
Property and Environmental Protection in Germany

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A. Objects of Private 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 ('*engerichteter und ausgeübter Gewerbebetrieb*'), i.e. the ensemble of real assets (land, buildings, machinery) and know how

Not considered as property are market opportunities and cost reduction factors, such as the demand for a product, the profitable location of a business,² easy access of a farmer or fisherman to his working ground, etc.³

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-state' 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. Social life must be characterised by allowing for private property. In relation to property in the economic sphere the legislator has more discretion to grant property rights. The larger the enterprise the more so. The constitution has since its inception of 1949 been interpreted to be neutral concerning capitalist or socialist economic concepts, i.e. to leave it to the legislator to decide. (Of course this question is presently of low importance). The limits posed to the legislative discretion are labelled the guarantee of the institution of property (*Institutsgarantie*).

The state and local communities may also possess private property (e.g. in land, as shareholders etc.) (sometimes being called fiscal property) but this property is not protected by the constitutional property guarantee because basic

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.

² See BGHZ 55, 261 – Soldatengaststätte: the construction of a throughway between a restaurant and military barracks hindered soldiers to visit the restaurant.

³ See BGHZ 45, 150 – Elbeleidamm: a dam cut a fisherman off easy access to his fishing grounds.

rights are construed as rights ‘against’, not ‘of’ the state. Local communities are – dubitably – considered to be part of the state in that regard.

B. Private 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
- contractual or tort law rights e.g. to deliver a plant or to compensate for the damage to a plant
- a concession (*Bewilligung*) to use public waters such as for extraction of water, introduction of drained water, utilization of rivers for power generation etc.
- 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)

It should be noted that the distinction between a concession and an authorisation to use natural resources is difficult to draw. A major example is water law. The concession (*Bewilligung*) to utilise public waters is the traditional form of allocating a proprietary right. It used to be granted upon formal public participation procedures and was conditioned by the applicant’s showing that without a secure right the investment was not feasible (§ 14 Water Act – *Wasserhaushaltsgesetz* – WHG). In contrast, the authorisation (*Erlaubnis*) only provided an entitlement (*Befugnis*), not a right. The blurring has happened in the following ways: On the one side the *Bewilligung* was excluded for any utilization that entails the introduction of substances into waterbodies, on the other the *Erlaubnis* was in a way strengthened because it was for larger projects also subject to a public participation procedure, and court case law developed it to a kind of property if the *Erlaubnis* was used to establish a business such as a factory discharging waste water into a waterbody.

C. Private Property Used in Defense of Environmental Protection (incl. Case of Polluting Factory)

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 private, not public law. In recent times conventional

and organic farmers have defended their land against the 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 damage to the environment as such if the damage coincides with individual damage. But in practice victims will focus on the prevention or compensation only of their individual damage. For instance, if the grazing ground of a farmer was polluted the farmer will ask for restoration of the grass but not necessarily of the endangered plant species that may have grown on the ground. .

Concerning public law rights, property holders can challenge administrative acts permitting damaging 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, in our case the farmer can challenge the responsible administrative body to take measures so that the usability of her land is restored, not however that rare species shall be reintroduced.

However, in cases where private property is not just adversely affected but shall be taken for public purposes (such as for 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 device they use 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*'- 'halting estate'). It has been controversial if such strategic behavior provides legal standing. The Federal Administrative Court (BVerwG) denies standing if the property was acquired *mala fide*, which it considers to be the case if the former owner retains the usufruct right, or if the price is far lower than the value of the land, or if the NGO does not plan to use the property e.g. for agricultural or nature protection purposes.⁴

If the adverse effects on natural resources in private property is caused by public bodies (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.⁵ The controversy has become

⁴ BVerwGE 112, 135 (137); 131, 274 (286). The BVerfG is concurring and even a bit more open for strategic purchases, see BVerfGE 134, 242 (287=No 153).

