QUESTIONNAIRE

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Spain

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Questions

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?

   (a) The Spanish Civil Code of 1889 defines property in wide terms ("Ownership is the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws").[1] This declaration would in some way reflect the Roman Law tradition of private property as "*ius utendi et abutendi re sua quatenus iuris ratio patitur*". However, the Civil Code also acknowledges the existence of limitations.
   (b) Article 33.1 of the Constitution admits the right *to* property but it does not provide a definition. Article 33 reads:

   > "1. The right to private property and inheritance is recognised.
   > 2. The social function of these rights shall determine the limits of their content in accordance with the law.
   > 3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law".[2]

   (c) The right to property ownership does not enjoy the guarantees of basic fundamental rights [those enshrined in Section 1 (Chapter 2) of Title I of the Constitution, e.g., private life] since Article 33 is included into Section 2 of the same Chapter. Therefore, there is no right to appeal (*recurso de amparo*) before the Constitutional Court (once ordinary venues have been exhausted) claiming that Article 33 has been breached (indirect questions may however be submitted by ordinary courts).[3] Likewise, ordinary courts are not bound by Article 33 as they are by other fundamental rights because, according to the Constitution "[t]he rights and freedoms recognised in Chapter 2 of Part (I) are binding on all public authorities".[4] Nevertheless, the right to property ownership has to necessarily be regulated by laws of Parliament and not merely by regulations.[5]

[1] Article 348.
[2] Spain has ratified Protocol 1 to ECHR.
[3] Article 53.2 of the Constitution reads: Any citizen may assert a claim to protect the freedoms and rights recognised in section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court".
[4] Article 53.1.
[5] Spanish Constitutional Court Judgment (SCCJ) 37/1981.

(d) The Spanish Constitution neither guarantees ownership rights on any types of goods nor designates their material scope.[6] In fact, Article 128.1 sets out that the entire wealth of the country in its different forms, irrespective of ownership, shall be subordinated to the general interest. This aspect is also clearly stated in the 1954 Expropriation Law, which refers to any form of singular dispossession of private property or of legitimate interests without establishing any classification as to the range of properties that may be affected by such powers. Therefore, the Constitutional Court has indicated that expropriation powers extend to all kinds of rights and patrimonial interests justified by a diversity of public and social purposes.

(e) Needless to say, there certain goods that are conceived as *res communis omnium*, e.g., wind,[7] and consequently no property rights can initially be asserted, e.g., wild species.[8] The Civil Code indicates that "[p]roperty capable of appropriation without an owner, such as game or wild fish, hidden treasure and abandoned movable things, are acquired by occupancy".[9] Other goods are also subject to a special regime, i.e., the public domain, particularly applicable to water resources and coasts (according to the conditions set out in the Constitution and the corresponding laws). Hence, they are regarded as *res extra commercium*. In this respect, Article 132.2 of the Constitution declares that "[a]ssets under the State's public property shall be those established by law and shall, in any case, include the foreshore, beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf". Other goods are also defined as public domain, i.e., mining resources. Therefore the Roman maxim according to which one who owns land owns it "*ad inferno usque ad coelum*" does not apply. Those goods remain inalienable and imprescriptible and cannot be subject to attachment or encumbrance.[10] Nature protected areas under Law 42/2007 are not regarded as public domain albeit they may certainly contain portions subject to this legal category, e.g., watercourses.

(f) Although the Constitution employs the term "property" (in singular) (*propiedad*) it in effect embraces a wide range of "properties". Property rights have traditionally been identified with real state. However, there are in fact different types, e.g., agricultural, fisheries, forestry, intellectual, urban, among others. This circumstance makes it difficult to draw a common element applicable to these types. Thus the Constitutional Court has said that there is not a single property right. On the contrary, there are diverse legal regimes that may legitimately be designed by the legislator taking into account a wide range of public interests.[11] Despite the variety of properties, the Constitution provides a notion that affects all possible types [i.e., its "core content" (*contenido esencial*) (Article 53.1)] and that must be respected by the legislator unless an expropriation (with compensation) takes place.[12] The core content refers to the essential characteristics of a fundamental right without which it could no longer be conceived as such.[13] In the case of the right to private ownership its core content would include the rights of use, enjoyment and disposal parallel to Article 17 of the

[6] SCCJ 37/1987.
[7] Spanish Supreme Court Judgment (SSCJ) of 28 March 2006, appeal 5527/2003.
[8] According to SCCJ 69/2013, Law 42/2007 conceives the natural heritage biodiversity as goods of public interest public. This category includes those whose legal regime, regardless of their public or private ownership, or even its nature as *res nullius*, is linked to the general interest, in order to ensure their restoration and conservation, and the right of everyone to enjoy them.
[9] Article 610.
[10] Article 132(1) of the Spanish Constitution.
[11] SCCJ 149/1991.
[12] SCCJ 204/2004.
[13] SCCJ 11/81.

