




University of
Zurich^{UZH}
Institute for International Law

Investments part I

23 April 2015
International Economic Law
Spring term 2015
Prof. Christine Kaufmann



University of
Zurich^{UZH}
Institute for International Law

Information about the lectures

- The guest lecture with Professor Colin Picker will take place on 5 May, 12.15 to 1.45 pm, in KOL-F-117.
- The lecture of 28 May will be rescheduled to **27 May, 8 to 10 am, RAI-J-031.**

2



University of
Zurich^{UZH}

Institute for International Law

Information about the exam

- The exam will be **written** and **open book** (alle written materials, no electronic devices). The duration of the exam is **2 hours**.
- The exam will take place:
 - on **29 May 2015, 9 to 11 am (for mobility students)** or
 - on **23 June 2015, 8 to 10 am (for the rest of the students)**
- http://www.ius.uzh.ch/studium/pruefungen/mlaw/fs15/pruefungsdaten_en.html

3



University of
Zurich^{UZH}

Institute for International Law

Objectives

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

4



University of
Zurich^{UZH}

Institute for International Law

Fundamentals (1/2)

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

5



University of
Zurich^{UZH}

Institute for International Law

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
 - In most cases: violations of investment protection treaties

6



University of
Zurich^{UZH}

Institute for International Law

Customary international law

(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

7



University of
Zurich^{UZH}

Institute for International Law

Customary international law

(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)

8



University of
Zurich^{UZH}

Institute for International Law

Customary international law

(3/5)

- Ctd. classical Western view
 - 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

9



University of
Zurich^{UZH}

Institute for International Law

Customary international law

(4/5)

- The wave of expropriations 1945-1970
 - Negotiations
 - Between governments
 - Between governments of the taking state and the former owners
 - With the help of intermediaries: e.g. 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
 - Proving/establishing customary international law is difficult

10



University of
Zurich^{UZH}

Institute for International Law

Customary international law

(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
 - Resolution of the General Assembly
 - Adequate compensation

11



University of
Zurich^{UZH}

Institute for International Law

Developments in 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. 35)
- 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)

12



University of
Zurich^{UZH}

Institute for International Law

Developments in 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

13



University of
Zurich^{UZH}

Institute for International Law

Example: ConocoPhillips vs. Venezuela

- See ISDS April 2014 (especially pages 15 and 16):
http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf
- ICSID Case No. ARB/07/30: <http://www.italaw.com/cases/321>
- Reconsideration rejected 10 March 2014.
- Can you draw parallels to Barcelona Traction (Text No. 33)?

14