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The Mexican Constitution and its
Safeguards against Foreign Investments

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INTRODUCTION

Every state has safeguards against foreign investment in its country. Most of the times these safeguards are contained in a main document which governs said countries. This document can take the form of a Constitution.

The Mexican constitution contains a safeguard against foreign investments in Article 27, where it is stated that the Mexican state can expropriate private property among other things, due to *public interest*. Any expropriation must be followed by an indemnification. The price to pay as indemnification shall not exceed the *assessment for tax purposes*.

The constitution also foresees that international treaties signed by the President and approved by the Senate, together with laws approved by the Congress are the supreme law of the country (Art. 133). The Mexican Supreme Court of Justice has determined that international treaties are below the Constitution and above national law, and that they can be challenged if they are unconstitutional.

This means that the North American Free Trade Agreement (NAFTA) agreement is mandatory in Mexico as long as none of its provisions are against the constitution. Article 1110 of NAFTA sets the rules for indemnification when one of the signatory countries expropriates any investor's property in any contracting state.

Among those rules, the State which makes the expropriation must pay an indemnification to the other party based on a *fair market value*.

Mexico did not make any reserve on this issue in the corresponding chapter of NAFTA. Reserves are contained in Chapter 22 of NAFTA with the reserves of each country.

Here we face a problem: Indemnification provisions for Expropriation of NAFTA are against the Mexican constitution.

What scenario would face American or Canadian investors if their investments were expropriated by the Mexican State when they come to get their indemnifications paid? Do the Canadian and American constitutions or their national laws contain similar provisions which would put Mexican investments in Canada and the United States at risk? What scenario would other countries face which are part of other Free Trade Agreements?

Several cases have been solved under arbitration established in NAFTA. One of them was *Metalclad v. Mexico*. Mexico lost this case as the controversy panel found that the Mexican State took measures against the American company tantamount to an expropriation.

I.- Constitutional framing of NAFTA under Mexican law.

a) Article 133 of the Mexican Constitution.

Mexico is a federal republic with three branches: executive, legislative and judiciary. The functions of each one are broadly detailed in the constitution. Mexico is a modern nation which enters into treaties with the international community but the real starting point on this issue started in the late 1980's. In 1985 Mexico entered the General Agreement on Trade and Tariffs (GATT), later on, it adhered to the Vienna Convention on the International Sale of Goods and in 1993 Mexico ratified the North America Free Trade Agreement (NAFTA).¹

The Mexican Constitution provides in Article 133 as follows:

*Article 133 - This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.*²

The literal text of this Article has created several interpretations which have been solved by the Mexican Supreme Court of Justice (*Suprema Corte de Justicia de*

¹ Patrick Del Luca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLARL. 35, 113-114 (2003)

² <http://www.historicaltextarchive.com/sections.php?op=viewarticleartid=93#TIC1>

la Nación) (SCJN). In 1999, the SCJN determined that international treaties are below the Constitution and above national law (federal, state and municipal).³

In a recent resolution the SCJN has determined that the international treaties signed by Mexico are in accordance with the Vienna Convention of the Law of Treaties, based on principles of international law, as well as in the internationally customary principle of “*pacta sunt servanda*”, therefore Mexico binds itself to these obligations before the international community and cannot avoid its fulfillment calling on domestic provisions because this would make Mexico liable internationally.⁴

The position of international treaties in relation to the Mexican Constitution is clear, one step under it and one step above all national law. Treaties shall not be at the same level of the constitution. In this case NAFTA is legally framed under the Mexican constitution, which does not mean that all its provision are.

³*Tratados internacionales. Se ubican jerárquicamente por encima de las leyes federales y en un segundo plano respecto de la constitución federal.* 9ª. Época; Pleno; S.J.F. y su Gaceta; X, Noviembre de 1999, página 46, Tesis: P. LXXVII/99 Tesis Aislada. Materia Constitucional.

