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**\*1147 HAS MEXICO CROSSED THE BORDER ON STATE RESPONSIBILITY FOR ECONOMIC  
INJURY TO ALIENS? FOREIGN INVESTMENT AND THE CALVO CLAUSE IN MEXICO  
AFTER THE  
NAFTA**

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I.	Introduction .....	1148
II.	Objectives of the Parties in Entering the North American Free Trade Agreement .....	1152
	A. Objectives of All Three NAFTA Partners .....	1152
	B. Objectives of the United States .....	1153
	C. Objectives of Mexico .....	1157
III.	International Law Regarding State Responsibility for Injuries to Aliens .....	1161
	A. The Latin American View .....	1162
	B. The United States View .....	1167
	The American Law Institute and the United Nations .....	1171
IV.	A. The American Law Institute's Restatement (Third) .....	1171
	B. United Nations Declarations and Resolutions .....	1175
	The North American Free Trade Agreement, Chapter Eleven, Investment .....	1178
V.	A. Introduction .....	1178
	B. What Position Does the NAFTA Take-the Hull Doctrine or the Calvo Doctrine? .....	1179
	C. Steps Taken by Mexico .....	1180
VI.	Analysis .....	1181
	A. Introduction .....	1181
	B. Has Mexico Accepted the Hull Doctrine as Customary International Law? .....	1183
	C. Is the Calvo Doctrine Moot? .....	1185
	D. The Permanence of Mexico's Changed Stance Regarding the Calvo Doctrine .....	1188
	E. What Does the NAFTA Do to the Calvo Clause Found in the Mexican Constitution? .....	1188
	F. What Does a Calvo Clause in a Contract Do to the NAFTA? .....	1189
	G. The NAFTA's Role in Settling Questions of Diplomatic Protection Under Customary International Law .....	1190
VII.	Conclusion .....	1192

**\*1148 I. INTRODUCTION**

Following World War II, many nations took the economic position that the promotion of international free trade would be mutually advantageous. Many international agreements and institutions developed during this postwar period, the General Agreement on Tariffs and Trade (GATT [FN1]) being the most comprehensive. The main goal of the GATT was to eliminate or reduce

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tariffs and nontariff barriers to trade. [FN2] Overall, the GATT has been very successful. [FN3] Economists generally believe that the imposition of tariffs and nontariff barriers directly conflicts with the principles of comparative advantage, [FN4] which advocate free international trade. [FN5]

**\*1149** Historically, agreements between nations have been used to facilitate free trade. A Free Trade Area is defined in the GATT as "a group of two or more nations in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories ...." [FN6] The desirability of increasing free trade through the use of free trade agreements is recognized specifically in Article XXIV of the GATT.

In the last decade, the United States has entered into three such treaties. The Israel-United States Free Trade Area Agreement was signed in 1985 [FN7] and the Canada-United States Free Trade Agreement (CFTA) went into effect in 1989. [FN8] In the summer of 1990, Mexican President Carlos Salinas de Gortari and United States President George Bush commenced negotiations for a comprehensive agreement eliminating all tariffs and most nontariff barriers to trade between the two countries. [FN9] Canada subsequently joined the negotiations and the result was the North American Free Trade Agreement (NAFTA). [FN10] The NAFTA will incorporate the majority of the CFTA, including the duty reductions previously negotiated in the CFTA. [FN11]

The NAFTA also will unify one of the largest markets in the world. The trilateral trading relationship between Mexico, Canada, and the United States amounted to \$243 billion in 1991. [FN12] The implementation **\*1150** of the NAFTA will "eliminate economic barriers and inefficiencies which impede commerce among the three countries." [FN13] The NAFTA will lead to a more open investment climate, particularly in Mexico, which has had a restrictive foreign investment regime since its revolution in the early 1900s.

This Article focuses primarily on economic injuries to aliens, which can be the result of either expropriation or nationalization of foreign-owned property by a domestic government. [FN14] One of the underlying reasons for the strained foreign investment relations that Mexico has experienced with traditionally capital-exporting states has been its rigorous adherence to what is known as the Calvo Doctrine. [FN15] The conflict between foreign investors and the concepts embodied in the Calvo Doctrine arises when a host country nationalizes or expropriates property owned by a foreign investor. Traditionally, capital-exporting nations have not disputed the sovereign right of a host state to expropriate property. [FN16] The time, place, and manner of compensation to the injured alien-investor have, however, been the center of much debate.

