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Investments



International Economic Law

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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**

2

Fundamentals

(1/2)

- **Expropriation law**
 - 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

3

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

4

Customary international law: Development (1/4)

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

5

Customary international law: Development (2/4)

- **Classical Western view**
 - PCIJ: Chorzow Factory case (1926-29)
 - Findings of the court are controversial
 - Consensus: Compensation as reparation (re-establishment)
 - The Hull-Formula
 - Developed in connection with Mexican expropriations after 1917
 - Compensation: Prompt, adequate and effective
 - Contrary to the Calvo-Doctrine

6

Customary international law: Development (3/4)

- **Theory and practice**

- The wave of expropriations 1945-1970
 - Negotiations
 - Between governments
 - Between governments of the taking state and the former owners
 - With the help of intermediaries: World Bank
 - Compensation is the rule (no return)
- No convincing legal foundations
 - Although international law plays a role, political and economic considerations prevail
 - The proof of customary international law is difficult

7

Customary international law: Development (4/4)

- **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

8

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 30)

- **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)

9

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

10