⁴*Tratados internacionales. Son parte integrante de la ley suprema de la unión y se ubican jerárquicamente por encima de las leyes generales, federales y locales. interpretación del artículo 133 constitucional.* Novena Época, Instancia: Pleno, Fuente: Semanario Judicial de la Federación y su Gaceta, XXV, Abril de 2007, Página: 6, Tesis: P. IX/2007. Tesis Aislada, Materia Constitucional

b) Article 27 of the Mexican Constitution

Article 27 is the cornerstone of property. It summarizes the history of the Mexican people as well as their struggle to keep their land and natural resources. For any foreigner, this Article would look too strict or even exaggerated. Is required knowing the events that have taken place in Mexican history concerning property to understand Article 27 as I will discuss later on. This Article among other things; includes expropriation and the indemnification to be paid to those who have been affected with this determination of the Mexican State.

This provision declares as follows:

Article 27 - Lands and waters understood to be within the limits of the national territory belong originally to the Nation, which has had and has the right of transmitting their ownership to particular persons, thus constituting them as private property.

Expropriations may only be for cause of public utility, and by means of indemnization. (sic)

VI. The States and the Federal District, as well as the municipalities of all the Republic, will have the full capacity to acquire and possess all the real property necessary for public services.

The laws of the Federation and the States, in their respective jurisdictions, will determine the cases in which public utility requires the occupation of private

*property. The procedures used by the administrative authority to acquire this property will be according to these laws. "The price fixed for indemnification of the expropriated property will be based on its fiscal value as figured at the appraiser's or assessor's office. When its worth has been demonstrated by the owner, payment has been accepted by him or her tacitly". Any increase in value that the particular property has for improvements during or after the date of appraisal will be subject to expert judgment or judicial resolution only.*⁵

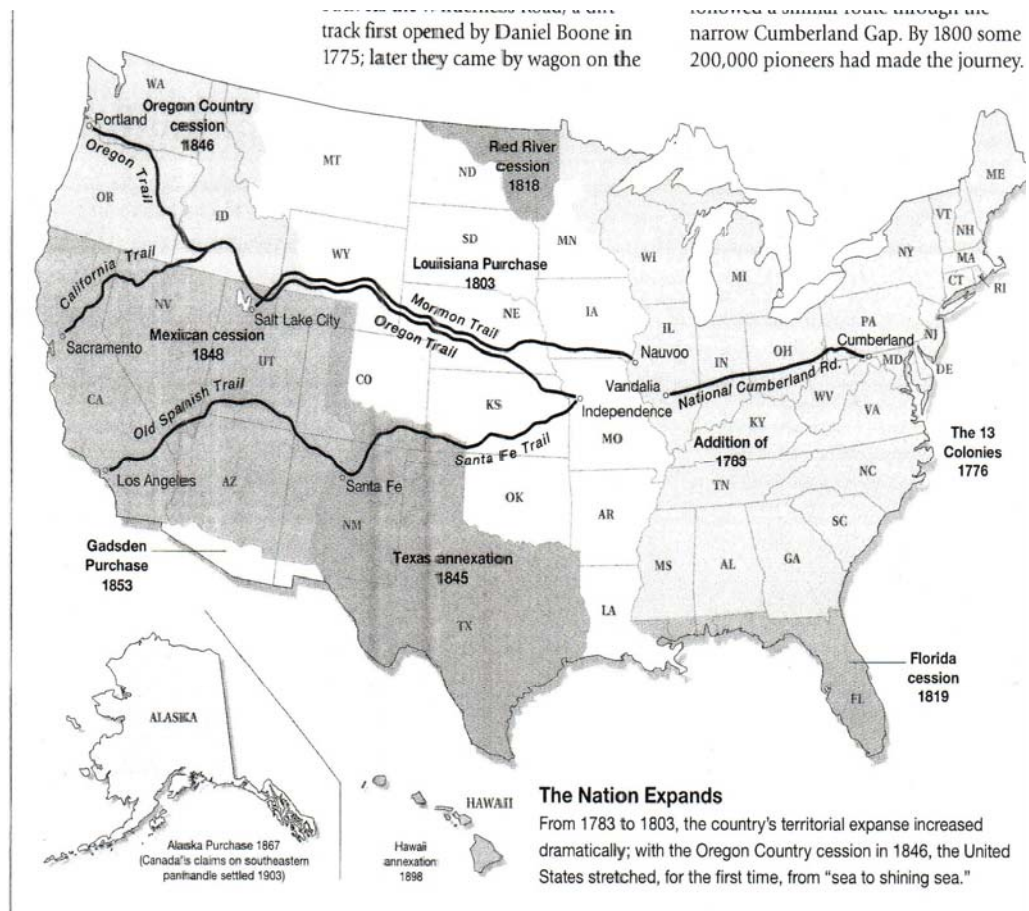
The preceding quoted paragraph of this Article is the topic of this essay in relation to NAFTA provisions.

