The Environmental Law and Property Guarantee in Italy

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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?*

In the Italian legal system, article 42 of the Constitution contains the basic provisions on the protection and regulation of property ownership and use. Article 42(1) reads as follows:

> "*Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations, so as to ensure its social function and make it accessible to all.*"

The basic provisions contained in the Italian Constitution are supplemented by the specific norms of the Italian Civil Code, which list the objects belonging to the public property of the State (article 822 to of the Italian Civil Code) and distinguish them from the objects that can be subject to private property. For the latter ones, no specific list is provided by the Civil Code.

In particular, article 822 of the Civil Code identifies and lists the objects which belong to the State (or to other local territorial public authorities), which are said to include the following: seashore, beaches, natural harbours, ports, rivers, creeks, lakes and all public waters. As far as the latters are concerned, the present provision of Civil Code was supplemented by Law 36/1994 which determines that all superficial and underground waters are to be considered public goods and belong to the State. Beside the objects listed in article 822 of the Civil Code, there are other goods which may be under both public and private property, and that are subject to some sort of public interest regulation. All goods belonging to natural and cultural heritage as well as landscape protected areas may be falling in this category.

Some of the objects which are subject to public property may be managed by private persons by means of a "concession" (*concessione*) given by the State, for a certain period of time, which confers him/her the right to exclude third parties from its use and exploitation.

In recent times, a widespread debate has developed in Italy on the opportunity to revise the traditional distinction between public and private property contained in the Italian Civil Code. To this effect, the Government has set up in 2007 the so-called *Commission on Public Goods*, also called *Commissione Rodotà*, by the name of its chairman. The Commission prompted and guided a very broad discussion on the revision of public and private property concepts in the Italian legal system and proposed the institution of a third category of goods, which ought to be identified as "common goods". The common goods should include all the goods which are aimed at satisfying common general interests and are functional to the exercise of fundamental rights, for the benefit of present and future generations. Common goods may be subject to public or private property, but their common and collective use must be guaranteed. The new category of common goods should include most natural resources, such as rivers, lakes and their sources; all waters; the air; parks, forests and other woods, high mountains, glaciers, environmentally protected coasts and seashores, wild fauna and protected flora; and, more generally, all archaeological, cultural and environmental heritage as well as landscape protected areas.

The reason for the institution of the new category of "common goods" lies in the fact that the State or the other local territorial public authorities, which presently exercise property rights on those goods, are often not able to provide them an adequate protection, insofar they are sometimes in a conflict of interest position. For instance, the State, might have an interest to protect parks and other cultural, environmental or landscape protected areas on the one side, which may possibly compete and conflict with the parallel interest to gain profits from their commercial exploitation. For this reason, the proposal of the *Commission on Public Goods* aims at reinforcing the protection of those goods, while enhancing their collective use, in the interests of present and future generations. Therefore, in the proposal of the *Commission*, the possibility to give a "concession" to private parties for the exclusive exploitation of those goods should be restricted, as compared to the current Civil Code regulation of public goods.

The ultimate aim of the proposal of the *Commission on Public Goods* is to lead to an amendment to the relevant provisions on property of the Italian Civil Code. So far, despite a broad support gained by the proposal, this has not happened yet. However, the work of the *Commission*, since its publication, has given rise to an intense scholarly debate, which may eventually exercise a certain influence on the interpretation of the existing legislation on property by Italian courts.

Going back to the Italian legislation on property currently in force, it should be mentioned that, under the present regulation of public and private property, it is possible for a private party to have ownership over natural resources. However, in this case, the relevant property rights must be exercised within the limits set by the law and the administrative regulations which may be enacted by public authorities, for the protection of the environmental and cultural heritage and as well as for the protection of archaeological, artistic and landscape values.

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)?*

Expropriation is the greatest limitation to private property existing in the Italian legal order. It is regulated by Decree 327/2001 (*Single Text on Expropriation*), in accordance with the general provisions of article 42 of the Italian Constitution and article 834 of the Italian Civil Code. In particular, article 42(2) of the Constitution reads as follows:

> "*In the cases provided for by the law and with the provision of compensation, private property may be expropriated for reasons of general interest.*"

Expropriation is normally preceded by a "declaration of public necessity" (*dichiarazione di public utilità*), issued in relation to the specific property at stake. This is the basis for the expropriation act itself.

In recent years, however, a special track procedure of expropriation was introduced in the Italian legal system, by means of article 12(1) of Decree 387/2003, adopted as the implementing measure of EC Directive 2001/77 on the promotion of renewable energies, with the aim of harnessing the construction of renewable energy plants and related infrastructures. The special track procedure aims at speeding up the expropriation procedure by removing the requirement of a prior declaration of public necessity. In fact, the construction of renewable energy plants is considered *ipso facto* a "public necessity".