EU Charter of Fundamental Rights ("Everyone has the right *to own, use, dispose of and bequeath* his or her lawfully acquired possession").

(g) As regards the employment of private property for the defence of the environment it should be observed that current State Land Law of 2008 defines rural lands as those preserved from urban sprawl by territorial and town plans.[14] This category embraces at least lands excluded from such transformation by legislation concerning the public domain, nature protection, cultural patrimony; or lands that must be protected due to their values, e.g., ecological, agricultural, cattle, forestry, or landscaping. Owners of rural lands have to protect terrains and vegetation to avoid risks of erosion, fire, flood, risks for the public security or health, damage to third parties or to the general interest, including the environment. They also have to prevent soil, water or air pollution and maintain the establishment and operation of services derived from the uses and the activities developed on those terrains. The aforementioned obligations (largely enshrined in previous urban Laws and regulations) have not however avoided the continuous degradation of the environment in the last decades. Further restrictions on property rights are also included in Law 42/2007, on the natural patrimony and biodiversity. According to the Law, fencing and enclosures of lands, the installation of which is subject to administrative authorisation, must be built in such way that in the whole perimeter the passage of wildlife that cannot be hunted is not hampered, and the risks of inbreeding is avoided in the case of species that may be hunted.[15] Forestry exploitations have sustainably been managed by municipalities (a practice that remains) through the figure of communal forests helping to preserve local economies but also soils and water resources. Private individuals may agree on the imposition of limitations on their own properties either with another private individual or with the public authorities. Law 42/2007, on the natural patrimony and biodiversity, includes rules on "land stewardship" whereby the public authorities promote agreements between stewardship organisations and proprietors of private or public lands. Land stewardship organisations are non-profit organisations enjoying legal personality. They act as intermediaries between, on the one hand, the public authorities that provide economic means for appropriate environmental management of the land, e.g., through fiscal measures, aids or economic benefits derived from a contract and, on the other hand, the individual owners who are committed to carry out a type of management transferring the running of the land to the organisation in exchange for a determined economic benefit granted by the Administration.

(h) The public authorities enjoy other powers affecting property rights to maintain the integrity of protected areas. This is the case of the right of first refusal and the right to repurchase in respect of businesses concluded for good and valuable consideration celebrated *inter vivos* and creating, modifying, transmitting or extinguishing property rights on real estate located within a protected area.[16]

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)?

(a) Expropriation is defined in the 1954 Law as any imperatively imposed deprivation of private property (or of rights or legitimate economic interests) be it a sale, swap,

[14] The Autonomous Communities are basically in charge of town and country planning matters under constitutional rules.
[15] Article 62.3.f).
[16] These powers do not apply to Natura 2000 sites.

census, lease, temporary occupancy or mere cessation of exercise. Since the Constitution does not guarantee a right to private ownership on any goods, nor determines its material scope, the 1954 Expropriation Law refers to "any deprivation" of goods and rights due to all kind of public and social purposes. It should be observed that any individual or institution (save those protected under international or UE law)[17] may be subject to expropriation. Spanish Law also extends this power to rights acknowledged by the courts of justice but under a limited number of justifications, e.g., risk of war.[18] However, expropriation powers may only affect certain parts of property rights, i.e., those required to achieve the public interests that are pursued.