c) **Short historic reference to expropriations in Mexico.**

Mexico was a colony of Spain for almost three hundred years. It was officially declared an independent nation in 1821 notwithstanding that the Declaration of Independence was on Sept. 15th, 1810. For the rest of the 19th century, Mexico faced several internal wars between different factions: conservators who wanted to have the Spanish regime back in the country or any similar government, and the liberals who wanted to have a new model as an independent country. During these troubled times Mexico was born as a Republic and moved to a monarchy starting with Emperor Agustín de Iturbide in the early 1820's to Maximilian of Habsburg in the early 1860's. In the meantime, the Catholic Church still exercised vast power over Mexico and had most of its private property.

⁵ historicaltextarchive, *supra* note 2

This country also suffered many interventions from foreign countries, especially from France and the United States. Specifically with the United States, Mexico had a deal to cede more than 50% of its territory; first Texas in 1845 and in 1848 through the Guadalupe Treaty into what is now California, Arizona, Nevada, New Mexico, parts of Colorado, Kansas, Utah and Wyoming.⁶



Benito Juarez who was president of Mexico in the late 1850's decided to expropriate the property of the Catholic Church in order to force these properties to

⁶ Reader's Digest, Atlas of America, 1998, 30

be traded by citizens and avoid that an entity would hold so much property for its own benefit in prejudice of the new emerging nation.

When President Porfirio Diaz,. Who was in power for more than 30 years (1876-1911), started the modernization of Mexico as well as foreign investments which brought several products and services, among them: electricity, railroads and telephone.

The 20th century brought winds of change to Mexico and started the first Revolution of that time in 1910. The promulgation of the constitution of 1917 began a long process of expropriation. For the first time, the original property of the land was found in favor of the Mexican nation. The Mexican state has expropriated:

- a) Land (initiated previously in 19th century with strong social emphasis on the period from 1917 to 1937 in favor of peasants who have a special kind of property on land: *ejido*)⁷
- b) Railroads 1937
- c) Oil 1938
- d) Electricity 1961
- e) Sulfur Extraction 1967
- f) Banks 1982⁸
- g) Sugar Cane Factories 2004

⁷ Constitución Política de los Estados Unidos Mexicanos.
<http://www.diputados.gob.mx/LeyesBiblio/index.htm>

⁸ Patrick Del Luca, *supra*, note 1, 74-84

Mexico has struggled for almost two hundred years for its independence and now is facing inclusion into the global economy. This definitively requires the modernization of its laws and judicial system but at the same time Mexico has to act with extreme caution due to disputes with foreign nations in the past which led to the expropriation of their assets in the Mexican United States.

Mexico has a federal law which deals with expropriations: *Ley de Expropiación*. This law set the rules of the paragraph of Article 27 of the constitution, which states the expropriation principles. As every Mexican state is sovereign, each state has a local legislative power to enact state laws dealing with expropriations.

d) The Calvo Doctrine

The *Calvo Doctrine* is a foreign policy doctrine that holds that jurisdiction in international investment disputes lies with the country in which the investment is located. The Calvo Doctrine thus proposed to prohibit diplomatic protection or (armed) intervention before local resources were exhausted. An investor, under this doctrine, has no recourse but to use the local courts, rather than those of their home country. The principle, named after Carlos Calvo, an Argentine jurist, has been applied throughout Latin America and other areas of the world.

