What we call land is an element of nature inextricably interwoven with men's institutions. To isolate it and form a market out of it was perhaps the weirdest of all undertakings of our ancestors.

Karl Polanyi

TTIP - a frivolous claim to public land policies?

The consequences of the investment partnership for property rights, procurement, and land values in Berlin and Vienna

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Abstract

It is always hazardous to write about the future. To date (December 2015), the Transatlantic Trade and Investment Partnership (TTIP) is in *statu nascendi*. Without knowing the definite content of the EU-US investment agreement, my paper speculates about the future of TTIP and its impact on *public land policies*. These policies commonly comprise the creation and definition of property rights, of expropriation as a legitimate regulatory purpose and consequence of *bona fide* regulation, property valuation, and land use planning instruments. According to the road map of the European Commission, 2016 will be the year when TTIP sees the light of the day, supposed that the national parliaments of all Member States agree with the final text of the treaty (ratification procedure).

The (secret) negotiations started in July 2013. In 2015, TTIP will dominate the controversial debate particularly in these two states. Former Austrian chancellor Werner Faymann and the German Minister of Economy and Energy, Sigmar Gabriel, are prominent opponents of TTIP at the current stage of negotiation. The results are treated as a secret by the European Commission. Faymann and Gabriel criticize TTIP because of the supposed downsizing of environmental, health and food standards and the overemphasis of investor-to state-dispute-settlement beside the national courts. The German and Austrian debate is led by the domestic angst of investor-state dispute settlement and the establishment of "arbitral tribunals" beside the domestic legislation and cognizance.

1. Introduction: TTIP for universal property protection and promotion – a *frivolous claim*, a threat to democracy and public participation?

With widened international trade relations, globalization and new classes of institutional and private investors (Reinisch 2014; EU Commission 2015; Bungenberg et al. 2015; Krajewski 2015) – including their legal advocates and lobbyists who wait in the wings to get TTIP started – nationwide in Germany and Austria, the gap left between traditional methods of dispute settlement by domestic courts and modern requirements has led to the idea of offering investors direct access to effective international procedures such as arbitration (Bubrowski 2013). The purpose to reduce the tariff rates between the EU and the United States cannot be the argument to establish TTIP. Instead, the abolition of non-tariff trade barriers dominates the sole line of justification for an implemented TTIP. Hence, TTIP will presumably introduce the following new arenas for land policies of the TTIP Member states and the EU Commission as the driving belt of TTIP. These are the core issues of TTIP:

- *protection of legitimate investment-backed expectations* in particular for intellectual, movable and immovable property;
- disclosure of *"manifestly excessive measures"* against investors, e.g., by planning decisions, the withdrawal of building permits, the termination of land use concessions and land leases for housing and infrastructure such as public transport systems;
- *expropriation or measures having an equivalent effect to expropriation:* indirect, but also de facto (so called "creeping") expropriation or measures tantamount to indirect expropriations such as regulatory coherence by a Cooperation Council which will supervise and develop TTIP issues, and
- *new procedures and standards,* e.g., for public procurement law in the planning and construction sector and for public bidding procedures related to brownfields that are not needed to fulfill public tasks – i.e., land, property, and valuation policy tasks – anymore.

Looking at these inventions, one has to be aware that TTIP is not an ordinary treaty. TTIP is a unique investment agreement that incorporates new, modified and unprecedented international investment rules. They will directly and indirectly affect procurement standards, environmental regulations, property rights, and presumably also land use planning. A "clash of norms" and valuation standards such as the Discounted Cash Flow (DCF) as the prior method in investment arbitration to determine the value of profits (and losses) is foreseeable. The exchange value of land will dominate if TTIP comes into force, whereas the social and ecological land value may suffer.

The aim of my paper is to show that TTIP is a double-edged sword: Originally designed as an extraterritorial and extrajudicial instrument to eliminate trade restrictions, TTIP could lead to diversified land policies and a *"boom of indirect expropriation"*, as Krajewski (2014) assumes rightly. Rudolf Dolzer, a leading commentator in international investment and expropriation law, puts it: *"(T)he task of defining expropriation would dominate the foreign investment legal context in the future"* (Dolzer 2002: 66). To date, it is fair to say that Dolzer was right in his assumptions. Property protection and promotion are the leitmotifs and *Raison d'Être* of any bi- and multilateral trade agreements. They will also be the paramount cornerstones of TTIP. In all trader agreements, the line between unreasonable and un-proportional regulation without expropriation and the "unjustly enrichment" of investors by conducting business in a manner detrimental to the general welfare (example for investment cases are: *S.D. Myers v. Canada*, supra note 9, para 212 or *Noble Ventures v Romania*) is, even after all the well-known jurisdiction and litigation battles (Dolzer 2002: 41), remarkably thin and fragile. This will be shown at the example of the said capitals. Are the land politicians and spatial planners in Berlin and Vienna aware of the conceivable consequences of TTIP for the state land policies with its still remarkable high shares of public property and communal housing such as the Viennese housing fund (*Wohnbaufonds*) or the public procurement procedures for public lands in Berlin which undergo permanent discussions and modifications in both increasingly "propertied" (Blomley 2001) capitals. Will all disposable plots in Berlin and Vienna go to the highest bidder, as soon as TTIP comes into force?

2. Overview on important regulations and contents of TTIP: Investment, competition, procurement, and trade facilitation

According to the negotiation mandate, the final agreement of TTIP will comprise 24 chapters. Information is accessible on the website of the European Commission and is given by so called "fact sheets" (European Commission 2015), and is grouped in three parts:

- Part 1: Market access: "Better access to the US market";
- Part 2: Regulatory co-operation: "Cutting red tape and costs - without cutting corners" and
- Part 3: Rules: "New rules to make it easier and fairer to export, import and invest".