(b) Expropriation powers require a previous *causa expropiandi* justifying the compulsory purchase of private ownership rights. This corresponds to a historical tradition already enshrined in the 1789 French Declaration of the Rights of Man: "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified".[19] The *causa expropiandi* may basically be specified following three different paths: (i) By a law of Parliament stating, in general terms, a *causa expropriandi* (albeit the public authorities have to subsequently specify it in a particular case, e.g., the designation of strict protected areas); (ii) by a law in a particular case; and (iii) implicitly in plans regarding the construction of public works (a common feature in Spain). Urban legislation also states that the adoption of town and country planning instruments implies the declaration of *causa expropriandi*.[20]In any case, as the Constitutional Court has held, the execution of expropriatory measures and the definition of the specific *causa expropiandi* are powers that cannot be separated from those of public authorities to fulfil their different sectoral policies.[21]

(c) Expropriation procedures essentially consist of different intermediate steps:

- A declaration on the need to occupy the goods (*declaración de necesidad de la ocupación*). This declaration specifies such goods, controls the legality of the *causa expropiandi* and serves to determine the location of the works or installations benefiting from the expropriation of private property. According to the 1954 Law, the declaration can only affect the essential properties for the carrying out of works or installations. Therefore, expropriation powers are subject to the proportionality principle.[22] When the expropriation involves only a part of a property in such a way that the non expropriated area has no further economic use, it is allowed to request the expropriation of the entire estate.
- The payment of compensation. The Constitutional Court has interpreted the expression "and with a proper compensation" in Article 33.3 of the Constitution as not requiring the prior payment of reparation. Therefore, it is not unconstitutional to delay the payment of compensation to the last phase of the expropriation procedure. The calculation of reparations may be initially agreed upon by the owner and the public authority. Both parties are entitled to value the property. If this first venue is not successful then it is determined by a special administrative body (*jurado provincial de expropiación*) within the limits of the respective calculations done by the owner and the public authority. The *jurado* is usually

[17] Protocol 36 to EU Treaties.
[18] Article 105.3 of Law 29/1998, on the jurisdiction of administrative law courts.
[19] Article 17.
[20] Royal Legislative Decree 2/2008, Article 29.
[21] SCCJ 251/2006.
[22] SCCJ 48/2005.

composed by a magistrate, officials of various types (including a notary) and representatives depending on the type of asset or right that is involved (engineer, architect or business professor).[23] Its decisions enjoy the presumption of accuracy and veracity of administrative acts. However, they may be challenged before administrative law courts. According to the case-law, the value of a property is its faculty to obtain another property in exchange for it. Hence, the true value of an asset is the price the market is willing to pay for it and, therefore, it will also represent its real value.

- Once the reimbursement is determined the public authorities carrying out the expropriation (or the beneficiary of the expropriated goods) have to pay it within 6 months. If there is a dispute between the owner and the authorities as to the amount of compensation, or the former party is opposed to receive the payment a compensation up to the limit at which there is an initial agreement between both parties will be deposited in a bank.

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?

(a) In constitutional terms an essential distinction is that of "expropriation" and "delimitation" (or "regulation"). The former category involves the duty to compensate any deprivation imperatively agreed by the public authorities. In other words, compensation must be paid because a public authority aims to directly deprive ("mutilate") a property right. In the case of the latter notion (delimitation or regulation) there is no such duty to compensate since, in principle, the measures adopted by the public authorities do not restrict the core content of property ownership. In other words, delimitation fixes abstract and general powers and duties on the property without affecting its core content. Legal measures of delimitation or general regulation of property rights, albeit constituting a restrictive limitation of some of their powers are therefore not prohibited by the Constitution.

(b) The dividing line between expropriation and regulation is not always easy to draw up, the question being the degree of "regulation" that can be reached without becoming, in fact, a "deprivation" of property rights (e.g., how many daisy petals should be taken off to conclude that a deprivation has taken place?). In more accurate terms, it seems apparent that a prohibition concerning the rearing of livestock in a protected area (an activity previously carried out) would represent a deprivation whereas a limitation on the number of cattle would be a regulation (without compensation). Similarly, the impossibility to graze on a protected area *versus* a change from irrigated to dry land farming use would explain the difference between expropriation and regulation. Accordingly, the separating line between delimitation (regulation) and expropriation (mutilation giving rise to compensation) is the respect of the essential content of property rights. In other words, the legal delimitation of economic rights or the introduction of new limitations cannot ignore their essential content (mentioned above); otherwise in such cases there would not be a general regulation of property rights, but a deprivation of such rights. In this sense, the courts consider that a

[23] Magistrates are usually excluded in the laws of the Autonomous Communities regulating this body.