The doctrine arose from Calvo's ideas, expressed in his *Derecho internacional teórico y práctico de Europa y América* (Paris, 1868; greatly expanded in subsequent editions, which were published in French). Calvo justified his doctrine as necessary to prevent the abuse of the jurisdiction of weak nations by more powerful nations. It has

since been incorporated as a part of several Latin American constitutions, as well as many other treaties, statutes, and contracts. The doctrine is used chiefly in concession contracts, the clause attempting to give local courts final jurisdiction and to obviate any appeal to diplomatic intervention. The Drago Doctrine is a narrower application of Calvo's wider principle.⁹

Pursuant to the Calvo doctrine, the Mexican government may grant expanded ownership rights to foreigners only if they agree to consider themselves nationals with respect to the law governing the property and agree to forgo the protection of their governments. The Calvo Doctrine encompasses two basic concepts: (1) the requirement of absolute equality of the treatment of aliens with the treatment of nationals, meaning that aliens have recourse to local remedies only (i.e., domestic law), and (2) the policy of non intervention of the alien's state of nationality in the event of a dispute.¹⁰

II.- Quick overview of Expropriation Regulation in the United States and Canada.

a. United States

The Takings Clause in the Fifth Amendment of the United States Constitution provides that *“private property cannot be taken for public use, without just*

⁹ Calvo Doctrine

http://en.wikipedia.org/wiki/Calvo_Doctrine

¹⁰ Starner, Gregory M, *Taking a constitutional look: NAFTA Chapter 11 as an extension of member states' constitutional protection of property*. 65.

http://findarticles.com/p/articles/mi_qa3791/is_200201/ai_n9063679/print?tag=artBody;c...

compensation.”¹¹ The U.S. judiciary has determined what eminent domain is for the expropriation purposes as follows:

The right of “*eminent domain*” is an inseparable attribute of sovereignty, and is an inherent power grounded in the primary duty of government to serve the common need and advance the general welfare, and designees of such right are mere legislative agents exercising a delegated authority, and expropriation of private property is essentially a legislative function, and Legislature can lodge selection of commissioners to appraise lands in such agency as it chooses, for that in essence is not exercise of judicial authority within Constitution.¹²

In the United States, the judiciary have in many cases concluded that compensation is required when it comes to a taking, regardless of the amount taken, as it was resolved in *Loretto v. Teleprompter Manhattan CATV Corp.*, where the court found a New York law requiring that landlords provide their tenants access to cable constituted a taking because it mandated that space be taken for cable operators on the rooves of New York buildings. The court expanded the scope of regulatory takings to include physical intrusions of only a de minimis nature, holding that no matter how minute the intrusion and no matter how weighty the public purpose behind it, compensation will be required.¹³

¹¹ Denise Grab, *Expropriation clauses: a natural extension of domestic takings law or much more?*
http://www.Are.berkeley.edu/courses/EEP131/old_files/NotableStudent04/RegulatoryTakingGrab.pdf

¹² *Ryan v. Housing Authority of City of Newark*, 125 N.J.L. 336, 15 A.2d 647 N.J.Sup. 1940

¹³ Starner, Gregory M, *Supra*, Note 8. 6,7.

http://findarticles.com/p/articles/mi_qa3791/is_200201/ai_n9063679/print?tag=artBody;c...

b. Canada

Canada has no specific provision to execute an expropriation in its constitution but has a safeguard against expropriation contained in the Canadian Bill of Rights which is a federal statute subject to be repealed by the provincial legislatures.

This legal instrument only requires that measures which infringe on property owners' right to the enjoyment of property need only satisfy procedural fairness which does not mean just compensation.¹⁴ The courts have held that "unless the words of the statute so clearly demand, a statute is not to be construed so as to take away the property of a subject without compensation".¹⁵

The preceding paragraphs show that the United States of America and Canada have legal provisions in several legal bodies in order to compensate their citizens from takings executed by the government.

