Karl-Heinz Böckstiegel, in: Enteignungs- oder Nationalisierungsmassnahmen gegen auslaendische Kapitalgesellschaften, Berichte DGVR Heft 13, Karlsruhe 1974

Summary

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Expropriation or Nationalisation Measures Concerning Foreign Companies. International Law Aspects

I.

Importance and actuality of the topic

1. In spite of an international discussion lasting for decades and of the resolution of many questions, expropriation and nationalisation measures continue to form a burning problem of International Law, which requires further exploration even after the Barcelona Traction Judgment and especially in view of the continuing development of international economic relations.

II.

Definitions

2. The present paper employs the following definitions:

a) "Enteignung" is an individual, "Nationalisierung" a general measure; both may be grouped under the comprehensive term of "Entziehung" (here after translated as "expropriation").

b) "Companies"*) are enterprises founded under municipal law, having legal personality, the interests in the company stock being divided into shares. The holders of the shares shall be called "shareholders".

c) A company shall be deemed "foreign", if it is registered or seated abroad or if its entire stock is held by alien shareholders.

* "Corporations" in American legal terminology.

III.

Applicable International Treaty Law

3. Despite many difficulties, especially in its execution in the domestic sphere, the present network of treaty provisions on expropriations against foreign companies forms the surest basis of the existing law and for the general development of the International Law on the subject.

4. The group of treaties containing settlement and compensation provisions on past expropriations – especially those concluded after World Wars I and II – does not offer uniformly applied solutions for the points in question. This makes proof of the existence of rules of general International Law difficult.

5. However, the investment protection treaties concluded by many industrialized states with developing countries in accordance with uniform treaty patterns, can, since the Vienna Treaty Convention, no longer be questioned as to their validity under International Law. At least the great number of treaties concluded by the Federal Republic of Germany offers comprehensive protection both to companies based in the Federal Republic and to German shareholders in companies based in the expropriating state – even against concealed expropriation where the substance of the membership rights in the company is taken away.

6. The protection under Art. 1 of the First Additional Protocol to the European Convention on Human Rights is of little practical importance, because no far-reaching expropriations are to be expected within its field of application and because anyway it merely refers to general International Law.

7. Within the constitutive treaties of the European Communities only the general prohibition to discriminate is immediately relevant.

8. International treaty law only to a small degree settles the application of the rules of conflict of laws regarding the company as such or the expropriating act.

9. In some rare instances treaties, which in their main substance deal with other matters, contain provisions on the qualification of expropriations against foreign companies.

10. Certain agreements between a state and a foreign company may in the case of expropriations constitute sources of obligations under International Law for the state.

IV.

International Law in the absence of treaty provisions

11. In setting out the general rules of law on expropriation of foreign companies in view of the existing opposition of interests and conflicting opinions, it has to be kept in mind that the burden of proof rests on the party who opposes a rule of International Law to the sovereignty of the state.

12. Without detailed explanation, which cannot be given in this context, this paper starts from the premise that the following basic principles relating to expropriation are part of International Law:

a) the general right of a state to take measures of expropriation within its territorial jurisdiction;

b) the duty to expropriate foreign property only in the public interest and against prompt, adequate and effective compensation;

c) the prohibition of discriminatory expropriation;

d) the duty to exhaust local remedies.

A.

Expropriation of the property of the company

13. The expropriation of the property of foreign companies generally comes under the rules of the law of aliens in so far as they deal with the protection of the property of aliens.

14.1. With respect to the property beyond the territory of the expropriating state, the principle of territoriality forbids the making or executing of acts of expropriation. This is also the case for acts which conform with the rules of International Law, especially those regarding compensation, and for expropriation of

companies which are registered and have their seats in the expropriating state, because in these cases as well the claim of sovereign power constitutes an infringement of the territorial sovereignty of another state.

14.2. Both the state within the territory of which the property is located, and third states, are justified in not recognising the measures of expropriation. In so far as third states recognise the measure, they may engage their international responsibility towards the state whose territorial sovereignty has been violated.

14.3. The state, upon the territory of which the property in question was situated at the time of expropriation, has a right to plead a violation of International Law by the expropriating state, independent of the nationality of both company and shareholders.

15.1. With respect to property of the company which is in the territory of the expropriating state, the applicability of the law of aliens depends on whether the company can be qualified as "foreign". That not only the registration and seat of the company but also the nationality of the shareholders can be treated as "connecting factors" seems confirmed by the line of reasoning in the Barcelona Traction Judgment, though the question was expressly left open.

15.2. As the Act of State doctrine is not part of International Law other states and their judges are free to recognise or not to recognise measures of expropriation.

15.3. As to which state can exercise the diplomatic protection of the company, the qualification of registration and seat as the "connecting factors" in the Barcelona Traction Judgment must for the moment be regarded as a statement of present international law whatever reservations one might have. The right of diplomatic protection of the home state of the shareholders has therefore for the time being a realistic chance of being recognised as a rule of general International Law only in those special cases which have been acknowledged by the International Court of Justice – for example where the company does no longer exist or where its home state does not have the right to exercise diplomatic protection.

B.

Expropriation of shares

16. Since shares may be qualified as "property" under International Law the expropriation of shares by their transfer to the state or third parties or by the dissolution of the company is subject to the aforementioned rules of protection of property, in so far as the shareholders can be qualified as "foreign".

17. These norms also apply where the shares are not formally expropriated, but where the substance of the right of property, to enjoy, transfer or otherwise realise the property, is made hollow by the misuse of the authority of the state to define the contents of property. A clear dividing line between "definition of contents" and expropriation depends upon the particular facts of each case.

18. The varying international jurisprudence on the legal consequences of expropriation of shares allows the negative conclusion that there is neither a uniform state practice on the requisition of shares nor an applicable rule of International Law. Thus the expropriating state, which interprets the contents of the expropriated membership-rights in such a way as to allow the same state to seize property of the company abroad does not thereby commit an international wrong. Conversely other states with an opposite interpretation equally commit no wrong. The application of the doctrine of severance is therefore admissible, though not normatively prescribed by International Law.

V.

De-lege-ferenda considerations by way of conclusion

19. In view of the practical importance of mesures of expropriation of foreign companies the incompleteness of the relevant International Law and so its inadequacy for judging questions of conflict of laws is to be regretted. Particularly regrettable is the failure of the International Court of Justice in the Barcelona Traction Case to use the chance to further develop the respective rules of International Law. So this task now rests above all with international legal science.