⁵ Chr. Külpmann, *Enteignende Eingriffe? Das Entschädigungsinstitut des enteignenden Eingriffs und die neuere verfassungsrechtliche Dogmatik der Eigentumsgarantie*, Berlin: Duncker & Humblot 2000, 143-148.

somewhat random because more and more sectoral laws include provisions which specify the conditions of compensation. For instance, Art. 42 BImSchG rules concerning noise from public roads:

(1) Where the emission limits laid down in Article 43 (1) first sentence No. 1 are exceeded [...], the owner of a building affected thereby shall be entitled to claim adequate financial compensation from the entity responsible for the construction, except where such impairment is deemed to be reasonable in view of the specific purpose for which the building is used.

(2) The compensation shall be paid for sound-proofing measures at the building covering the actual expenditure incurred where such expenditure is within the limits determined by an ordinance [...]. [...].

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.

Concerning the case:

If the factory is a regulated industry under Directive 2010/75/EC, Art. 21 of this Directive should be applied. 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 transformation of this clause into German law is contained in Art. 17 BImSchG which reads:

Article 17

Subsequent Orders

(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 [...]. If after the issuance of such a licence [...] 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 should issue subsequent orders.

(2) The competent authority may 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 emissions 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 should 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 allows⁶ for preventive measures even in situations of uncertainty. The competent authority is empowered to intervene in such cases, e.g. by requiring BAT. It is obliged⁷ to intervene if harmful effects on the general public or the neighbourhood 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)).

D. Natural Resources as Public Property or Interest

The protection of natural resources is considered as a public interest justifying the taking of appropriate measures serving it. There is no concept of public trust in Germany.⁸ In principle, natural resources can be an object of the private property of individuals. However, public entities (a local commune, a *Land*, the federal state, a university, etc.) can also acquire private property in natural resources. In relation to specific resources, a public entity will normally be the proprietor. This is for instance the case for the federal water courses and federal highways (owned by the *Bund*⁹). Other resources such as most of the minerals are excluded from individual ownership and form a kind of property without being called property. They are public goods and as such allocated to the management of public entities, in particular the *Länder* in the case of minerals.¹⁰ This kind of property or allocation to public entities aims at ensuring that the benefits from exploiting the resource are socialised such as by payment of royalties. It also serves to determine who bears the burden of maintaining the resource, for instance, by dredging navigable rivers and constructing highways.

There is a legal category transporting the idea that an object shall be open for public use: the *öffentliche Sache* (public thing). A thing is made *öffentliche Sache* by a special administrative decision called *Widmung* (consecration). The thing can be in individual property but will normally be in private property of a public entity. Things qualifying for *öffentliche Sache* are publicly usable assets such as streets, squares, parks, railways, ports, dikes, sewage purification plants, etc.).

⁶ Cf the 'may' in Art. 1 1st sentence. The administrative thus has discretion to act or not.

⁷ Cf the 'should' ('soll') in Art. 1 2nd sentence. The 'should' signifies an obligation which is more than discretion but less strict than a 'shall'. In German legal doctrine this is termed 'obligation in the normal case'.

⁸ See, however, H. Kube, *Eigentum an Naturgütern. Zuordnung und Unverfügbarkeit*, Berlin: Duncker & Humblot 1999, for an interesting attempt to transfer the US concept of public trust to German nature protection law.

⁹ § 1 para 3 Federal Water Courses Law (*Bundeswasserstraßengesetz*); § 2 para 2 Federal Roads Law (*Bundesfernstraßengesetz*).

¹⁰ §§ 3 & 6 Federal Minerals Act (*Bundesberggesetz*).

