



University of
Zurich^{UZH}

Institute for International Law

Investments

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Objectives

- Know the evolvement of investment protection law
- Understand current fundamentals of public international law for the protection of investments
- Know the key developments in jurisprudence



Fundamentals (1/2)

- Expropriation law offers different levels of protection for
 - own nationals
 - Extensive legislative authority: Constitutional Law
 - Art. 26 Federal Constitution, Art. 1 First Additional Protocol to the ECHR
 - foreign nationals
 - Minimum standards of public international law
 - Public interest, non-discriminatory, compensation

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Fundamentals (2/2)

- Objects of expropriation law
 - Real estate, movable objects
 - Bank deposits, corporate shares
 - Right of exploitation (i.a. licences to exploit natural resources)
 - Disputed: Breach of contract as expropriation?
- Violation of international expropriation law: Consequences
 - State responsibility: Damages
 - Comprehensive compensation
 - Most cases: Violations of investment protection treaties

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Customary international law: Development (1/5)

- Before World War I
 - National treatment (treating foreigners and own nationals equally)
 - Right to compensation
- Breakdown of the consensus
 - Russian Revolution 1917
 - Abolition of private property
 - Expropriation/nationalisation without compensation
 - Protest by Western states
 - Mexican Revolution (1917)
 - Social function of property
 - Calvo-Doctrine

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Customary international law: Development (2/5)

- Classical Western view
 - PCIJ: Chorzow Factory case (1926-29, Germany vs. Poland)
 - Legal basis: Treaty of Versailles:
 - o Former German governmental property can be seized
 - o Value to be credited against Germany's obligation for reparation
 - Court considers factory to be privately owned, therefore seizure by the Polish government was unlawful
 - Unclear whether the Court's decision was based on customary international law or the Treaty of Versailles
 - Consensus: Compensation as reparation (re-establishment)

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Customary international law: Development (3/5)

- The “Hull-Formula”
 - Developed in connection with Mexican expropriations after 1917
 - Hull insists on compensation to be “prompt, adequate and effective”
 - Contrary to the Calvo-Doctrine



Customary international law: Development (4/5)

- Theory and practice
 - The wave of expropriations 1945-1970
 - Negotiations
 - o Between governments
 - o Between governments of the taking state and the former owners
 - o With the help of intermediaries: World Bank
 - Compensation is the rule (not the return of the property)
 - No convincing legal foundations
 - Although international law plays a role, political and economic considerations prevail
 - The proof of customary international law is difficult



Customary international law: Development (5/5)

- Attempts for codification in the UN
 - Declaration on Permanent Sovereignty over National Resources 1962 (General Assembly Resolution 1803)
 - New international economic order
 - Revision of GA resolution 1803
 - Charter of Economic Rights and Duties of States 1974
 - o Resolution of the General Assembly
 - o Adequate compensation

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Jurisprudence (1/2)

- International Court of Justice (ICJ)
 - Jurisdiction of the ICJ
 - Only disputes between states
 - Depends on the consent of states
 - Barcelona Traction Case (Text No. 34)
- National courts
 - Different approaches
 - Some courts affirmed their jurisdiction to review actions of foreign governments within their own territory
 - Some courts denied: Act of state doctrine (various exceptions to the application of the doctrine)

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Jurisprudence (2/2)

- Summary
 - Lack of consensus, ambiguous precedents, political and ideological conflicts
 - Approaches by courts
 - Avoiding the issue
 - Referring to conflict of laws or act of state doctrine
 - Discrimination generally viewed as illegal
 - Different definitions of discrimination
 - In practice: Difficulties to prove



New case: Expropriation of oil firm by Argentina

- 16 April 2012: Argentina announces to seize 51% of YPF shares. YPF is a subsidiary of the Spanish oil company Repsol.
 - Spanish Government announces "clear and forceful measures"
 - Repsol: Measures are "manifestly unlawful and gravely discriminatory"
- Comments by Robert Zoellick (outgoing), president of the World Bank
<http://www.youtube.com/watch?v=egK0nTI03IE>
- What options do Repsol and the Spanish Government have?
- Can you draw parallels to Barcelona Traction (Text No. 34)?