The Calvo Doctrine, named after the famed Argentine jurist, Carlos Calvo, encompasses two basic concepts: (1) the requirement of absolute equality of the treatment of aliens with the treatment of nationals, meaning that aliens have resort to local remedies only, and (2) the policy of nonintervention of the alien's state of nationality. [FN17] While most of Latin America follows the Calvo Doctrine, the United States maintains that an international **\*1151** minimum standard of treatment for compensation for injuries to alien-investors exists and that the United States has a right, based on diplomatic protection, to assert its citizens' claims in an international tribunal. [FN18] Thus, an ongoing debate exists regarding the treatment of aliens between capital-exporting states such as the United States and lesser developed countries such as Mexico. This debate has focused on the "seemingly unbridgeable jurisprudential gap in the international community regarding the treatment of aliens." [FN19]

The conflicting views regarding the resolution of investment disputes at an international level are important in the context of the North American Free Trade Agreement. The NAFTA contains provisions that explicitly deal with investments and the resolution of investment disputes. [FN20] This Article addresses many questions involving the resolution of conflicting trade issues under the

NAFTA.

Part II of this Article describes the objectives of the NAFTA partners in deciding to enter into the treaty. Some of these objectives are obvious, but many are discovered only through a careful examination of the underlying assumptions that these countries have about each other and about free trade in general. [FN21] Part III provides a background of the international law regarding state responsibility for injury to aliens. It examines the law's history, the Latin American view of international law, Mexico's position on international law, the Calvo Clause in Mexico, and methods of settling disputes between nations. This Part also explores the U.S. position, the genesis of that position, and the current status of diplomatic protection and dispute settlement in U.S. policy and law. Part IV considers the relevant views taken by the American Law Institute's Restatement and the United Nations. Part V of the Article \*1152 details the investment provisions and dispute settlement procedures found in Chapter Eleven of the NAFTA.

Part VI postulates that, although the two views regarding investment disputes are disparate and Mexico's joining of the NAFTA seems to indicate that it has given up its adherence to the Calvo Doctrine, Mexico may not have given up anything. Certain NAFTA provisions have eliminated the need for the Calvo Doctrine without overtly confronting the basic postulates of the Doctrine. Thus, while the Doctrine is still part of Mexican law and ideology, its use will be minimal at best because of the NAFTA. In this sense, the traditional Mexican view has prevailed because its principles have been affirmed. Additionally, by pursuing this treaty with the rest of North America, Mexico has positioned itself in a situation ripe for economic gain, regardless of the "official" legal ideology.

## II. OBJECTIVES OF THE PARTIES IN ENTERING THE NORTH AMERICAN FREE TRADE AGREEMENT

### A. Objectives of All Three NAFTA Partners

Negotiators from Canada, Mexico, and the United States (the "Parties") were guided by underlying principles which can now be found in the Preamble of the NAFTA. [FN22] The NAFTA Parties made a commitment to promote employment and economic growth in each country, which is to be achieved by maximizing trade and investment opportunities and enhancing the competitiveness of their firms in the global marketplace. In making these commitments, the Parties considered the rights of workers, the desire to promote development, the environment, and the diverse social and cultural backgrounds in the three countries. [FN23]

The opening provisions of the NAFTA formally establish a free trade area, consistent with the GATT, between the Parties. Next, the basic rules and principles that govern the agreement are set forth, along with the objectives that will guide their interpretation. \*1153 [FN24] Additionally, each Party affirms its rights and obligations under the GATT and other international agreements. As a general rule, however, the NAFTA takes priority over other agreements in the event of a conflict. [FN25]

The most important objective of the NAFTA is the enhancement of the international competitiveness of firms throughout North America. This enhancement is crucial because all three NAFTA Parties have large foreign debts and must pursue an export-led growth strategy. Therefore, it is essential for all three countries to improve the efficiency and productivity of their work forces and industries in order to compete globally, as well as at home, without having to rely solely on their neighbors to solve their problems. [FN26]

### B. Objectives of The United States

The Bush Administration set out to negotiate an agreement that would benefit as broad a spectrum as possible of United States businesses, workers, and consumers. The State Department has stated that specific objectives included: (1) eliminating tariffs either immediately or within ten years; (2) eliminating nontariff \*1154 barriers on goods and services; (3) establishing open investment, and (4) protecting and enforcing intellectual property rights. [FN27]

Although several obstacles have stood in the way of achieving free trade with Mexico at an earlier time, a primary obstacle has been the "disparate power and conflicting histories" between the two countries. [FN28] It is possible, however, to overcome these types of differences. France and Germany represent an example of a mutually satisfactory trading relationship established despite a history of distrust, antagonism, and political tension. [FN29] To understand fully the United States-Mexico trading relationship, a brief historical outlook is appropriate.