dispossession of hunting or forestry exploitations (e.g., cork; or of the right to cut dry trees in a natural park for self-consumption); or the restrictions imposed by measures for the recovery of a species are not mere limitations imposed on property rights but a deprivation (e.g., prohibition of use of machinery) thus requiring compensation.[24] However, a reduction in the number of species that may be hunted does not represent an expropriation but a delimitation.[25] In certain cases, e.g., designation of protected areas, the dividing line between expropriation and delimitation has taken as a reference the respect for traditional and consolidated uses in the affected areas before the imposition of the corresponding restrictions.[26] As long as those traditional rights or activities are respected, the regulations affecting them will not be conceived as expropriation.[27] However, the case law consistently requires owners to ascertain that (i) the uses did previously exist,[28] and (ii) were effectively carried out before the applicable restrictions (in other words they were in effect incorporated into the patrimony of the affected owners).[29] Likewise, mere expectations cannot be uphold, e.g., an alleged reduction in the value of an estate due to the impossibility to exploit plots as irrigated lands.[30]

(c) Private ownership rights are not incompatible with legal obligations requiring a prior authorisation.[31] The courts have held that prohibitions imposed on certain activities, e.g., hunting, cannot be regarded as expropriations but as limitations on the carrying out of such activities. Therefore, in those cases the law does not need to respect expropriation guarantees.

(d) If applicable laws do not envisage the payment of compensation private individuals may still resort to administrative liability principles claiming for damages. According to the Constitutional Court, the lack of references to this matter in a law cannot be regarded as an infringement of Article 33.3 of the Constitution.[32] Therefore, if the law remains silent as to the grant of compensation the general rules on the liability of the public authorities are applicable.[33]

(e) As regards the level of compensation, since the Constitution does not use the term of fair price, the compensation must correspond to the economic value of the expropriated right. However, there must be a proportional balance. The legislator can set out different modes to assess the compensation depending on the nature of the expropriated rights, e.g., urban parcels of land.[34] Legislative options are in principle respected unless they are manifestly devoid of reasonable basis. The constitutional guarantee of compensation gives the right to receive the payment that corresponds to

[24] SSCJ of 20 September 2012, appeal 7089/2010; SSCJ of 24 June 2009, appeal 1182/2005; SSCJ of October 21, 2003, appeal 10867/1998; SSCJ of April 30, 2009, appeal 1949/2005.
[25] Jugment of the High Court of Castilla-La Mancha of November 4, 2005, appeal 1026/2001.
[26] SCCJ 170/1989.
[27] SSCJ of December 10, 2009, appeal 4384/2005.
[28] Judgment of Audiencia Nacional of September 14, 2001, appeal 54/2001 (alleged ecoturism activities in Doñana national Park); Judgment of the High Court of Catalonia of March 9, 2011, appeal 217/2010 (alleged use of intensive agriculture with pastics or irrigation).
[29] SSCJ of 24 May 2013, appeal 2134/2010; Judgment of the High Court of the Autonomous Community of Castilla-La Mancha of 20 May 2002, appeal 279/2002; Judgment of the High Court of the Autonomous Community of Valencia of January 13, 2005, appeal 1138/2003.
[30] Judgment of the High Court of Castilla-La Mancha of July 26, 2010, appeal 400/2007
[31] SSCJ of 24 April 2012, appeal 1630/2009.
[32] "No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law".
[33] SCCJ 28/1997.
[34] Royal Legislative Decree 2/2008, Articles 21-24.

the actual value of the assets and rights expropriated. Overall, what the Constitution guarantees is a reasonable balance between expropriation and repair.[35]

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?

(a) According to the Constitutional Court, the fixing of the "substance" of private property rights cannot be done from the exclusive perspective of individual interests. It must also include the necessary reference to the social function, understood not as mere external limit to the definition of ownership rights or their exercise, but as an integral part of those rights.[36]

(b) As indicated in previous answers, Spanish law includes a whole range of public interests that may legitimately impose obligations on private ownership rights. This certainly applies in the case of expropriations but also of regulations. As indicated above, Spanish Law allows for the expropriation of rights acknowledged by a court of justice in restricted cases, i.e., clear and present danger of serious disruption of the free exercise of the rights and freedoms of citizens; the fear of war; or the breach of territorial boundaries. The social function of property, pursuant to which laws are to delimit the content of property rights, operates in relation to different classes of goods affected by such rights. In this sense, the expropriation becomes "an unwavering instrument" the public authorities may legitimately use for the achievement of public purposes.[37]

(c) The Constitutional Court has also upheld laws imposing the expropriation of property rights because of the breach of the social function of property ownership, e.g., parcels of rural or urban lands not subject to exploitation.[38]

(d) Private individuals cannot rely on public aims to expropriate private ownership rights. Hence, there is no *actio popularis* empowering private individuals, e.g., NGOs, to carry out expropriations. It is only for the public authorities (State, Autonomous Communities and municipalities) to exert those powers. However, private individuals are on many occasions beneficiaries of expropriations carried out by the authorities. It is for this reason that the 1954 Expropriation Law distinguishes between "public" and "social purposes". In the second case, the Law is also contemplating the existence of private beneficiaries, e.g., an electric utility; a company in charge of a waste disposal site, among others.