The status as *öffentliche Sache* involves a special public regime that determines the rights of the public to its free common use (*Gemeingebrauch*), the allocation of and payment for special uses (*Sondernutzung*), but also the obligation of government to provide them.¹¹

While private property of public entities as well as '*öffentliche Sache*' have traditionally been legal concepts supporting public use they can of course also be employed to restrict uses in cases of scarcity, such as if the public use of a nature park is restricted. However, the environmental media which have traditionally been the concern of environmental protection, such as the atmosphere, the space, water bodies and the underground are in nobody's private property. Neither has a separate category of public property been created.¹² These natural resources are free goods the use of which is however regulated in the public interest of protection.

E. Property in Public Aids for Beneficial Use of Natural Resources

The granting of a subsidy is not conceived as property because property presupposes that the beneficiary has invested labour or capital into the position that shall qualify for property. Nevertheless, if a subsidy was granted such position is protected by the principle of legitimate expectation (*Vertrauensschutz*). The principle has been codified in relation to individual administrative acts such as an allowance. For instance, if an operator was granted a certain subsidy for investing in pollution reduction technology such allowance cannot be withdrawn but for certain given reasons, including breach of laws, non-attainment of investment targets, diversion of funds for other purposes etc. In relation to general subsidy schemes (such as the guaranteed feed in tariff for electricity from renewable sources) the principle of *Vertrauensschutz* is less precisely framed. Factors to be considered include whether the subsidy scheme has become politically controversial, how much capital and labour an operator spent trusting that the subsidy scheme would endure, if the investment is close to amortisation, if the public budget can afford continuation, how important the protected environmental good is, etc.

F. Expropriation

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

¹¹ For details see H.-J. Papier, *Recht der öffentlichen Sachen*, in: Hans-Uwe Erichsen, Dirk Ehlers (eds.) *Allgemeines Verwaltungsrecht*, 13th ed. Berlin: De Gruyter. Papier 2005.

¹² An exception is the public property in dikes that was established by the Land Hamburg.

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 is undoubtedly expropriation if it involves the transfer of the right to another (private or public) person or body (as, for instance, the transfer of land to the government or a private person for the sake of the construction of a road). This case is called expropriation for acquisition of an object (*Güterbeschaffung*). Expropriation for the dissolution or invalidation of a property right constitutes a second case of which it is not yet conclusive if this counts as expropriation or as *Inhaltsbestimmung*. The more recent jurisprudence of the BVerfG takes the latter position so that expropriation in the genuine sense is always construed to aim at *Güterbeschaffung*.¹³

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.

The expropriation will normally be ordered by individual administrative decision. It is however also constitutionally possible that it is ordered by the law itself, such as in the case when a Land took all private property in dikes and transferred it to the state.¹⁴

The overriding public interest can be determined by the executive but the legislator needs to somewhat specify the allowable reasons. A general law that would allow the executive to expropriate for any public interest would convey too broad powers. For instance, the BVerfG found § 79 of the German Minerals Act (*Berggesetz*) constitutional in which expropriation was allowed if, among other reasons, there is a demand for the minerals that shall be exploited.¹⁵ In addition, the public interest supporting the expropriation must be weighed with possible conflicting interests, such as nature and landscape protection in the case of open pit mining of brown coal.¹⁶

The public interest must be the more significant the more the expropriated object belongs to the personal sphere of a person rather than her economic sphere.¹⁷

If the expropriation leads to the transfer of property to private persons it must be ensured and supervised that the beneficiary satisfies a public interest.¹⁸

¹³ BVerfGE 104, 1 (10). By contrast, BVerfGE 83, 201 (212) advocated the former opinion. BVerfGE 134, 242 (289=No. 162) leaves the question open.

¹⁴ BVerfGE 24, 367 (398-403) (Hamburger Deichgesetz).

¹⁵ BVerfGE 134, 242 (303-305=Nos. 201-204) (Garzweiler).

¹⁶ BVerfGE 134, 242 (307-310=Nos. 210-218) (Garzweiler).

¹⁷ BVerfGE 134, 242 (294=No. 177) (Garzweiler).

¹⁸ BVerfGE 134, 242 (295=Nos. 179-180) (Garzweiler).