¹⁴ Dr. Bryan P. Schwartz, Melanie R. Bueckert, *Regulatory Takings in Canada*
http://www.law.wustl.edu/wugslr/issues/volume5_3/p477schwartzbueckert.pdf

¹⁵ Starner, Gregory M. *supra*, Note 11, 26

Comparative Chart of Legal Provisions on Expropriation of the United States of America, Canada and Mexico (NAFTA). Brazil, Uruguay and Argentina (MERCOSUR)

<u>United States</u> Constitution	<u>Canada</u> Canadian Bill of Rights	<u>Mexico</u> Constitution	<u>Brazil</u> Constitution	<u>Uruguay</u> Constitution	<u>Argentina</u> Constitution
<p><i>Fifth Amendment:</i></p> <p>Private property cannot be taken for public use, without <i>just compensation</i>"</p> <p><i>Fourteenth Amendment:</i></p> <p>No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without <i>due process</i> of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁶</p>	<p>1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,</p> <p>(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except <i>by due process of law</i>;¹⁷</p>	<p>Art. 27.Expropriations may only be for cause of public utility, <i>and by means of indemnification</i>. "The price fixed for indemnification of the expropriated property will be based on its fiscal value as figured at the appraiser's or assessor's office. When its worth has been demonstrated by the owner, payment has been accepted by him or her tacitly". Any increase in value that the particular property has for improvements during or after the date of appraisal will be subject to expert judgment or judicial resolution only.¹⁸</p>	<p>Art. 5 XXIV The law shall establish the procedure for expropriation due to public need or use or for social interest by means <i>of a fair and previous indemnification</i> in cash, with the exceptions established in this Constitution.¹⁹</p>	<p>Article 32. No one can be deprived of his/her property rights unless cases of public need or use established in a law and receiving from the National Treasury <i>a fair and previous Compensation</i>²⁰</p>	<p>Article 17.- Property is inviolable and no inhabitant of the Nation can be deprived of it only by virtue of judgment based on law. <i>Expropriation must be legally qualified and previously indemnified.</i>²¹</p>

¹⁶ *United States Constitution*, <http://www.usconstitution.net/const.html>

¹⁷ *Canadian Bill of Rights*,

http://www.laws.justice.gc.ca/en/showdoc/cs/C-123/bo-ga:l_I/en#anchorbo-ga:l_I

¹⁸ *Constitución Política de los Estados Unidos Mexicanos*, *supra*, note 6

¹⁹ *Brazilian Constitution in Spanish*, <http://www.constitution.org/cons/brazil.htm>

²⁰ *Uruguayan Constitution*, www.rau.edu.uy/uruguay/const97-1.6htm#1

²¹ *Constitution of Argentina*, <http://www.senado.ar/web/interés/constitución/cuerpo1.php-33k>

The common issue in these countries is that an expropriation must take place under the *rule of law* which does not precisely mean the payment of compensation based on fair market value as is shown clearly in Canada and Mexico. All countries of MERCOSUR mentioned in this chart (Brazil, Uruguay and Argentina) require that the indemnification must be paid previous to the taking of property, an action that surely diminishes the economic loss suffered by the owner.

III.- Chapter 11 of NAFTA concerning Expropriation.

NAFTA came into effect on January 01, 1994 and one of the most controversial chapters of it is Chapter 11, which refers to the dispute resolution mechanism for investors. United States investors did not rely on the Mexican judicial system as they remember the bitter disputes between bank owners and the Mexican State back in 1982 and were very concerned about this. Furthermore, they recalled the long expropriation history of U.S. assets in Mexico.

In order to avoid controversy over the expropriation provisions in Article 27 of the Mexican Constitution, arbitration was chosen by the partners of the agreement as the method to solve disputes. The dispute resolution mechanism is based on *ad hoc arbitration* which means no arbitral administering institution is involved.²²The tribunals operate under the arbitration rules of either the International Center for Settlement of Investment Disputes (ICSID) or the United Nations Commission on

²² Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* 1 (2008)

International Trade Law (UNCITRAL). Chapter 11 tribunals award monetary relief to the winning party.²³

The Article which deals with expropriation reads as follows:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the *fair market value* of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, *to determine fair market value*.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