[35] SCCJ 166/1986.
[36] SCCJ 37/1987.
[37] SCCJ 45/2005.
[38] SCCJ 319/1993; SCCJ 148/2012.

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)?

(a) As the Constitutional Court has observed, the Constitution does not include the term of "vested right". According to the Court, "[f]rom the point of view of the Constitution, it must be avoided any attempt to apprehend the elusive theory of acquired rights, because the Constitution does not employ the term "acquired rights" and presumably the constituents avoided it because the defense at all costs of acquired rights does not fit with the philosophy of the Constitution; it does not respond to the requirements of the rule of law proclaimed in the first article of the Constitution; and basically because the theory of acquired rights, forcing the Administration and the courts when examining the legality of the acts of public authorities, does not concern the legislative branch, nor the Constitutional Court when interpreting the Constitution". [39]

(b) Holders of legal titles, e.g., authorisations or franchises, enjoy rights derived from those enabling titles. Therefore, in principle, the public authorities cannot annul or revoke such titles without (i) proper reasons (set out in the law) and (ii) following a procedure. Third, the annulment of a legal title does not *per se* grant a right to compensation.[40] However, Spanish law does foresee the grant of compensation in certain cases, e.g., the cancellation of an authorisation due to the adoption of new criteria (e.g., the closure of a petrol station in urban areas) or the annulment of an authorization if it was wrongly granted.

(c) The transformation of private property into franchises (as a way to grant the corresponding compensation required by the Constitution) is well reflected in the case of the 1988 Spanish coasts Law (amended by Law 2/2013).[41]

- According to this Law, private ownership rights on lands declared as maritime-terrestrial public domain (hereinafter MTPD) by judgments prior to 1988 turned (*ope legis*) into rights of use (franchises) for a period not exceeding thirty years of duration that could be extended to other thirty years. These franchises had to respect existing uses (including any constructions) but were not subject to taxation. The same solution was adopted in the case of owners that, according to the demarcation carried out under the 1988 Law, enjoyed property rights not regarded as MTPD before 1988 but had been included into this category by reason of this Law. Any buildings and facilities on the MTPD but already illegal under the regulations prior to 1988 were demolished unless the State legalised them for reasons of public interest. The buildings and legalised constructions and those that had been erected in accordance with the previous regulation had to be knocked down but only after the expiry of the franchise into which the property title had been transformed. Accordingly, if the transformation of private property into franchise had taken place in 1989, the latter could be extended until 2019 and even until 2049.

[39] SCCJ 27/1981.
[40] Art. 102.4 of Law 30/1992, common administrative procedure.
[41] See Lazkano, I., and García-Ureta, A., "The 2013 reform of Spanish coastal legislation: a further step towards diminishing environmental protection", (2014) *Environmental Liability* 1.

- In its judgment regarding the 1988 Law, the Constitutional Court examined may aspects of the Law, *inter alia*, the decision to transform private ownership rights into temporary administrative authorisations or franchises. The debate was mainly focused on whether that decision was in effect a compulsory expropriation without compensation breaching the mandate of Article 33.3 of the Constitution. In the Court's view the elimination of private ownership on lands included into the MTPD could not be considered, in constitutional terms, as an arbitrary decision or devoid of justification, because it was the simplest arrangement to put in practice a decision already made by the Constitution.
- According to the Court, it was apparent that the 1988 Law had foreseen the grant of compensation. The expropriation had occurred due to the transformation of private properties into franchises and it was the Law itself the instrument that had fixed the compensation. Besides, nothing prevented those affected by the expropriation from challenging the corresponding decision transforming their rights into franchises. The solution designed by the Spanish Parliament in 1988 was, to a great extent, endorsed by European Court of Human Rights (ECHR) in two decisions (*Brosset-Triboulet v. France and Depalle v. France*) that in spite of being concerned with the demolition of facilities located in the French MTPD, mentioned the provisions of the 1988 Law without finding any relevant objection; rather they were mainly employed to reinforce the ECHR's conclusions in those two cases.