Especially the chapters on regulatory co-operation (part 2) and rules (part 3) are unique and have never been before parts of any international agreement. These chapters might interfere in processes such as the services for the public (*Daseinsvorsorge*) at national, regional and local level, the rule of law, domestic and EU litigation, and the function of TTIP Member State parliaments (Bubrowski 2013; Corporate Europe Observatory 2014; Fisahn and Ciftci 2015; Flessner 2015; Schneider 2015). "Rules" will invent new measures particularly in sectors such as energy and raw materials or small and medium-sized enterprises. The currently re-designed Part 3 will also provide for an arbitration of investment disputes by Investor-State Dispute Settlement (ISDS) schemes, a Government-Government Dispute Settlement system which is yet unsettled by the EU-US negotiations, and an obligatory umbrella clause.

TTIP is by far not the only instrument that aims at security of investments and standards. It is, until now, the only one that *incorporates international law rules*. TTIP also raises fundamental questions of constitutional and property law in the Member States. The partnership would create a legal order that is autonomous in relation to domestic law, its legislative production processes and their legitimacy. Hence, TTIP is unique due to its binding for the Member States, especially the obligation of decisions made by dispute settlement tribunals, together with the possibility to avoid interventions of national governments if the TTIP contracting partners agree. In consequence, domestic Constitutional Courts such as the German Federal Constitutional Court are avoided and thus the ability is given to keep negotiations and contracts as a secret (Bubrowski 2013; Corporate Europe Observatory 2014; Eberhardt 2014).

A prominent case is the *Vattenfall AB and others v Germany* dispute. The Swedish energy company Vattenfall has brought a claim against the German government based on the Energy Charter Treaty seeking €4,675,903,975.32 for the loss of profit plus four percent interest. Given the fact that a remarkable high amount of taxpayer's money is at stake, the transparency problem behind this case is obvious. The public has no access to background information or to the text of the complaint. After the Fukushima nuclear disaster in March 2011, the German government has decided to significantly speed up the phasing-out of nuclear power generation. This led to the shutdown of Vattenfall-owned nuclear power plants Brunsbüttel and Krümmel (European Commission 2013: 5; Corporate Europe Observatory 2014; Krajewski 2015). As the case *Vattenfall v Germany* indicates, the relationship between international arbitral tribunals deriving their existence from investment treaties and the role of domestic courts is the most important – and controversial – issue in investment arbitration. To date, the future of arbitration regulation within TTIP is unclear and disputed. Looking at these inventions, one has to be aware that TTIP is not an ordinary treaty.

3. Non-discrimination, protection of investment, competitiveness, de-regulation, and indirect expropriation: the gold standards of TTIP?

"(…) And let me be clear: the TTIP that the European Commission will negotiate and present for ratification will be an agreement that is good for citizens – good for growth and jobs here in Europe. It will be an agreement which strengthens Europe's influence in the world, and which would help us protect our strict standards. The European Commission would never even consider an agreement which would lower our standards or limit our governments' right to regulate. Neither would EU Member States, nor the European Parliament", said the Swedish EU Commissioner of Trade, Cecilia Malmström, according to a European Commission Press Release in 2015.

"Parallel justice in the name of money"? What sounds good, convincing and reasonable in general becomes complicated and questionable in detail. But is TTIP a "free trade lie", as the German activist Bode from the Food Watch NGO claims (Bode 2015) or a *"clandestine coup d´état"* (Prantl 2014)? Is TTIP equivalent to investment exuberance, a legal order autonomous from domestic and EU law that undermines democratic structures in the TTIP Member States and leads – through arbitration courts – to a *"parallel justice in the name of money"* (Kohlenberg et al. 2015)? In a nutshell: Does TTIP mean the privatization of public spaces in European and US-American cities as investment promotion and protection? These core issues will be raised in the following chapters.

3.1. The installment of a regulatory council beside existing institutions and parliaments in the Member States: CETA as a template for TTIP

TTIP as a global "game changer" has trade agreement forefathers on both sides of the Atlantic. Blueprints for the final text for TTIP documents that are available so far (European Commission 2015) came from diverse Bilateral Investment Treaties (BIT), the North American Free Trade Agreement, the Energy Charter Treaty, but especially from the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) as of November 2014. Although CETA has not yet entered into force and is equally disputed as TTIP, the final text can be seen as the prime and instructive template for TTIP. Studying CETA carefully, we can learn about the role and function of investment treatment, dispute resolution, and the installment of regulatory bodies. Hence, CETA and TTIP are siblings.

TTIP covers more than the well-known and widely published chloride chicken story. It seems as if the people affected by TTIP worries more about these negligibility than about issues about expropriation or transparent negotiation processes. Similar to any trade and *investment* agreement, TTIP – with emphasize on the "I" concerning land and natural resources – will bring innovations with direct linkage to planning, law and property rights in the TTIP Member States. The trade deal might bring the following inventions (to name just the relevant issues for land policies):

- investment protection, reducing of trade barriers (non-tariff trade restrictions), and regulatory coherence;
- cross approval of standards and new regulations beside and above domestic and EU legislation, execution and jurisdiction of TTIP Member States;
- protection of legitimate investment-backed expectations. The term "investment" entered international law only recently;
- disclosure of "manifestly excessive measures" against investors;
- safeguarding of fair and equitable treatment and of reasonable investment expectations;
- characterization of a State measure as indirect, *de facto* ("creeping") expropriation or measure *tantamount to indirect expropriations* such as amendments in environmental and business or taxation regulations: "The higher the purpose of a measure and the greater its practical benefit to the public welfare, the greater is the level of investment interference that must be demonstrated in order to tip the scales toward a characterization of the measure as an expropriation" (Fortier and Drymer 2004: 300), and
- the invention of "regulatory coherence" by a to-be installed Regulatory Cooperation Council with executive power. The council shall supervise and develop TTIP issues, helps to foster investments and to speed up procedures and standards, and acts independently from the national legislation of TTIP Member States.

Hence, the partnership would create a new (global) *legal order* that is autonomous in relation to domestic law, to its legislative production processes, and their legitimacy. TTIP is unique due to its commitment for the signing Member States, especially the obligation of decisions made by dispute settlement tribunals, together with the possibility to avoid interventions of national governments if the TTIP contracting partners agree. Domestic Constitutional Courts such as the German Federal Constitutional Court are avoided and thus the ability is given to keep negotiations, agreements, contracts, and important declarations as a secret (Raza 2014; Corporate Europe Observatory 2014; Eberhardt 2014; Pinzler 2015; Bode 2015; Flessner 2015). National treatment (*Inländergleichbehandlung*), most-favored nation treatment (*Meistbegünstigung*), international minimum standard, fair and equitable treatment, and the full and constant protection of security are core elements of international investment law.