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 (e.g. nature protection and agriculture different from pollution prevention measures)?

Generally speaking, it is commonly understood that the legislature (or the public administration) has a certain margin of appreciation, which may result in regulatory restrictions for which no compensation is normally due. For instance, when Law 36/1994 was adopted, which declared that all superficial and underground waters ought to be considered as falling within the "public property", the legislature did not foresee any kind of compensation for the private owners of such resources. In such a case, to the best of my knowledge, this regulatory restriction was not contested before national courts.

As far as regulatory restrictions on the use of property are concerned, the relevant case-law of Italian courts has consistently tried to establish a clear distinction between expropriation and restrictions related to expropriation on the one side (for which compensation is normally due) as opposed to restrictions to property not related to expropriation on the other side (for which compensation is normally not due) (see *Corte Costituzionale*, No. 179/1999).

As to the specific restrictions to property not related to expropriation, Courts have held that land planning restrictions regarding the modalities of the right to build on a land normally do not require any compensation. However, compensation may be required for absolute restrictions of the right to build (*ius aedificandi*), particularly in case when they are re-iterated over a long period of time without any clear justification or in case legitimate expectations have been created on the right to build. Just in the latter case, a duty to compensate may arise (see *Corte Costituzionale*, No. 6/1966, No. 55/1968, No. 133/1971, No. 417/1995, No. 419/1996, No. 179/1999).

Similarly, compensation is normally not due for restrictions based on environmental and landscape grounds (see *Corte Costituzionale*, No. 179/1999), even in case of regulatory changes, which modify a previously existing situation and restrict owners' property rights. This is now also explicitly foreseen by article 145 of the so-called Italian Cultural Heritage and Landscape Code (Decree 42/2004, as amended by Decree 63/2008).

4) *Can the state authorities demand obligations (active & passive; to do or not to do something) regarding the use of property in cases:*
    a. *to prevent environmental damage;*
    b. *to prevent traditional damage;*
    c. *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.);*
    d. *to limit activities/property due to the special protected area, like Natura 2000*
    e. *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?

To my knowledge, no specific limitations or duties, including both active and passive obligations, are normally placed under Italian law on landowners to prevent traditional or environmental damage. Similarly, I am not aware of the existence of any specific limitation or duty imposed by the law on landowners for risk prevention with regard to public health and safety. Obviously, the situation is different for enterprises, which may be subject to the obligation to adopt several preventive measures for environmental, health and safety reasons. As to the duties and obligations which may be imposed on the land owner in case of illegal tipping of waste on his/her land, there have been some cases based on the interpretation of

the provisions contained in the so-called Italian Environmental Code (Decree 152/2006, as amended several times) decided by Italian courts. (On this issue, see below § 8).
As far as the regulation of allowed and prohibited activities which can be carried out in protected areas, such as, for instance, Natura 2000 sites, is concerned, the main legislative source is represented by Decree 184/2007 of the Ministry for the Environment. Such a Decree contains national guidelines and minimum standards for the management of Natura 2000 protected sites. These guidelines have to be supplemented by regional legislation, since the management of protected site is dealt with at regional level.

5) *Is there a category of 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)?*

In Italy there is no evidence in recent year of situations in which legislative or administrative acts adopted by public authorities caused the sudden or gradual dissolution of vested rights of private parties, along the line experienced in Germany with the stepping out of nuclear power or in Spain with the phasing out of subsidies to green electricity.
However, it can be assumed that should such a situation occur, the general rules on expropriation and regulatory restrictions (seen above under § 2 and 3) would apply.

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?*

In case a property owner claims that he/she has been subjected to a restriction, amounting to a sort of an indirect expropriation, in the form of what is sometimes referred to as a "regulatory taking", he/she can normally oppose an administrative decision directed to him/her before an administrative court, whereas no direct remedy is foreseen for private parties before the Constitutional Court, in case a regulatory taking is made through the adoption of a legislative act.

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 some cases, for instance when the property owner claims that the value of his/her property has decreased in connection with the construction or operation of an industrial installation located nearby or with the construction or operation of an energy plant or in connection with other infrastructures for the distribution of energy, the possibility to file a claim for compensation may be dependant on the prior annulment of the permit which allows the performance of a certain economic activity or which authorises the construction of certain plant or infrastructure.
Conversely, the prior annulment of the permit would not be necessary in case the property owner claims to have suffered damages, in relation to the violation of criminal law provisions, related to environmental or health protection.
As far as environmental damages are concerned, private parties cannot claim compensation, insofar the relevant competence lays exclusively with the State, according to article 311 ff. of the Italian Environmental Code (Decree 152/2006, as amended several times).