(d) Spanish environmental laws conceive industrial activities as continuous installations (*tracto continuo*) and logically subject to changes (output, emissions or scope). Therefore, their authorisations may also be subject to amendments regarding the conditions under which they operate. It is for this reason that, in principle, any modifications of the initial (or subsequent) conditions are not subject to compensation. In other words, they are not regarded as expropriation owing to the changeable nature of the activity. This is clearly reflected in Law 16/2002, which transposes Directive 96/61 (IPPC; currently Directive 2010/75, industrial emissions). Following the requirements of the Directive, Law 16/2002 enumerates certain cases requiring an amendment of the existing conditions to which an installation may be subject. None of those cases allows for compensation as expressly mentioned in the Law.[42]

(e) As regards the reduction of feed in tariffs in the case of solar power installations, the Spanish Supreme Court has held in its judgment of January 13, 2014 (appeal 357/2012) that even though a limitation in profits was well documented, that did not mean that the special legal framework to which they were subject had substantially been altered thus requiring compensation. The Supreme Court based its findings on the following assertions:
   - The principle of reasonable profitability had to apply to the whole life of the installations.
   - The holders of solar power installations for the production of electricity did not enjoy a right to maintain the current (at that time) legal framework unaltered. Since they were protected from competition they were also subject to legal changes. In other words, the elimination of entrepreneurial risks owing to the existence of feed in tariffs was in effect an advantage in comparison with other operators who were subject to open competition. Therefore, they should have known that the existing (at that time) legal framework could be modified to adapt it to future changes.

[42] Article 25.5 of Law 16/2002.

- According to the Supreme Court the principle of legal certainty (as deterrence from possible legal changes) was particularly ill-suited in the case of renewables owing to their continuous evolution. Hence, economic and technological changes justified a review of initial rules by the public authorities. A limitation of the regulated rate or, in general, of the initial regime that favoured the renewable energy sector was foreseeable in view of the course of subsequent economic and technical circumstances, especially after the year 2007 (the beginning of the economic downturn). In the Court's opinion, that was enough to dismiss the claim regarding the breach of the principle of legitimate expectations.
- In the light of Article 1 of Protocol 1 to ECHR, the Supreme Court held that it was necessary to examine, in the circumstances of the case, whether the interference by the public authorities had respected the right balance to be achieved between the interests of individual operators and those of society as a whole. In this particular case, the Court concluded that there was not a breach of the right to property ownership insofar as the regulatory measures questioned were not unreasonable and aimed at preserving the sustainability of the electricity network.

(f) In 1984 the Spanish government approved a nuclear moratorium and the subsequent cancellation of 5 stations.[43] To compensate the companies it was initially decided that 1.72 % of electricity bills would reimburse the companies affected by the moratorium. In 2006, that percentage was revised and reduced to 0.33 % of the bills. As of 31 December 2013, more than 250 million Euros remained to be paid.

(g) Different laws contain rules affecting private properties without compensation. The 2007 Law on the natural patrimony and biodiversity allows the public authorities to completely or partially suspend hunting rights if the management of a farm negatively affects the sustainability of resources or their renewal. Owing to the nature of this measure no compensation is foreseen. Mountains Law 43/2003[44] provides that the Autonomous Communities shall ensure the restoration of forest land previously burned. For the attainment of this purpose, the Law prohibits (1) the change of forest uses for at least 30 years; and (2) any activity incompatible with the regeneration of the vegetation cover during the period determined by the Autonomous Communities. The Communities may apply certain exceptions provided that, prior to the forest fire, the change of use was foreseen in (i) a previously approved planning instrument, or (ii) a planning instrument subject to approval (with a previous favourable environmental assessment) or to public information (in case the assessment was not required); or (iii) in a guideline on agro-forestry policy including extensive agricultural or livestock use on woodlands with uncultivated or abandoned native species.

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?

(a) Private individuals are barred from challenging Laws of Parliament before ordinary courts.[45] Likewise, they cannot directly challenge laws before the Constitutional Court. However, decisions applying laws may be questioned before administrative law

[43] There are eight stations operating in Spain.