Intermediate result: TTIP will incorporate all of these international investment law standards and, at the same time, contradicts them on the national level due to discrimination of domestic investors.

3.2. Regulatory or expropriatory? Investment protection and promotion for land as immovable property by the right to regulate

The most important objective of TTIP is promotion of investment by the "right to regulate" (Muchlinski 2008; European Commission 2013; Krajewski 2014: 38; European Commission 2015) for a stable, transparent, equal and non-discriminatory framework. Core aims of the regulatory quality are non-discrimination, fair and equitable treatment, indirect expropriation and the guarantee of investment-backed expectations. What is "investment" under TTIP? Although the ongoing negotiations for TTIP are secret, we could learn about the outcome from the sibling CETA. There, according to the Annex, Pos. A, the scope of the substantive investment protection provisions lists under "investment" (…) *"any other moveable property, tangible or intangible, or immovable property and related rights"* (see: letter h, Annex to Investment Protection in the Proposed EU-Canada Agreement (CETA)).

Doubtlessly, "land" can be subsumed under immovable property. According to Art. 1 (6) of the Energy Treaty Charter, *"investment"* covers any kind of asset which is owned or controlled directly or indirectly by an investor, including tangible and intangible, moveable and immovable properties. Investment also encompasses any property right such as property titles leases, mortgages, guarantees, liens and pledges, mineral rights, also assets such as stocks, portfolio shares, stakeholder interests and percentages, revenue sharing, concession and leases. However, a legally-binding definition of "investment" can be given neither from literature nor from jurisprudence. The term is as ambiguous as the "fair and equitable treatment" and the "full and constant protection and security"-standard. Questions remain since the current TTIP negotiating documents published by the European Commission (2015) do not allocate a concluding definition of the term "investment", whether all types of investment – direct or indirect, enterprise-based, by contract or cross-border – will be covered by TTIP. The relation between Foreign Direct Investment in land and natural resources such as in commodities, minerals, water, and other TTIP investments in energy, infrastructure, and land is somewhat vague. To date, nearly any investment could be involved in investment disputes, in particular by gas fracking moratoria or amendments of energy policies such as the phasing-out of nuclear power.

3.3. "Fair and equitable treatment" as an ambiguous clause and mystifying term – leading to expropriation light and a neoliberal straitjacket for states?

What is "fair and equitable treatment (FET)? Fair and equitable treatment is an emerging and controversial issue in international investment law. It consists of four variations (Crawford 2012: 617):

- a self-standing standard without reference to international law standards;
- in accordance with international law;
- linked to standards of "minimum treatment of aliens" to avoid severe discrimination, achieve freedom from coercion or harassment, protect against arbitrariness and to promote good faith and
- with express reference to obligations, e.g., unreasonable or discriminatory measures.

However, arbitral tribunals such as the ICSID offer significant leeway on how to interpret the requirement of fair and equitable treatment standards. Through the looking-glass of international investment law, fair and equitable treatment is interfered by

- the non-renewal of business license and leasing rights (cases: *Wena Hotels Ltd v Egypt; Tecmed v Mexico; Saluka Investments v Czech Republic*);
- newly introduced regulatory and planning instruments and requirements by the legislative and executive organs affecting the economic basis of the enterprise (case: *Pope & Talbot v Canada*);
- the termination of investment contracts and building concessions (cases: *Siemens AG v Argentina; Duke Energy v Ecuador*) and/or
- and the abusive treatment of the investor (case: *Vivendi v Argentina*).

Generally, in the often-referenced case *"Waste Management v. United Mexican States I"* (ICSID Award, para 98), the deciding tribunal found that

"(…) fair and equitable treatment is infringed (…) if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectorial or racial prejudice (…) or a complete lack of transparency and candor in an administrative process" (ICSID Case No. ARB(AF)/98/2, Award).

Given this general definition, one might call the ambiguous clause of fair and equitable treatment comparable – in investment law terminology: tantamount – to "expropriation light". The line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. This is the evidence from the interesting Sempra Energy v Argentina case (ICSID Case No. ARB/02/16, 28 September 2007, paras 300 and 301). Indicators such as the protection against discrimination, transparency and stability, legitimate expectations as "the reasonably-to-be-expected economic benefit" (case: *Metalclad Corp v Mexico*, Award, 30, para 103) or proportionality of State measures show that fair and equitable treatment is an ambiguous clause. Hence, this mystifying legal term may be interpreted differently and may change from case to case as it is sometimes not precise as would be desirable (Schreuer 2006; Yannaca-Small 2008: 129; Crawford 2012).

The linkage between land use planning and the fair and equitable treatment qualification is obvious in the case *MTD Equi-*

ty v. Chile. There, the prevention and withdraw of an urban development project due to the violation of the preparatory land use plan was interpreted as an infringement against the fair and equitable treatment. In this case, the Tribunal underlined that the fair and equitable treatment standard is also violated in cases of passive behavior of the State, e.g., by the denial of adaption of the (preparatory) land use plan according to the requirements and business expectations of the investor:

"Its terms are framed as a pro-active statement – "to promote", "to create", "to stimulate" – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors" (*MTD Equity v Chile,* ICSID Case No ARB/01/07, Final Award from 25.5.2004, para 113).

3.4. Boom of indirect expropriation as a result of TTIP?

The question whether direct versus indirect expropriation and "creeping expropriation" occur by manifestly excessive measures as the dominating doctrine in TTIP chapter on investment protection – according to part three of the current TTIP documents – is the nub of the issue. Even after all these years of legal debate, it is an ever-evolving discussion where to draw the line between non-compensable regulation including the regulation of property rights, the compensable expropriation, and the temporary taking (Alterman 2010; Davy 2012). Which function has an indirect expropriation in that respect? According to part three of TTIP negotiating documents on "rules" (see above), the partnership follows an international "expropriation trend": from direct towards indirect, "creepy" or ad hoc-expropriation. An indirect expropriation could occur in situations in which the property of an investor has not directly affected, but was impaired by "manifestly excessive measures", as a substantial loss and economic deprivation resulting in the erosion of rights associated with ownership by state interferences.