²³ Gary Clyde Hufbauer, NAFTA revisited: Achievements and Challenges 204 (2005)

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

1. Contradiction of NAFTA Article 1110 with the Mexican Constitution

From the reading of Article 1110, one finds on one hand, that point 2, when it talks about *fair market value*, is influenced by the fifth and fourteenth Amendments of the American Constitution in reference to *due process*, but on the other hand when Article 1110 talks about *asset value including declared tax value of tangible property*, it resembles Article 27 of the Mexican constitution. The contradiction of this provision lies in the fact that it requires the expropriating state to pay the other party compensation for expropriation based on fair market value but this goes against the Mexican constitution, which is only authorized to pay no more than the assessment for tax purposes. Therefore the provision is *unconstitutional* unless the assessment for tax purposes value is similar to the fair market value, which is extremely rare.

2. Remedy under the Mexican Constitution

In a recent binding resolution for all Mexico (*jurisprudencia*) the SCJN has determined that international treaties can be challenged by means of an action of

unconstitutionality as they are general provisions,²⁴ as long as they are not against the constitution, otherwise they would be unconstitutional (*like Article 1110 of NAFTA*). The procedure is established in Article 105 sub clause I of the Mexican Constitution which literally says:

Article 105 - The Supreme Court of Justice of the Nation will get to know, in the terms that the regulating law specifies, about the following affairs:

II. Of actions of constitutionality that may have as their object the establishment of a possible contradiction between a norm of general character and this Constitution.

The actions of unconstitutionality will be resolved upon, within thirty natural days following the publication of the norm, by:

*B) The equivalent of thirty-three percent of the members of the Senate, against federal laws or those for the Federal District passed by the Congress of the Union, as well as international treaties concluded by the Mexican State.*²⁵

Why if Congressional representatives in Mexico have legal recourse to challenge an unconstitutional clause of NAFTA related to an individual guarantee

²⁴ Tratados internacionales. Son normas generales y, por tanto, son impugnables en controversia constitucional. Novena Época Instancia: Pleno Fuente: Semanario Judicial de la Federación y su Gaceta XX, Septiembre de 2004 Página: 1258 Tesis: P./J. 84/2004 Jurisprudencia Materia: Constitucional.

²⁵ <http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=93#T1C1>

contained in Article 27 of the Constitution when it comes to an expropriation, they do not challenge it? It could be a matter of public policy.

IV.- International legal framing of expropriations in Mexico

Mexico, as an entity and subject of international law, is a member of several international organisms and has entered into many treaties and conventions, among them United Nations, the Organization of American States, and the Inter-American Court of Human Rights and has adopted the American Convention on Human Rights as well. The resolutions of these organisms are binding on Mexico as long as their resolutions do not conflict with the Mexican constitution.

A 1962 General Assembly resolution mentions that expropriation should occur with payment of "appropriate compensation in accordance with international law," without defining the term "appropriate" or otherwise specifying the substance of the relevant international law.

Other resolutions of the United Nations General Assembly include the 1974 Charter of Economic Rights and Duties of States, which states:

"Each State has the right . . . 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 law and regulations and all circumstances the State considers pertinent. In any case where the question of

compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals" ²⁶

Article 21 of the American Convention on Human Rights states as follows:

1. Everyone has the right to the use and enjoyment of his property.

The law may subordinate such use and enjoyment to the interest of society.

*2.No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*²⁷

From the analysis of the aforementioned provisions, it can be concluded that a country member of the organisms that enacted these documents, like Mexico, can expropriate and follow the indemnification procedure as established in their own laws which is not the case with the arbitration under NAFTA in relation to Chapter 11, because the fact that arbitration takes place eliminates the possibility of challenging the compensation procedure before a national court. Such action puts Mexico at disadvantage as it has renounced its sovereignty to the national court when a NAFTA dispute arises.

