limits are labelled the guarantee of the institution of property (Institutionsgarantie).

The state and local communities can also possess private property (eg in land, as shareholders etc) (sometimes being called fiscal property) but this property is not protected by the constitutional property guarantee because basic rights are construed as rights "against", not "of" the state. Local communities are – dubitably - considered to be part of the state in that regard.

(2) Property in natural resources

Private property in natural resources is possible if the natural resources are implied in the assets listed above, such as:

- private property in land includes property in the plants growing on it; however, the genetic programme contained in a plant is as such not included, neither is it the species character of a specimen growing on it

[1] There is even a notion of public law property ('öffentlich-rechtliches Eigentum'). For instance, in the Land of Hamburg dikes are public property. The concept expresses the political will to make something a common good and convey the necessary powers to manage it. Those powers can however also be established if the property is (fiscal) civil property in public hands.

- contractual or tort law rights eg to deliver a plant or to compensate for the damage to a plant
- an established business entitled by law or licence to using natural resources (a fisherman, a nature camp, an installation discharging waste water into a river)

The protection of natural resources is considered as a public interest justifying the taking of appropriate measures. Natural resources are in Germany, other than in other states), not conceived as a public trust, common property or common good in order to provide them with a prominent status.

However, the traditional concept of "public things" (öffentliche Sachen) is partly applicable to natural resources. This concept frames publicly usable assets (streets, squares,parks, railways, ports, dikes, sewage purification plants, forests, mineral resources, etc.) as things that are subjected to a special public regime determining the obligation of government to provide them, the rights of the public to its free common use (Gemeingebrauch), the allocation and payment for special uses (Sondernutzung) etc. To the extent public things are natural resources their specific regime is sometimes used as a means of environmental protection (such as if a forest or park is protected against overuse).

(3) Use of property in defense of natural resources

The typical cases of use of private property in defense of natural resources involve land-owners (farmers, landlords living in or letting their houses, etc.) who challenge authorisations for infrastructure or industrial developments. More traditional are cases of nuisance in neighbourhood relationships that are treated under civil, not administrative law. In recent times conventional and organic farmers have defended their land against influx of pollen from genetically modified plants growing on neighbouring fields.

The use of private property to defend natural resources is in the German legal system restricted in certain ways. Concerning civil law claims (contractual or tort based) a victim can theoretically ask for injunction of or compensation for environmental damage. But in practice victims are only interested to prevent or recover damage to the exploitation and exploitability of the natural resource. Concerning public law rights, property holders can challenge administrative acts permitting damageable activities (or administrative omissions concerning such activities) only to the extent they are individually concerned. They are not considered to be individually concerned if environmental damage as such is at stake. For instance, a farmer whose land will be or was polluted can challenge the responsible administrative body to take measures so that the usability of the land is restored, not however that rare species shall be resettled or the groundwater shall be cleaned up.

However, in cases where private property shall be taken for public purposes (such as the construction of a road) the land-owner can challenge the related administrative authorisation also in relation to environmental damage as such. This can be explained by the fact that the taking of property is a very serious intrusion that necessitates legality in all respects of the public action.

Environmental NGOs can, apart from their rights to file an association action as representatives of public interests, also act as property holders. The trick is to buy a piece of land in the neighbourhood of a contested development just for the purpose of searching legal protection as a land-owner (the plot is called 'Sperrgrundstück'- 'stopping estate'). It has been controversial if such strategic behavior is legitimate property in the constitutional sense. But the Federal Administrative Court (BVerwG) has

taken a formal position in that regard and acknowledged that the strategic purchase of property is nevertheless property.

If the adverse effects on natural resources in private property is caused by government (such as air, particle and noise pollution from public roads, odors from public waste deposits or sewage treatment plants, etc.) property holders can claim compensation for "expropriating encroachment" ("enteignender Eingriff"). The preconditions (and even the very existence) of this right to compensation for "enteignender Eingriff" are highly controversial. The preconditions center around criteria of gravity and of inequality of impact.

Note, that the right to compensation for "enteignender Eingriff" only concerns cases where the damage has already been caused. If the encroachment can still be prevented the proprietor must seek primary legal protection. The problem of compensation is then one of the appropriate legislatory determination of property content (see above Question 1 chap. (1) and below Question 3 chap. 1).