Manifestly excessive measures are amendments of health, environmental or building regulations (European Commission 2015). Investors might file a lawsuit against investment-target states (here: Member States of TTIP) due to anticlimax. These situations are not protected and covered by international and domestic laws such as constitutions, planning laws, housing regulations or environmental laws. The undermining and even "gulliverization" (Bode 2015) of national legal, planning and awarding procedure for public land and building codes is currently being discussed in Germany (Corporate Europe Observatory 2014; Krajewski 2014). Dispute claims and claims of indirect expropriation as a result of disappointed investor's expectations are often sufficient to freeze government action. Lawmakers realize immediately that they would have to pay to regulate (Corporate Europe Observatory 2012: 15-17; Eberhardt 2014: 100-119). Instructive cases are *Philip Morris v. Australia* and *Philip Morris v Uruguay*.

Indirect expropriations appear in *"great multiplicity"* (Hoffmann 2008: 152; Schmidt 2012). They are flexible, unforeseeable and hardly defined. The unanswered questions surrounding them are manifold, especially since attempts to define the demarcation line between indirect expropriation and "simple" regulatory measures have frequently been made (Hoffmann 2008: 152), however without much persuasive power. Investor state arbitration was originally envisioned for "simple" cases of direct expropriation – "when the government took the factory" (Corporate Europe Observatory 2012). Expropriation, also described as compulsory purchase or regulatory takings (Fortier and Drymer 2004; Alterman 2010) has always been a contentious – and dynamic – issue (Reinisch 2008; Muchlinski 2008; Wälde and Sabahi 2008). Most investment dispute cases deal with the controversy whether a taking has occurred by regulatory changes of legislation regarding the content of property (Dolzer 1985; Dolzer 2002; Davy 2012; Schmidt 2012). Krajewski argues that the protection against uncompensated expropriation has always been the historic root and raison d'être of international investment protection (Krajewski 2014: 13). As it is difficult to define the legitimate investment backed expectations, it is even more delicate to distinguish an indirect expropriation from a simple regulatory (direct) measure, e.g. by land use planning or amendments of land policies. Indirect expropriation could be even broader and have severe (budgetary) consequences than the violation of fair and equitable treatment. Hence, TTIP will presumably introduce a *super basic right* concerning indirect expropriation as *the* universal ambiguous clause and *"the most dangerous assaults ever launched on democracy and the welfare state"* (see the conclusion of Prantl 2014: 13).

Indirect expropriation could result in regulatory measures that lead either to a "frustration of investment expectation" (cases: *Feldman v Mexico; Generation Ukraine v Ukraine*), a disproportionality of measures, and in a non-transparent, arbitrary and discriminating procedure (case: *Rumeli v Kazakhstan*). As Reinisch points out correctly, questions of direct expropriation seem to have become less important in recent treatises on international investment law which hardly address the issue of their legality (Reinisch 2008: 171-172; Reinisch 2008: 407-458; see also: Bubrowski 2013). Direct expropriation is seldom. Today, it is clear that a taking which lacks a public purpose and a discriminatory taking as the potential raw nerves of land use planning regulations (Alterman 2010) are illegal. The "Hull-Formula" respective the Calvo-doctrine for prompt, adequate and effective compensation seems to be implemented in all constitutions of European Union Member States, albeit with a different level of broadness of compensation rights and valuation methods (Wälde and Sabahi 2008: 1049-1124; Kantor 2008). Internationally accepted compensation methods and calculations are

- market value;
- replacement value;
- book accounting value;
- liquidation value;
- de facto-spent outside expenses.

Surprisingly and although numerous expropriation cases have been settled by tribunals, no consent on a consistently used method for compensation has been found yet (Marboe 2006; Kantor 2008). No blueprint has yet emerged. Conversely, indirect or "creepy" expropriations" have gained popularity in investment treaties as blueprints for TTIP (Muchlinski 2008: 27-29; cases: *Metalclad Corp v. Mexico*, Award, 30 August

2000; *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, Award, 12 April 2002; *Waste Management Inc. v Mexico*, Award, 30 April 2004; Reinisch 2008: 407-458; Crawford 2012: 621; Schmidt 2012). In the well-reviewed *Metalclad* case, the disappointment of legitimate investor expectations created by the investment host state was causal for the admission of an indirect expropriation. However, the project for a landfill had complied with all relevant planning regulations and environmental standards.

In the case Middle East Cement v Egypt, the tribunal found that:

"When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation" (*Middle East Cement v Egypt*, Award, 12 April 2002, para 107).

In the *Tecmed v Mexico* case, the tribunal declared the failure to renew the operating permit for a landfill as an indirect expropriation. Following these decisions, the following conclusion for the investment chapter of TTIP can be drawn: It is, from investor's perspective, easier to claim indirect expropriation than direct expropriation. Evidence for indirect expropriations is always unclear and open to the tribunal's interpretation. If the trade barrier of "excessive and arbitrary taxation", if the denial of government export permits, if the permanent transfer of the power of management and control to withdraw of licenses and their granting of which an investor could have been legitimately expected which was being held to constitute an indirect expropriation in arbitral practice (Reinisch 2008: 454), then most governmental measures would fulfill the matter of fact of indirect expropriation. In close relation to the fair and equitable treatment and aiming at the promotion and protection of investment are the "international minimum standard" with access to justice and the rule of law principle (argument: no denial of justice), the national treatment (argument: no foreign investor shall be treated less fair than a domestic investor), and the most-favored nation treatment (argument: foreign investors shall get the best treatment and conditions equivalent to investors from a third country (*Drittstaat*).

