Investments

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International Economic Law
Spring term 2014
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Information for 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 23 June 2014 (subject to change).
• [http://www.ius.uzh.ch/studium/pruefungen/mlaw/fs14/pruefungsdaten_en.html](http://www.ius.uzh.ch/studium/pruefungen/mlaw/fs14/pruefungsdaten_en.html)
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

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
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

Development of 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
Development of 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)

Development of 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
### Development of 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

### Development of 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
### International Economic Law, Spring Term 2014

**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)

### 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
Example: ConoccoPhillips vs. Venezuela

- 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. 35)?