2) How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?

(1) Notion of expropriation

Expropriation is constructed in a formal sense: a property right must have been removed from the property holder, such as the private property in a piece of land or a legal title. The restriction of land property by a registered servitude also counts as expropriation. The taking of a right may either involve the transfer of the right to another (private or public) person or body (as, for instance, the transfer to the developer of an infrastructure project or the establishment of a servitude for nature protective land-use restrictions), or consist in the mere dissolution or invalidation of a right (as, for instance, if a factory is closed down). In cases of the latter category it has sometimes been difficult to determine if use restrictions are an expropriation.

(2) Preconditions of expropriation

The preconditions of expropriation are: (1) It must be based on an empowering law (2) It must be needed for an overriding public interest (3) Full compensation must be paid (4) The law must declare that it enables expropriation (the so-called Zitiergebot ('cite requirement') which shall alert the legislator to the fact that expropriation is at stake.

Expropriation is normally used for development purposes (construction of infrastructure projects, public purpose buildings in planning law, etc). As a means of environmental protection expropriation is a rare phenomenon. It can happen, for instance, if a farmer's land must be used for specific intensive nature protection measures which exclude any private exploitation. In such cases the landowner has even the right to ask for the expropriation and compensation of the land.

3) Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation? What are the criteria

of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?

(1) Preconditions of any use restriction

Use restrictions must be based on a parliamentary law (so-called legislative reservation, Gesetzesvorbehalt), legitimated by a public interest, and meet the proportionality test. As a general rule the use use regulation can be the more restrictive the more important the objective (here: protectable environmental goods, serious endangerment of them) and the less important the property and its use are.

(2) Use restrictions entailing compensation

The German legal system does distinguish between allowable use restrictions with and without compensation. Other than in many legal systems use restrictions involving compensation is however not named indirect or regulatory expropriation but rather "entschädigungspflichtige Inhaltsbestimmung des Eigentums"(determination of property content mandating compensation). I believe the difference in terms implies a difference in concept in three respects:

- By categorising use restrictions as legislatory determinations of property content the legislator is conceded more freedom of political action than if it must always reckon with being blamed to transgress the border to expropriation.
- The concept of content determination allows to employ the proportionality principle as a sophisticated instrument of fine tuning the border between non-compensation and compensation. In contrast the concept of indirect expropriation suggests the border to be drawn solely in terms of severity of impact.
- Applying the proportionality principle a balance can more easily be drawn between the importance of the public interest (here: environmental protection) and the severity of impact. In addition, compensation can be considered as just one among other possible ways the legislator may take to reduce the gravity of use restrictions. For instance, rather than granting financial compensation it may allow for exceptional uses.

(3) Criteria of distinction between compensatable and non-compensatable use restrictions

When assessing whether a use restriction must be accepted without compensation, German property doctrine distinguishes between different functions of protectable property: if the property serves a personal purpose (an apartment, personal belongings, pension rights etc) it has more weight than if the property is used for commercial interests or is tied into a public interest.

Further criteria include the severity of impact and the inequlity of treatment.

Some specific criteria have been developed in different sectors:

(a) Nature protection

In relation to land use restrictions for nature protection purposes courts apply a concept of implied boundedness of a site (Situationsgebundenheit): where a plot of land is situated in valuable nature the owner must acquiesce to restrictions that conserve this situation.

Case Thüringer Oberverwaltungsgericht, Urteil vom 15. August 2007 – 1 KO 1127/05 –, ThürVGRspr 2008, 97-104. The case concerns the prohibition of gravel removal from a site in a landscape protection area. The court rejected the appeal of the landowner against this restriction.

"Every piece of land is distincted by its location and characteristics and the imbedding in its environment, in other words by its situation. This situation boundedness can legitimate legislatory restrictions of property rights, because the discretion of the legislator according to Article 14 sec. 1 sentence 2 GG is the broader the stronger the social relationship of the object of property is which again is dependent on its characteristics and function. If the conditions of nature and landscape of a site are worth preserving in the public interest and need to be protected this results in a restriction of property rights which are immanent, i.e. adhered to the site and are only retraced by nature and landscape protective regulation". (my emphasis)

However, to the extent the use restrictions are very severe nature protection law provides that some compensation shall be paid, but only insofar as the excessive burden shall be alleviated.