4. TTIP as a feasible contradiction to the Property and Public Procurement System in Germany?

4.1. German Constitution: Article 14 as the social model for land policy versus the reasonably-to-be-expected economic benefit of an investor

The German "social model" of property clearly requires landowners to act in a socially responsible manner, as determined by regulations authorized by the legislator. The contents and limits of property rights are aiming at a "socially just property order." The social obligation must meet the proportionality test and allows, under certain circumstances, government's interventions. These depend on the social importance of the property type which may change over time. The German Constitution distinguishes two forms of property restrictions (see figure 1 below): the determination of content and limits (Article 14 para 1 sentence 2) and direct expropriation (Article 14 para 3). Direct expropriation is the last resort for the public interest particularly in connection with legally-binding land use planning for its implementation (Dieterich et al. 1993).

Meaning of "property" according to Article 14 of the German Constitution

Property (Art. 14 para 1 sentence 1)	**Content and limit of property (Art. 14 para 1 sentence 2)**	**Expropriation of property (Art. 14 para 3)**
↓	↓	↓
Private property rights;	Government's action to	Legal and administrative action;
Rights given by public law and	determine contents and limits;	in the public interest;
based on owner's performance;	**Generally**: no compensation required;	Civil court procedure for compensation;
No property: Possibilities,	Balance between private and	Compensation (not necessarily
(business) expectations,	public interests (proportionality);	due to the market value)
chances and wealth	Protection of interest	No protection of future business profits
		No indirect expropriation

Fig. 1. The concept of "property" within Article 14 of the German Constitution

Although case law from the German Federal Constitutional Court has extensively tried to demarcate the realms of paragraphs 1 and 3 of Article 14 of the German Constitution, the discussion and interpretation of the problems combined with Article 14 are anything else than being ultimately solved. This is true in respect of the social and natural functions of non-renewable resources and the legally justified governmental interventions to restrict and – even more essentially – to define private property rights in the public interest. The content and limits of the "expropriation" are entirely clear, at least on paper: "Expropriation means a deprivation of property in an individual case directed at a transfer of property from one person to another in order to achieve an objective of public interest", consisting of all general restrictions of property imposed by law that constitute a determination of content and limits in the sense of Article 14 para 1 sentence 2 of the German Constitution.

The German Constitution, but also the Federal Building Code, is silent about the term "indirect expropriation". However, the problem lies within the interpretation of the regulatory measures provided for by Article 14 para 1 sentence 2 (*"Inhalts- und Schrankenbestimmung"*) of the German Constitution, since it does not say anything about compensation. All general restrictions of property such as regulations of legally binding land use plans, urban restructuring and urban land readjustment imposed by law do only constitute a determination of content and limits (Article 14 para 1 sentence 2). Today, most states refer to their competency to police power. States have learned from the controversial case *Ethyl Corporation v Canada* (ICSID, Decision on Jurisdiction from 24.6.1998). Non-discriminatory, state regulations which serve a public purpose do not cause the duty of compensation even in the case of property restriction:

"A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other actions of that kind that is commonly accepted as within the police powers of states, if it is not discriminatory (...) and is not designed to cause the alien to abandon his property to the state or sell it at a distress price" (US Restatement of the Foreign Relations Law, Section 712, para 1, Comment g).

Compensation serves as a consequence of expropriation, but also as a balancing factor within the principle of proportionality. Compensation for expropriation and for damages from public planning and building law damages as well can be made below the market value. A general prescription for any compensation is not possible. The compensation surely depends on the motivation and rationalities of the involved parties, the private landowners and the government. But it is not just the task of the state to guarantee property rights and the inheritance of these rights. Another element of "regulatory quality" is that the state defines and implements underlying legal and institutional conditions. The state has to ensure that the "public good" of the ownership of land shall be used to the maximum possible value for all (Article 14 para 2 of the German Constitution).

Hence, one of the main principles of the social market economy is the guideline of "property entails obligations." This sentence is of paramount importance for the land market, investments, and a comprehensive land policy. The assumption is made that what is known as the "freedom to build" forms an essential element of the individual land ownership, although it cannot be derived from Article 14 para 1 sentence 1 of the German Constitution. But individual landowners are only entitled to make (personal) use of this theoretical "freedom to build" where it is possible to ensure that the building activity does not counteract public purposes (e.g., environmental, infrastructure or energy supply issues), and qualifies to be permitted. The "right to build" is thus formed by urban development law and construction statutes. It does not include or create a right to profit from property.

4.2. Excursus: Procurement law and TTIP

In German as well as in European procurement law (*Vergabe- und Vertragsordnung für Bauleistungen* – VOB, parts A and B), but also the Ordinance on Procurement for Assignment concerning traffic, water supply and energy (*Sektorenverordnung* – SektVO) are based on the principles of competition and transparency and the equality principle of bidders. Any discrimination is unlawful. In sections 2 and 17 VOB, Part A, the non-discrimination-rule is embedded within the general principles of procurement law. Competition is, as a matter of course, the core element of public procurement. For the contracting authority, it follows the commandment that all entrepreneurs/investors shall be treated equally. This is also derived from Article 3 of the German Constitution. The basic rights shall bind the fiscal auxiliary business of the public administration such as construction contracts or public land sales by land funds or real estate agencies owned by the federal and/or state governments. In primarily applicable EU law, the prohibition of discrimination also applies without adaption to national law. This principle applies to all procurements in the construction and energy sector. It prohibits the participation of a limited number of undertakings or business entrepreneurs only from selected EU countries in the awarding process, by written documents only – or made exclusively available – in the local language.

The prohibition of discrimination of domestic investors should be noted. This principle obliged the contracting authorities to treat all participants in the tendering procedure equal, although similar situations are present, unless a disadvantage is due to the Law against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)) expressly commanded or permitted. Under the TTIP-regime (Pinzler 2015), the investments (as protected and promoted property) would be protected in special manner for investors from the European Union in the US and vice versa of US investors in the European Member States. This treatment envisaged differs significantly from the property protection of domestic investors within the EU and American Investors in the USA (discrimination of domestic investors; *"Inländerdiskriminierung"*) (Flessner 2015). The procedure is unlawful according to Article 3 of the German Constitution. It would lead to a discrimination of German domestic investors in Germany and hence a privilege of foreign investors (*"Ausländerprivilegierung"*).