In the environmental policy context 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.

G. Indirect Expropriation by Environmental Regulation?

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 regulation can be 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 are, 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 legislative 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 employment of 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 is to be drawn solely in terms of severity or inequality 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 compensable and non-compensable 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 inequality 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 distinguished by its location and characteristics and the imbedding in its environment, in other words by its situation. This *situation boundedness* can legitimate legislative 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)

The case would be different if the site was destined for public purposes such as recreation facilities, playing grounds etc., i.e. for purposes which do not reinforce the immanent protectable properties of the site.¹⁹

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 be considered to be bound not only situationally but more generally by its very function as land of primary agricultural production. Such 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

¹⁹ See BVerwGE 94, 1 (5) concerning restrictions of using valuable moorish land for (among others) camping purposes. See also A. Mengel, A. Naturschutz, Landnutzung und Grundeigentum, Baden-Baden: Nomos 2004.

– 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 by legislative act 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.

H. Dissolution of Property for Environmental Protection

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 nuclear power plants (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).²⁰ 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 (Appl. 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 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, *Kopecný 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).'

I. State Liability for Environmental Damage to Private Property (incl. Case of Municipal Waste Disposal Site)

Assuming first that the operator of the waste deposit is a private person the law of nuisance applies. The relevant provisions are sec. 1004 and 906 Civil Code (*Bürgerliches Gesetzbuch* – BGB) which read:

sec. 1004 Claim for removal and injunction

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.

sec. 906 Introduction of imponderable substances

(1) The owner of a plot of land may not prohibit the introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land to the extent that the influence does not interfere with the use of his plot of land, or interferes with it only to an insignificant extent. An insignificant interference is normally present if the limits or targets laid down in statutes or by statutory orders are not exceeded by the influences

²⁰ BVerfGE 58, 300 (351).

established and assessed under these provisions. The same applies to values in general administrative provisions that have been issued under section 48 of the Federal Environmental Impact Protection Act [*Bundes-Immissionsschutzgesetz*] and represent the state of the art.

(2) The same applies to the extent that a significant interference is caused by a use of the other plot of land that is customary in the location and cannot be prevented by measures that are financially reasonable for users of this kind. Where the owner is obliged to tolerate an influence under these provisions, he may require from the user of the other plot of land reasonable compensation in money if the influence impairs a use of the owner's plot of land that is customary in the location or its revenue beyond the degree that the owner can be expected to tolerate.

(3) [...]

The provision is rather complex. Like in an algorithm it proceeds along certain criteria that lead to different claims of injunction and compensation. The neighbours have a right of injunction if the odour causes 'significant interference' ('*wesentliche Beeinträchtigung*'). The judge will have to determine what is significant, but if public law thresholds exist and were obeyed it is rebuttably presumed that the interference was not significant. In addition, if the interference is significant, it must be more serious than what is customary in the location ('*ortsüblich*'). If, for instance, the location is characterised by many industrial activities the level of odour may be customary. If the customary level is exceeded only the taking of preventive measures can be claimed, not however the stopping of operations. If the preventive measures are financially too costly the neighbours can claim reasonable compensation, provided the customary use of the land and the revenue from it is seriously impaired.

Besides trying private law nuisance claims the neighbours can also try public law means. This can be done by 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 preconditions are given, i.e. if their health and well-being is seriously affected.

The legal situation changes in structure but less so in effect if the disposal site is run by a public entity, such as the local authority. Public law remedies apply rather than the private law nuisance claim.²¹ Action for injunction or improvement is possible if the authority acts unlawfully, such as if the site was not duly authorized or was run in breach of permit conditions and applicable threshold values. Compensation can be claimed for past damage if the operation was unlawful. If the operation was lawful, in particular, if no applicable threshold was exceeded, compensation may nevertheless be claimed if the pollution

²¹ BVerwGE 79, 254 (257).