My own opinion is that agricultural land should not only situationally but more generally be considered to be bound by its very function as primary production. Primary production is dependent on and embedded in natural life cycles. It cannot be managed as a pure techno-industrial undertaking without seriously disturbing natural cycles and thus – in the long run – damaging itself. Therefore primary production must share its processes and yields with the non-cultivated nature. In practical terms this implies, for instance, that part of the products must be tolerated to be consumed by insects which again feed birds etc.

(b) Dangerous technology

The authorisation of dangerous installations (as regulated by Directive 2010/75 and Bundesimmissionsschutzgesetz – BImSchG) does not grant a property right in the once authorised technology because it is conceived as a privilege to cause risks to human health and the environment. It implies that the operator must adapt the installation to new best available technology and prevent newly detected dangers. However, the proportionality principle may require that the operator is granted appropriate time to write off his/her investment (Art. 17 BImSchG). In contrast, the permit to construct a normal building for dwelling purposes is not subject to subsequent alteration. However, if important interests such as energy saving so require new buildings can be required to meet certain isolation standards.

(c) Land-use planning

Landownership does not entail the right to construct a building. Rather, this is dependent on whether land-use plans allow this. Where no plan has been enacted constructions are in principle not allowed outside settlements (except for agricultural buildings e. a.); within settlements they are allowed if fitting to the dominant intensity and shape of existing constructions. However, compensation is due if the right under an existing land-use plan to construct is removed or seriously restricted by a new plan.

4) What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:

- *to prevent environmental damage;*
- *to prevent traditional damage;*
- *to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
- *to limit activities/property due to the special protected area, like Natura 2000*
- *of public health/safety reasons.*

To what extent can private individual invoke these sorts of powers – eg actio popularis)?

In which above cases compensation is foreseen by law?

In German law, all of these public interests are considered legitimate reasons to impose restrictions of property use. Only in relation to the renovation of facades it is doubtful if such reason would justify commanding measures.

5) Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?

Yes, there is such a category. The stepping out of nuclear energy can be regarded as a case in point (although the question is still to be decided by the BVerfG). If the legislator re-structures an entire legal area for the future, it is first of all authorised to decide that certain categories of property shall not be accepted. This means for nuclear energy, that the legislator is able to ban property in new NPPs—in other words, to refuse to license new NPPs. In addition, and most importantly in our context, the legislator is allowed to remove existing rights without paying compensation. This was approved in a landmark decision of the BVerfG concerning old rights of land-owners to gravel mining. The court ruled that such rights can be dissolved without compensation, if overriding reasons of the public interest (in casu: groundwater protection) exist and the right holders are given a sufficient grace period, which allows them to switch to other economic activities (Auflösung von Rechtspositionen).[2] In doctrinal terms the court categorises this dissolution of rights (Auflösung von Rechtspositionen) as a variant of "Inhaltsbestimmung" but I believe it is in fact a variant of expropriation – one without compensation.

It may be noted that also the ECtHR exceptionally accepts non-compensation of removal of property rights in cases of a basic reorientation of the law. See CASE OF JAHN AND OTHERS v. GERMANY (GC)(Applications nos. 46720/99, 72203/01 and 72552/01):

> "94. [...]In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a

[2] BVerfGE 58, 300 (351)

disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances" [cites]

"113. In that connection, the Court reiterates that the State has a wide margin of appreciation when passing laws in the context of a change of political and economic regime (see, inter alia, Kopecký v. Slovakia [GC], no. 44912/98, § 35, ECHR 2004-IX, and Zvolský and Zvolská, cited above, §§ 67-68 and 72). It has also reiterated this point regarding the enactment of laws in the unique context of German reunification (see, most recently, Von Maltzan and Others v. Germany (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111-12, ECHR 2005-V)."

6) How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?

The general rules on access to courts apply.

7) Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?

In general yes.

8) Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?