5. Case Study: TTIP and the debate on the realignment of Berlin's land policy

5.1. Propertied Berlin between investment euphoria and land as a service for the public

Originally, population figures for Berlin were expected to dwindle until 2015 as far as 3.1 million inhabitants – as if the correlation of demand to population figure (with a simultaneous increase in the number of households) could make it possible to predict the exact development of the total population – including migration into EU member states. Berlin is undergoing a remarkable urban transformation. Investors from throughout the world have arrived in Berlin. Big capital from European investors and from the US moves currently in. Postmodern development fosters the inner-city revitalization. As a consequence, neighborhoods in districts such as vacant brownfields at Spree riverside, Mitte, Friedrichshain, Neukölln, Kreuzberg or Pankow are rapidly changing (Thiel 2015). The geographies of social life are getting increasingly "propertied" – a term coined by Nicholas Blomley – in Berlin (Blomley 2001: 116).

Berlin mirrors the geographies of liberalized property markets, thus the politics of property, urban land policy and the city, but also governance aspects, land policy and participatory planning for the booming capital. Numerous neighborhoods are in transition: Property values have quadrupled in recent two years even in non-prime areas of Berlin. Local initiatives such as the "rethink the city" platform try to intervene in fundamentally market and investment-driven processes (Initiative Rethink the City 2012). These activists criticize the acceptance of public tender triggered by the rent-gap which is expected by the public real estate fund. Sociological influenced movements demand a moratorium of selling public assets. Does that lead to modifications of investment decisions as unfulfilled investment expectations of investors according to chapter three of TTIP?

5.2. Case study Upstall property (former Dragoner barrack): Development potential thanks to a good location

The 47,000 m² comprehensive Upstall-terrain provides for a centralized land currently owned by the Federal Agency for Real Estate (BIMA) is in the immediate vicinity of the Halle Gate. The surface shows certain disadvantages in terms of their capacity for development and rehabilitation needs, but also significant potential due to its location. Although now a master plan was developed, the land sale will be continued. Until 2015, there was no discussion in the direction of a participatory brainstorming at the district level, for alternative procurement procedures rather than for unconditional bidding procedure or for more than a heritable building right (*Erbbaurecht*) for the investor. Existing planning instruments, although present, is not yet discussed to advance alternative proposals to the current user initiative. The Berlin Senate Department for Urban Development and Environment has discovered the problem of land policy.

While you're looking for more recent publications of the Berlin planning and land policy authority, property policy statements are in vain. Provided, however, is now, that not fiscal, but the urban overall development should take centre stage. Budgetary consolidation cannot be the target of the property policy in the opinion of the Berlin Senate Department of Urban Development. The criteria of *social diversity* and coherence versus the maximum award close out anyway. A "gentle award" of non-operating land and buildings by the fund should in future include a conceptual tender along with environmental and social criteria – instead of the previous bidding process – include. The order of heritable building rights is to be interpreted more as long-term revenues of public land leasing fees for the city's budget.

5.3. Moratorium of selling public property to a bidder as a violation of investment expectations according to TTIP regulations?

This chapter will discuss the current land policy issues in Berlin and the expected effects of TTIP for the national sovereignty in the development and application of a transparent and participatory public land policy. How are international treaties, agreements, guidelines and safeguards such as TTIP affecting Berlin's public land policy? The following set of questions mirrors the difficulties and challenges for contemporary public land policies in Berlin (Thiel 2015):

- How does a transparent public land policy with dialogue-based tender procedures work, if possible as a freely accessible online portal, and how is it violating investment protection provisions based on TTIP, part three on "rules"?
- Which forms of ownership (communal land rights, leasing, hereditary land rights) and tools are feasible and make sense to safeguard the city's assets in the long term and to set out (interim) concepts for use?
- Which stakeholders and political debates will play the central role in a potential realignment of land policy? What significance will cooperatives, construction projects by owner-occupiers or housing associations have?
- How can provision be made for the future if in a few years the spaces and land that the public sector would need for community purposes has already been sold?

Award and bidding procedures as seen as core elements of land policy and might conflict with the TTIP guideline of "fair and equitable treatment". The Berlin Senate Department for Urban Development and the Environment has also discovered the problem of the uncoordinated, if not missing public foresight land policy. While more recent publications

from the authority no longer contain any statements on land policy, it is telling that the focus should now be on overall urban development rather than on fiscal development and investment. In the opinion of the Senate Department of Urban Development and Environment, budgetary consolidation and selling of assets to the highest bidder cannot be the aim of land policy. The criteria of social diversity on the one hand and awarding to the highest bidder on the other do not need to be mutually exclusive.

A "carefully considered" awarding of land that is not necessary for operations should include a concept tender in addition to ecological (such as environmental impact assessment) and social criteria – instead of the free bidding procedure used to date. These provisions may conflict with TTIP "Competition Policy" according to the negotiating texts and factsheets (European Commission 2015), especially with the establishment of competition laws to prevent unfair und unequal competition and to protect legitimate investment backed expectations. While it would still be possible to sell public real estate, the priority given by a modified public land policy must be for residential construction: 40% concept preparation, 30% hereditary building rights, 20% taking into account urban residential construction firms and 10% for owner-occupier construction groups. The registration of hereditary building rights should be interpreted more strongly as long-term income from interest on those rights for the city. Up until now, in the event of a deadlock in Berlin's or budgetary committee, it is the Senate Department of Finance that holds the deciding vote for decisions pertaining to land policy (Thiel 2015). At the very least, the city administration and the fiscal administration should have equal rights with regard to matters involving land to strengthen local policy instead of possibly narrowing it by TTIP, leading to a discrimination of foreign investors, to a violation of a legitimated backed investment expectation or to somewhat "disturbed" free trade with the resource land.

5.4. Berlin and the investor calculation: the discourse on the real estate "potential value" – alchemy, esoteric rules or obscure prophecies like those based on Nostradamus of 16th century?