Such a procedure does not validate the unconstitutionality of article 1110 of NAFTA and can be challenged before the SCJN through a constitutional controversy by trying to vacate the arbitration in an appeals court with jurisdiction. The arbitration

²⁶ Patrick Del Luca, *supra*, note 1, 120

²⁷ American Convention on Human Rights
http://www.hrcr.org/docs/American_Convention/oashr5.html

award could not be enforced because this specific issue falls in the hypothesis foreseen in Article V clause 2 b of the New York Convention which literally says:

Article V

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

*(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*²⁸

It is of public policy in Mexico to pay compensations due to expropriations according to Article 27 of the Constitution. No treaty or Federal law is above it.

V. Metalclad Corp. v. Mexico (September 2000)

On January 2, 1997, the Metalclad Corporation, a U.S. corporation, filed a claim under NAFTA with the International Center for the Settlement of Investment Disputes against the government of Mexico. The claim principally alleged that the decision of the Governor of the State of San Luis Potosi to deny Confinamiento Técnico de Residuos Industriales, a Metalclad subsidiary, permission to operate a waste management facility constituted an expropriation of that facility in violation of Article 1110. Metalclad claimed that it had been authorized by the Mexican federal government to operate the facility in 1995 and invested \$22 million in preparing the facility for operation. In response to protests

²⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards
<http://www.wipo/amc/en/arbitration/ny-convention/text.html>

by environmentalists and local citizens, the Governor ordered that the facility be shut down and denied further construction permits. The Governor went on to declare that the site of the facility would form part of a much larger ecological reserve. Mexico claimed in part that the regulation was a legitimate exercise of environmental regulations and not an expropriation under Article 1110.

The tribunal, in a final decision on the merits released in September 2000, recognized that:

Expropriation under NAFTA included not only open, deliberate and acknowledged taking of property, such as outright seizure ... *but also covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.*²⁹

²⁹ Starner, Gregory M. *supra*, Note 11, 108-112

CONCLUSION

A new President of the United States of America, of a different party and the first Afro-American in history took office on January 20th, 2009. This could mean a new policy from the United States towards Mexico. The relationship between both countries has been a hard and a difficult one. Nevertheless, the United States was the principal promoter of NAFTA and was very interested to have Mexico as a partner for trade purposes. Mexico has been very reluctant to modify its Constitution on property affairs and other issues due to the loss of sovereignty which this might imply and because this country does not want to take the risk of losing more than it has in the past. But economic globalization offers a new challenge and Mexico must open itself to the world and to its investors by executing its policies under the rule of law. The country has opened in a certain way but it is not enough. It requires a deep reform in its laws starting by modifying the Constitution in order to assure investors that expropriation shall be compensated by fair market value.

In *Metalclad v. Mexico*, the Mexican government never argued the unconstitutionality of Article 1110 of NAFTA and the Mexican Congress has remained silent on this; maybe because Mexico thinks that this would endanger foreign investments which provide work to millions of Mexicans but ignores the fact that by submitting to arbitration the disputes that might arise from expropriation do not validate its illegality.

Mexico has an invaluable opportunity to attract foreign investments but it must provide an assured legal framework to investors. Mexico must learn from the experience acquired in NAFTA and especially from Chapter 11 investment dispute

resolution panels through arbitration which has turned into a laboratory for Free Trade Agreements (FTA's) and Multilateral Investment Treaties (MIT's) around the world.

On one hand, Mexican public policy must allow investment in the Mexican United States this within a regulatory scheme that guarantees investors the safety of their assets are safe and that they contribute to national development. On the other hand, Mexico can make reserves in FTA's concerning to expropriations to be compensated according to Article 27 of its constitution so that partners know the rules of the game and think thoroughly about they want to invest in Mexico.

It is of the utmost importance for Mexico to establish a Constitutional Tribunal whose main purpose will be to verify that laws enacted by Congress and the treaties signed by the President and ratified by the Senate are not against the Constitution in order to avoid unconstitutional actions once the laws are effective like in the case of NAFTA. International public policy does not allow Mexico to challenge the unconstitutionality of several provisions of it, like Article 1110.

At the end of the day, no country enters into a trade agreement to have its assets expropriated by the investing country; this is an event which takes place seldom, if ever, but it can happen.

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