Yes, under traditional police law the causer and the property holder are responsible for a nuisance. The administrative body has discretion from whom to require remediation but is considered to be bound to address the causer rather than the proprietor. The latter can seek redress from the former.

These principles have been held up but specified by legislation concerning soil protection (Bodenschutzgesetz), and in particular in relation to contaminated sites.

9) Does the state permit (like IPPC permit, operation permit etc) exclude the holder from the liability towards third persons (in case of damage cause by undertakings)?

Yes, if an IPPC permit was issued and has become valid a concerned neighbour cannot anymore ask for an injunction under civil law. The neighbour can however ask for technical improvements according to BAT provided this is economically feasible.[3] He/she can also, under administrative law, ask the competent administrative body to modify the permit and order the operator to improve the installation if it causes emissions having adverse effects on his/her health.

[3] Art. 14 BImSchG.

10) Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?

I am not aware of such cases in environmental litigation.

11) How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?

In a case concerning the emissions trading regime the BVerwG was asked to check whether the capping of climate gas emissions from coal power plants breached the constitutional property guarantee. The court ruled that the capping was fully determined by EU law (Directive 2003/87/EC)and were therefore to be tested against the EU property guarantee rather than the national one. The BVerwG considered how the ECJ would answer this question and concluded that it was likely to approve the constitutionality of the Directive. For this reason the court did not submit a related question to the ECJ.[4]

12) Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?

I am not aware of such cases.

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?

Could the inhabitants rely on the public remedies procedure?

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

[4] BVerwGE 124, 47 (57).

It seems that Art. 21 Directive 2010/75 should be applied in this case. It requires that permit conditions shall be adapted to existing BREFs or other best available techniques, even independently of whether environmental adverse effects are proven.

The legal provision of German law dealing with such case is contained in Art. 17 BImSchG which reads:

> Article 17
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> Subsequent Orders
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> (1) In order to perform the obligations resulting from this Act or from any ordinance issued hereunder, orders may be issued following the granting of the licence or an alteration notified pursuant to Article 15 (1). If after the issue of such a licence or after an alteration notified pursuant to Article 15 (1), the protection of the general public or the neighbourhood against any harmful effects on the environment or any other hazards, significant disadvantages and significant nuisances turns out to be inadequate, the competent authority shall issue subsequent orders.
>
> (2) The competent authority shall not issue any subsequent order if such order would lack proportionality, above all if the effort needed to comply with an initial order is not commensurate with the desired effect; in this respect, special attention shall be paid to the nature, volume and hazardousness of the emissions originating from the installation and the immissions released by it as well as to the useful life and the characteristic technical features of the installation. Where a subsequent order is not permitted for lack of proportionality, the competent authority shall revoke the licence wholly or in part in accordance with the provisions of Article 21 (1) Nos. 3 to 5 ; Article 21 (3) to (6) shall be applicable.

Art. 17 (1) 1st sentence refers, among others, to the precautionary principle which asks for preventive measures even in situations of uncertainty. The competent authority is empowered to intervene in such cases, eg by requiring BAT. It is obliged to intervene if harmful effects on the general public or the neighorhood can be proven (Art. 17 (1) 2nd sentence. In any case, however, proportionality must be kept (see Art. 17 (2) 1st sentence. If proportionality is denied the administrative body shall revoke the permit and must pay compensation (Art. 17 (2)

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)? Do they have to annul the operation permit first?

I assume the operator of the waste deposit is a public authority.

According to German law the inhabitants would first have to try means to induce the site operator to improve the disposal site. This could be done filing a mandamus action against the competent supervisory authority asking the court to condemn the same to serve an improvement order on the operator. The authority has such powers under Art. 39 Kreislaufwirtschafts-/Abfallgesetz (formerly

such powers derived from general police law), and it can be mandated by the court to take action if the plaintiffs can prove that the odor is seriously affecting their health and well-being.

If such primary legal protection fails because the adverse effect is not considered to be harmful the inhabitants can claim compensation for “enteignenden Eingriff” (see above Question 1 chap. (3). The criteria to be applied would be whether the adverse effect is serious and whether the inhabitants are unequally treated. I believe only if the odour is clearly untolerable the court would grant compensation. But then primary legal protection would be as well be successful.

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