Who (and with which valuation methods?) determines the original fair value (exchange value) for land in Berlin, e.g., as basis for compensation following expropriation or to support events – besides expropriation – when there is a need to redress for the investor and the requirement to be assessed under the standard of fair and equitable treatment (Wälde and Sabahi 2008: 1049), for protection, and how differs this market value from the "potential value"? Valuation plays a key role for the determination of compensation, such as the loss of property due to (direct and indirect) expropriation. It might be the basis to undermine the argument of a violation of the "fair and equitable treatment", regardless of the vagueness of this term since the role of fair and equitable treatment changes from case to case (Yannaca-Small 2008; Hoffmann 2008).

For sure, Berlin has value potential – territorial value (Davy 2012). The Return on Investment is strongly connected with the exchange value of land; the exchange value of land regards land as commodity, as an investment opportunity protected by multilateral agreements such as TTIP, and as a good to be bought and sold like bread and meat. Most scholars – and most tribunals in investment arbitration cases such as ICSID – rely on the Discounted Cash Flow Method (DCF) as the dominant approach to estimate future cash flows and to reflect cost and capital already invested in the asset. However, there are alternate approaches to value the compensation such as replacement cost method, the liquidation value method or, as currently discussed in Berlin, the potential value method. The potential value method has yet not been integrated in the German Valuation Ordinance (Immobilienwertermittlungsverordnung – ImmoWertV). The DCF is not reliable and highly speculative. There is no reliable way of predicting market changed and influences such as growth rate, higher taxes or regulatory changes several years down the line as we are unable even to predict the stock market of tomorrow. DCF is not the received wisdom of valuation (Wälde and Sabahi 2008: 1075; Kantor 2008). It is rather alchemy or comparable to *"obscure 16th century prophecies of Nostradamus"* – to borrow a quotation from Ignaz Seidl-Hohenveldern.

Berlin's tax authorities want to capture the potential of real estate better in terms of its value. According to the Senate Department of Finance,

"The method used in the past to calculate value (…) does not reflect the actual demand and market situation and thus the recoverable purchase price in Berlin realistically. (...) The potential value calculation is based on future expectations and development opportunities for real estate" (Senate Department of Finance Berlin 2012: 2).

However, the real estate potential value, also referred to as the investor value as the net present value of future cash-flows as speculative elements (Wälde and Sabahi 2008, p. 1114), is the subject of controversy in the technical literature and legally it is extremely uncertain, even more uncertain than to calculate the present value of future cash flows as is it provided for by the Investment Method. This is because anyone who wants to calculate the market value of real estate in Germany would be well-advised to stick to the methods listed in the ImmoWertV [German Ordinance on the Valuation of Real Estate]. Otherwise, confusion ensues as a result of non-standard terminology, procedures and methods. The market value as defined by the ImmoWertV is a normed category. Anyone who diverges from the market value can easily cause misunderstandings (Marboe 2006) and has to have good reasons for diverging such as for a "potential value" based on a forward-looking financial approach that relies on speculation of future income streams (*"esoteric rules of accountancy for measuring the value of property rights"*, as Rudolf Dolzer calls them; see Dolzer 2002: 41) and might be followed by financial inventions on the real estate market.

The ImmoWertV does not provide for a potential value as it does not provide the discounted cash flow (DCF) method.

There is a valid concern that a potential value in the area of the price level obtainable in conventional bidding procedures would far exceed the fair value of a piece of land according to ImmoWertV and would thus constitute a "speculative market value". What is certain is that the approach of valuing real estate also based on its socio-economic utility value, including a defined use in the price calculation and including it in a life cycle analysis of urban development would not be served adequately by a potential value. It is also questionable whether an urban return by companies in the creative industries could be validated appropriately by such a speculative market value. The significance of a creative environment for planning and urban development is highlighted without, strangely enough, being able to substantiate this by means of the development of the real estate values or standard land values.

5.5. Berlin and the budgetary law

TTIP might also affect Berlin's Budgetary Law. The regulating factors for a sustainable budgetary policy are to set and withdraw incentives. The starting point is the budgeting based on the cost accounting. As long as a district in Berlin has real estate in its assets and uses this real estate, it has to pay the real estate fund or the State of Berlin the corresponding lease payment (fee). When the district's budget comes under pressure, there is thus often pressure to sell the real estate. There is no transparency regarding how the rent prices are calculated and set in the cost accounting. The moratorium to "Stop the sale of land" could be approached such that the flow of real estate out of the districts to the investment market is stopped immediately. The regulating factor – and thus a "manifestly excessive measure" (European Commission 2015) – with which to do this would be to stop participation of the districts in the income, thus taking away their incentive.

This strategy could be based on Sec. 63, para 2 of Berlin's State Budget Ordinance, which states that *"assets can only be sold if they are not needed in the foreseeable future to fulfill the tasks of Berlin"*. In the case of the sale of real estate classified as not needed for operations, this condition cannot be assumed to always be met. Without taking stock of the portfolio in advance (exact portfolio analysis) there is no guarantee that subsequent additions to the sales portfolio will not restrict the fulfillment of the state's tasks. Political controllability versus privatization of land properties for debt reduction: Another aspect would be to abolish or at least fundamentally revise budgeting based on cost accounting in order to restore political controllability in the districts in the area of urban and real estate development. The objective would have to be to break through the short-sighted budgetary logic that is resulting in the sale (and investment contracts with parties from e.g. the USA) for debt reduction of community spaces that could potentially be urgently needed in the near future. It may also prove useful to introduce a stockpiling system for spaces for public use that are removed from the sales process and are available for future use by the community. This is because it is problematic that matters of urban policy including measures in favor of the public welfare, utilitarian housing policies and – necessarily – also land expropriation measures are continuously changing.