[44] Despite its name, this Law is not related to the common notion of mountains, e.g., natural elevations of the earth surface rising more or less abruptly from the surrounding level, but to any surface covered with vegetation, either trees or bushes, and carrying out environmental, landscape, productive, amenity or protective functions.

[45] Unless they are under the scope of the Aarhus Convention, in the light of the *Boxus* case.

courts which can subsequently submit a preliminary question to the Constitutional Court regarding their compatibility with Article 33 of the Constitution. In addition, courts may review the conditions set out in authorisations or in prohibitions for the carrying out of activities traditionally executed in areas subject to a particular protection regime, e.g., Natura 2000, and conclude that an expropriation has taken place without proper compensation.

(b) As regards the criteria, see the answer to question 3).

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)?

(a) No. The payment of compensation is compulsory for the public authorities in cases concerning expropriation of private property. A different matter, however, is the timely execution of this guarantee since there is usually a large lapse between the decision to expropriate (and the corresponding deprivation of those rights) and the payment of compensation that may take place two or three years later. The 1954 expropriation Law aims to compensate for the delay by setting out default interests and the revaluation of the expropriated property.

(b) It should be observed that Spanish public authorities usually employ the urgent expropriation procedure, which in effect is the usual procedure, e.g., for the expropriation of a parcel of land to erect a sports centre for university students. In essence, this means that the authorities straightforwardly occupy the corresponding parcels of land by (1) describing their current state and by (2) paying a symbolic sum of money. The exact calculation of the compensation is done at a later stage. Nevertheless, the decision to carry out an expropriation and also the calculation of the compensation may be challenged before the courts. Administrative law courts infrequently question the use of urgent expropriatory procedures albeit they are entitled to review the reasoning supporting it and eventually quash the whole procedure. It should also be noted that the European Commission has not enquired whether the apparent time lapse between occupation and payment of compensation represents in effect an illegal State aid under the TFEU, particularly if the beneficiaries are private individuals.

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)?

(a) This matter is expressly foreseen in the case of contaminated parcels of land. According to Law 22/2011, on waste and contaminated land, those responsible for the pollution are forced to carry out decontamination and recovery operations. If there are several persons responsible they will be jointly answerable. Owners of polluted soils and the holders thereof will subsidiarily respond. In the case of franchises on public domain lands, the persons responsible are (1) the possessors and (2) the owners of the franchise. The recovery of decontamination costs must not be required above the levels of contamination associated with the use of the land at the time when the contamination was caused. If decontamination and recovery operations are to be done with public financing, it may only be granted provided any possible capital gains revert to the public authority granting the aids. The decontamination of the soil for any intended use may be carried out through a voluntary reclamation project approved by the competent Autonomous Community. Owners of lands where potentially

polluting activities may have been carried out must state this fact in the corresponding public deed should they transfer them to a third party. This fact must appear in the Property Registry.

(b) Law 16/2002 (as amended) includes the requirements of Directive 2010/75 concerning the cessation of the activities and the measures necessary to address the pollution that may have been caused so as to return the site to the state prior to the commencement of the IPPC activity.

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)?

(a) This matter is regulated by Law 26/2007, on environmental liability. According to this law, the operator of an installation is not obliged to bear the cost of remedial actions where (1) he demonstrates that he was not at fault or negligence and that the emission or the fact that was the direct cause of environmental damage constituted the express and specific purpose of an administrative authorisation issued in accordance with the rules applicable to the installations subject to the law.[46] (2) The operator has to prove that the environmental damage was caused by an activity, an emission, or the use of a product that, at the time of its use, was not considered as potentially harmful to the environment according to the state of scientific and technical knowledge existing at that time. However, these provisions may not impede civil liability claims under the Civil Code.

(b) Notwithstanding the aforesaid, Law 26/2007 indicates that the liability set forth in this law is compatible with penalties or administrative sanctions for the same acts causing environmental liability.

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) The application of Article 8 ECHR has basically taken place in cases concerning noise pollution,[47] (not always properly applied by the Spanish courts)[48] whereas the application of Article 1 of First Protocol to ECHR is mainly done through Article 33 of the Constitution.[49]

(b) As regards the level of compensation, since the Constitution does not use the term of fair price, the compensation must correspond to the economic value of the expropriated right. There must be a proportional balance for which the legislator can set out different modes of assessment depending on the nature of the expropriated rights. They must be respected, from a constitutional perspective, unless manifestly

[46] Additionally, it will be necessary that the operator strictly adjusted in the development of the activity to determinations or conditions laid down for that purpose in the authorisation and with the rules applicable at the time of the causal event of environmental damage.