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)?*

In general terms, according to the relevant provisions of the Italian Environmental Code (Decree 152/2006, as amended several times), the owner of a land cannot be held responsible for the environmental damage caused by the illegal deposit of waste within his/her land, for the mere fact of being the landowner. However, the landowner may be nonetheless subject to some duties and obligations in such cases. In fact, in several cases Italian courts have dealt with the interpretation of the provisions (art. 244, 245 and 253) of the Italian Environmental Code concerning the duties and obligations of a landowner in case of illegal deposit of waste on his/her land. Recently, the Italian Supreme Administrative Court, that is the Council of State (*Consiglio di Stato*), by means of Order 28/2013, has stated that the land owner has no duty to prevent or minimise environmental damage in such a circumstance, but an encumbrance (*onere reale*) may be imposed on the value of his/her property, which is equivalent to the costs of the clean-up operations performed by the State on the contaminated land. The Council of State, however, with the same Order 28/2013, has submitted a reference for a preliminary ruling to the CJEU regarding the interpretation of such duties, in particular with reference to their conformity with the EU environmental law principles listed in art. 191(2) TFEU as well as with the provisions contained in art. 1 and 8(3) of EC Directive 2004/35 (ELD Directive). The relevant case is still pending before the CJEU.

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)?*

In presence of a valid permit to operate an installation, the holder of the permit would be normally excluded from liability towards third persons. In general terms, it seems that claims for damages could be successful only if the claimants are able to demonstrate that the installation was operating without a valid permit, or was acting in violation of specific provisions thereto. In such a case, claims for damages could be requested after the annulment of the permit by an administrative court. Obviously, the situation would be different, and the permit defence would normally not operate, in case of a criminal law violation performed by the installation management, with regard to public health or environmental protection.

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)?*

A recent case connected with the application of art. 1 of the First Protocol of the ECHR, that is presently pending before the ECtHR, is the one filed in 2010 by two Italian landowners, (*Miceli e Cutrone vs. Italy*, case No. 16909/2010). The case regards the possibility for landowners to exclude hunters from their property. This issue is regulated by article 842 of the Italian Civil Code, which prescribes that the owner of a land may exclude hunters from entering his/her property only in case that the property is aptly fenced or in case produce cultivated in the fields may be damaged. Italian courts have been traditionally quite reluctant to further extend the possibility of the owner to impede the entry of hunters on his/her property. However, the situation might change in the future following the recent case-law of the European Court of Human Rights, such as in particularly in the case *Hermann vs. Germany* (2012).

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?*

To my knowledge, there is no evidence of case-law in which direct or indirect expropriation has been caused by the implementation of EU legal acts into the Italian legal order. However, it can be presumed, that should such a case be brought before an Italian court, the usual rules (seen above) on the regulation of expropriations and regulatory restrictions may be applied.

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

To my knowledge, there is only a recent case in which an Italian Court has submitted a reference for a preliminary ruling to the CJEU in a situation somehow related to property issues. The case has been presented under § 8 above.

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?

This fictional case presents some similarities with a real case that happened in Italy in the last few years and that is still not completely settled. This is the case regarding the steel factory Ilva, located in the town of Taranto, in southern Italy. In such a case, there was a criminal prosecution started against the managers of the factory for the alleged damage to human health caused by the continuing operation of the factory in violation of applicable health and safety standards. The criminal prosecution is still on-going at the moment. In the meantime, however, the Ministry for the Environment (MOE), prompted by the existence of the criminal prosecution and the limitations that the competent criminal court, through interim measures, had imposed on the plant production, acted for the revision of the IPPC permit which had been previously issued by the same Ministry to the factory, imposing higher standards for the maintenance of the economic activity. The MOE acted on the basis of the allegation that some provisions contained in the permit had not been correctly complied with by the industrial installation. There is no evidence that the company claimed any sort of compensation for damage with respect to the revision of the permit by the MOE. Quite on the contrary, it can be assumed that the intervention of the MOE was actually aiming at finding a reasonable balance between the economic and commercial interest of the company to continue its production and the conflicting public interest related to environmental and health protection.

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?

In a case such as the one at stake, it seems that the property owners whose property value has decreased in relation to the operation of the waste disposal site in the vicinity of their properties may be allowed to claim compensation for the suffered damages. However, on the basis of similar cases decided by Italian courts, it is very unlikely that they would be successful in the claim for the mere decrease of value of their property. Conversely, if they could demonstrate that the waste disposal installation was operating without a valid permit, or in violation of specific provisions thereto, following the annulment of the permit by an administrative court, they could most probably successfully claim compensation for the damages suffered.

The situation would be different in case the property owners could demonstrate to have suffered damage to their health, in connection with the operation of the waste disposal facility. In such a case, in fact, the matter could be dealt under criminal law and the request for civil damages may be brought by the claimants before the competent criminal court, in parallel with the criminal proceedings.