6. Short Comparison: Vienna and the possible implications of TTIP for the procurement of public land plots

TTIP might influence the public land policy in Vienna – through the regulatory body, the invention of international investment standards such as fair and equitable treatment, full protection and promotion of investment, and the most-favoured treatment. Particularly, this could be the case for procurement and the modalities of developer competitions for building sites within a project area suitable for residential use. Derived from the CETA blueprint, any trade and investment treaty comprises chapters on public procurement for public construction projects, their realization, reasonably-to-be-expected investor's benefits and the existence of pro-investment land use planning. In Vienna, Developer competitions are awarded for project areas that are not owned by the housing fund (Wohnfonds), from a total of 300 residential units and will be built with funds from the Viennese housing subsidy assessment panel, with special focus on social housing and the consideration of housing cooperatives within the procurement process. Young people are particularly vulnerable to temporary tenancies and precarious work, and of above-average housing costs under the conditions of uncertain income. No doubt there are already housing policy measures specifically aimed at younger inhabitants by so-called SMART apartments, incentives for young families in the housing subsidy, special conditions for "Young Viennese", but these measures and supports do not seem to go far enough (Gutheil-Knopp-Kirchwald and Kadi 2014).

Currently, all developers competitions are carried out from the point of the "affordable housing" standard such as the SMART-housing program which aims to provide affordable housing for young families, couples, single parents, and singles. SMART-apartments are distinguished by optimum use of space, thoughtful compact floor plans, the choice of different equipment packages, low construction and user costs, financial contribution (construction cost and basic fee) of max. € 60/m² for living space. The total monthly usage fee is fixed at max. € 7,50/m² for living area. The assessment and evaluation of the contributions are made by a specialist jury consisting of experts. Eligible developers are the City of Vienna, all non-profit developers following the principle of benefit to the public (*Gemeinnützigkeit*), developers who follow the requirements of Section 117 para. 4 Austrian Industrial Code, and foreign commercial developers following the requirements of Industrial Code or by the comparable requirements in the country of origin, either reimburse the display of the service, in accordance with Section 373a Austrian Industrial Code or the equal attitude of her qualification in a EU Member State or Switzerland.

Vienna follows the remarkably active guidelines and measures of a comprehensive active land policy, consisting of land purchase (via pre-emption law), undertaken by the housing fund Vienna. The tasks of this land market regulatory body include the provision of land for social housing construc-

tion in Vienna. Within its projects, the targeted space requirements for the subsidized housing should be ensured. The housing fund acquires suitable properties and brownfields within the city boundaries of Vienna such as undeveloped land in all locations, with or without land dedication by land use planning or an urban construction contract, agricultural land, unused properties or brownfields. Under the TTIP regime in Austria (Raza et al. 2014; Raza 2014; Pinzler 2015; Fisahn and Ciftci 2015; Bode 2015), the bidding procedures and award criteria of the housing fund might come under scrutiny of the "reasonably-to-be-expected" investment expectations and benefits of US investors. Since TTIP leads to a discrimination of domestic (here: Austrian) investors and a favored-treatment of an investor from the US, the procurement principles of the housing fund and the admission of investors from the United States of America might be changed if TTIP comes into force.

7. Summary and (investment) outlook: TTIP as a "frivolous claim", an unfounded case and threat to social coherence?

Does the currently debated EU-US treaty lead to the *"fundamental right to undisturbed investments"*, as Heribert Prantl, the head of the domestic affairs department of the *Süddeutsche Zeitung*, predicts (Prantl 2014)? The answer is uncertain at the moment. The case studies Berlin and Vienna demonstrate the necessity of "marrying" investment protection procedures, fair and equitable treatment and standards with the domestic rule of law and the instruments for an effective land policy at hand. Can land policy be interpreted as a sub-category of investment planning and "business of managing public affairs, serving as a "gold standard" for investment in areas such as energy, transport, water, and housing? Dispute settlement procedures, direct and indirect expropriation and the power of the national constitutional Member States of TTIP will be the major stumbling blocks within the land policy issues of the treaty. A "clash of norms", standards and the invention of indirect expropriation (here from Austrian and German legislation) can clearly be foreseen.

What has been particularly missing in Berlin is a platform for implementation proposals for alternative public land and urban policy strategies that may prevent investment decisions and the selling of "silverware" and land plots for debt reduction. Berlin might sell its public land portfolio only once. An important finding of the debates in Berlin in recent months is the establishment of a Space Council. The Council could accept, for example, as an urgent task of formulation of guidelines and governance standards on the future land policy – in contradiction to the guidelines of the TTIP "Regulatory Cooperation Body" (Committee) with possible special powers to trade, services or the intellectual property; additional competencies might be added. In addition, a "Joint Committee", consisting of members of the executive authority from Canada and Europe, has general responsibility, but no absolute power to decide. The tasks are fixed in an additional contract. For TTIP, the definite sphere of power in favour of the Regulatory Cooperation Bodies is unclear at the moment.

The process of ratification shows similar vagueness; it is unclear whether TTIP and CETA are "mixed treaties" that demand the approval of national parliaments and – in case of constitutional necessities for the ratification of a treaty – a public memorandum on the final text of the agreement (for Germany: Article 59 para 2 German Constitution; for Austria: Art. 10 para 1 No. 2 and Art. 50 para 1 No. 2; ratification by and through the National Assembly of Austria). There is a risk of losing social and cultural diversity in view of Berlin's form of land policy – with the former land fund and its primary aim of budgetary consolidation and with TTIP as an instrument to reduce trade obstruction and to narrow the German legislator's possibility to determine content and limits of property. Just as a reminder of the TTIP and CETA mandate with its core aim to implement new standards for services in health, environment, traffic, education, and planning – "beside and above national legislation" (European Commission 2013; European Commission 2015; Schneider 2015).

There are also differences in opinion with regard to private landownership and its restriction through regulations on content and limits following the principle of *"property entails obligations"*. It is possible that a debate has started – fuelled by the example of Berlin and the housing policy in Vienna – surrounding the ownership law arrangements for real estate. There is a need for completely new democratic participatory planning processes, methods and instruments that guarantee timely, comprehensive and relevant information to citizens and landowners with regard to the future use and structure of real estate on the one hand. On the other, it is necessary to take the ideas, needs, concerns and worries of the residential population into account in order to involve citizens, their power, time and creativity in the design of real estate and land for community use for the public good.

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