[47] SCCJ 150/2011 contains the current caselaw.

[48] E.g., *Marínez Martínez v. Spain*, judgment of the ECHR of October 18, 2011; *Moreno Gómez v. Spain*, judgment of the ECHR of November 16, 2004.

[49] Judgment of the High Court of Aragón of May 25, 2010, appeal 88/2006 (planning rules); Judgment of the High Court of the Canary islands of September 1, 209, appeal 459/2008 (*de facto* expropriation); judgment of the High Court of the Canary Islands of April 22, 2008, appeal 583/2005 (change of use of property from the category of "able to be urbanized" to "specially protected"); judgment of the High Court of Murcia of October 29, 2001, appeal 2458/1998 (noise).

devoid of reasonable basis. The constitutional guarantee of compensation gives the right to receive the payment that corresponds to the actual value of the assets and rights expropriated. What the Constitution guarantees is a reasonable balance between expropriation and repair.[50]

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?

(a) First, it should be observed that it would be a matter for EU law to determine whether an indirect or direct expropriation has taken place owing to the application of an EU rule, e.g., *Hauer* case. Preliminary references would be submitted. Indirect expropriations would be included within the concept of regulation which, as seen above, would not require prior compensation.
(b) The question whether there is an expropriation due to the application of EU law would initially be subject to Spanish law.

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

(a) No references have been so far made. It should be noted that as from the date of Spain's accession to the EU, only two references have been submitted to the ECJ regarding environmental matters.[51]
(b) Nevertheless, property rights were raised in a case concerning the application of the Habitats Directive but the ECJ dismissed the challenge due to the lack of *locus standi* under Article 263 TFEU.[52]

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?

(a) Under urban legislation, the authorities could declare the installation as a non-conforming activity with planning regulations (a nonconforming activity is an activity that met the applicable zoning requirements in effect at the time it was

[50] SCCJ 166/1986.
[51] Case C-142/07, *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid*; Case C-300/13, *Ayuntamiento de Benferri v. Consejería de Infraestructuras y Transporte de la Generalitat Valenciana, Iberdrola Distribución Eléctrica SAU*.
[52] Case T-366/06, *Calebus v. Commission*; case T-174/09, *Complejo Agrícola, S.A. v. Commission*; case C‑415/08 P, *Complejo Agrícola, S.A. v. Commission*.

established, but which is no longer allowed in the corresponding area under current urban regulations).[53] This means that works of modernization, consolidation, increased volume or improvement cannot longer be authorised, save works deemed necessary for the maintenance of the building in minimum conditions of habitability and health and those directed to avoid damage to third parties. In other words, such declaration would represent the announced closure of the activity. However, the closure does not grant any right to compensation to the holder of the installation.[54]

(b) If the authorities are not able to file a case against the factory they would be forced to compensate for the closure.

(c) Alternatively, if there is a breach of the conditions under which the installation operates, the revocation of the authorisation would be feasible without compensation (with the prior guarantee of the right to be heard). Likewise, the closure would be feasible if a decision imposing a fine is taken owing to the breach of the conditions of the authorisation.

(d) Private individuals could certainly initiate civil law proceedings claiming compensation but they could not force the public authorities to close the installation unless they manage to prove that it was illegally granted. Spanish law provides a venue to challenge at any time administrative decisions provided they are null and void.[55]

(e) The provisions of the Law on environmental liability or of contaminated sites would be applicable requesting the holder of the authorisation to carry out the decontamination of the site.

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?

(a) Legal action claiming State liability for the existence of a harmful activity would be available. However, the plaintiffs must demonstrate that (1) the public authorities caused the damage by granting the authorisation or by maintaining a harmful activity (provided it did not comply with the corresponding standards); (2) that they were not under any obligation to bear the damage (in other words, there was no legal duty tolerate the harmful effects derived from the activity); and (3) there was a causal link between the grant of the authorisation (and the lack of control) and the damages.

(b) It should be verified whether the inhabitants already lived nearby the installation or arrived once it was operating. In the former case, the chances of obtaining compensation due to the loss of value would be greater than in the latter case.

[53] This case is different from from illegal activities that did not comply with urban regulations when they were established.
[54] Royal Legislative Decree 2/2008, Article 35.a) (second paragraph).
[55] Article 102 of Law 30/1992.