Outline of Lectures

1. Introduction and History (from the 1780s to the early 1990s)
2. The Rise and Evolution of US Bilateral Investment Treaties (BITs)
3. The ‘Spaghetti Bowl’ of International Investment Agreements (IIAs)

- Note: See the UN Audiovisual Library of International Law (AVL) for recommended texts for each lecture and power points

- Definitive Treaty of Peace (US colonies and G. Britain)(1783)
- US Constitution (1787-89)(ratified by all US states: 1790)
- Treaty of Amity, Commerce and Navigation (US/G. Britain)("Jay Treaty")(1794; effective 1796)
- Alexander Hamilton (with Rufus King), "The Defence" (1795)

“No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals.”

- Alexander Hamilton, *The Defence*

Sources of International Investment Law

- National Laws and Constitutions
- **Customary International Law (e.g., the international minimum standard of treatment/denial of justice)**
- **International Investment Agreements (Bilateral Investment Agreements (BITs) and Investment Chapters within Free Trade Agreements or FTAs)**
- **Arbitral 'caselaw'**
- Other international sources (hard and soft), e.g., WTO (TRIPs and TRIMs), arbitration instruments (e.g., ICSID Convention)

Core Dilemma

Alleged ‘obsolescing bargain’ for Investors

vs.

Host States’ Right/Duty to Regulate in the Public Interest

Key Developments Post Jay Treaty

- Diplomatic Espousal
- State to state arbitrations
- Development of customary international law rules recognizing state responsibility for harms to aliens
- Reaction: Calvo and Drago Doctrines
- Chorzow Factory (PCIJ)(1928)
- Treaties of Friendship, Commerce and Navigation (FCNs)
- Hull Rule or Doctrine (1938)
- Lump sum settlements
- GA Res. 1803 (1962)
- NIEO GA Res. (3171 (1973) and Charter of Ec Rts and Duties of States (CERD, 3281)(1974)
- Post NIEO arbitral rulings
- Unsuccessful multilateral treaty efforts
- ICSID Convention (1966)

“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

Factory at Chorzow, p. 47

The Hull Rule

"There does not exist in international law any principle universally accepted by countries, nor by writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but . . . the time and manner of such payment must be determined by her own laws."

- **Mexican Note, Aug. 3, 1938**

"The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective compensation."

- **Cordell Hull's Response, Aug. 22, 1938**

“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.”

- **G.A. Res. 1803 (1962), para. 4.**

Permanent Sovereignty over Natural Resources

G.A. Res. 3171 (1973)

"The General Assembly . . .

3. Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures . . ."

Charter of the Economic Rights and Duties of States (CERDS)

G.A. Res. 3281 (1974)

2. Each State has the right . . .

c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless sit is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

“Under international law, any sovereign government has a right to expropriate property for public purposes. But that same international law requires adequate and prompt compensation for the investors or owners . . . . Expropriations, even when there is fair compensation, can create deep concern among those whose resources developing countries wish to attract---commercial banks, international lending institutions, private investors. Such actions tend to dry up sources of investment for other purposes . . . . We have made it clear that if an American firm were seized without reasonable efforts to make effective payment, we would provide no new bilateral economic assistance to the expropriating country.”

- **Nixon, Fourth Annual Report to Congress, 1973**

- Disagreement over CIL rules/no prospect of multilateral treaty
- Continued lack of confidence by foreign investors in host states' local courts
- Continued resistance by some states to international arbitration
- Pressure on capital importing states to adopt market-driven economic development.

Result:

Rise in IIAs starting in middle of 1990s