

„Regulatory Expropriation“, International Investment Law and Democratic Governance

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The paper deals with the concept of „regulatory expropriation“ which applies to changes in the national legal framework of an investment due to the implementation of public policies that aim at the protection of public interests (such as the environment, health or safety issues), but that reduce the economic scope or value of the investment at the same time.

Using the examples of the constitutional complaint and the investment arbitration procedure that Vattenfall has initiated against the phasing-out of nuclear energy in Germany, the paper compares the protection of property and legitimate expectations under the German constitution (Grundgesetz) and under international investment treaties as interpreted by arbitration bodies. It demonstrates that the German constitution focuses on the maintenance of the political capacity to act and to adapt the legal framework to new developments and democratic preferences and therefore only provides for compensation for lawful constraints to the use of private property in exceptional cases. In contrast, international investment law strongly focuses on the “legitimate expectations” of the investor and therefore exonerates the investor from related legal and social obligations/commitments of the polity.

Investment lawyers justify this prominent position of foreign investors having recourse to democratic theory. They argue that investment law compensates for the external effects of domestic decision-making as foreign investors are not represented in national political processes. Others simply argue that by signing an investment treaty states decidedly guarantee a stable and predictable investment framework in order to attract foreign investment; which investors can rely on.

These approaches, however, pose more democratic problems than they solve. Amongst others, exclusive rights for foreign investors "infuse into democracy an oligarchic element" (Somek). Moreover, the constitutional problems of external legal commitments of states are comparable to other highly problematic commitments of state representatives, e.g. in environmental agreements with industry, in that they lead to a shift of power from legislator to executive, and to a blocking of democratic processes.