The undercurrent of enmity that Mexico feels for the United States began after the 1846-48 War between Mexico and the United States, which ended with the Treaty of Guadalupe-Hidalgo. [FN30] United States intervention in Mexican affairs continued thereafter and included overt occupation by troops as well as meddling in domestic and foreign affairs. In the early 1900s, Mexico's concerns shifted from armed occupation to economic dependency on the United States. The Mexican people deplored the dominance that their northern neighbor maintained over their economy. [FN31] As a result of this perceived dominance, deep feelings of inferiority emerged in the minds of the Mexican people. [FN32] Consequently, Mexican economic policies were based on these perceptions. Mexico's restrictive import policies over the last fifty years have been largely the result of an attempt to lessen the domination of the United States, with the unintended effect of stifling the Mexican economy.

Mexico is responsible for its own development policies, however, and the ineffectiveness of these policies cannot be blamed on the \*1155 United States. [FN33] Moreover, since 1985, Mexico has shown that innovative and nonprotectionist foreign investment regulations can and will move the country toward economic independence and away from dependency on the United States. It is with this background and these concerns that Mexico understandably avoided a free trade agreement with the United States at an earlier time.

On the other hand, the United States had its own concerns and apprehensions before entering free trade negotiations with Mexico. Many detractors argued that a free trade agreement with Mexico would only lead to an inflow of goods made with cheap Mexican labor or an influx of Mexican workers migrating to the United States. [FN34] While the U.S. economy was, and is, generally not dependent on Mexico, it has been dependent, to some extent, on Mexican oil. Thus, the relationship between the two countries was one of interdependence. In fact, the stimulus to the idea of a bilateral free trading relationship was Mexican oil. Recognizing the importance of Mexican oil to the United States, senior U.S. officials quickly proposed a North American common market for energy. [FN35] Unsurprisingly, Mexico's reaction was negative. United States officials recognized that although a common market for energy would not become a reality, revenues from Mexican oil would create opportunities for other goods and services of the United States only if the Mexican market was open to U.S. firms. Suppliers in the United States were already in a position to take advantage of Mexican import growth because of their physical proximity and low transportation costs. In many cases, U.S. suppliers were also familiar with Mexican buyers and sellers and had enjoyed a dominance in prior trade relations. [FN36] These basic considerations led to increased U.S. interest in promoting liberal foreign investment laws in Mexico and eventually led to negotiating for a free trade agreement.

The United States also has a fundamental interest in assisting and cultivating a strong political climate and greater democracy in \*1156 Mexico. [FN37] Reducing the risks of instability of Mexico

in turn benefits the United States. Some commentators have contended that Mexican workers without jobs are a direct threat to the political stability of Mexico. Operating under this premise, critics of the NAFTA have argued that free trade will lead to a legalized free movement of workers: a fear that must be dealt with at a pragmatic level. In reality, many undocumented workers enter the country illegally and fulfill a need for jobs in low-wage markets in the United States. If the United States is faced with the choice between democratic stability in Mexico versus an influx of Mexican workers, surely stability will be chosen. Abridgement of Mexican immigration to the United States will be sacrificed for political security. [FN38]

The opportunity to integrate fully the economies of North America, which under the NAFTA is pledged to democracy and the free flow of capital and trade, is an opportunity that the United States cannot afford to forgo in this post-Cold War period. [FN39] The NAFTA has been characterized by U.S. government officials as "a rare strategic opportunity to secure, strengthen, and develop our continental base, economically and politically, in a way that will promote America's foreign policy agenda, our economic strength and leadership, and U.S. global influence." [FN40] Accordingly, it is apparent that U.S. political goals are just as significant as economic goals.

An important reason for U.S. interest in pursuing a free trade agreement with Mexico is the perceived benefit to domestic free trade in addition to the positive overall effect on worldwide trade. Mexico is the United States's third-largest trading partner, behind only Canada and Japan. [FN41] Therefore, the United States has a compelling interest in expanded trade with Mexico. Additionally, United States policy makers have seen that the efficient use of natural \*1157 and human resources on a regional basis throughout North America can be accomplished with a NAFTA and will lead to an increase in the global competitiveness of U.S. firms and workers. [FN42] An increase in Mexican economic growth will increase Mexican demand for U.S. goods and services which, in turn, will lead to expanded employment in the United States. Eventually, Mexican economic growth may lead to a slowdown of illegal immigration into the United States. [FN43]

Since 1985, Mexico has engaged in ongoing trade liberalization measures throughout its economy. These measures have led to increased opportunities for U.S. firms in Mexico. However, continued unilateral trade reforms by Mexico could be considered risky for foreign investors. Mexico's trade liberalization measures have been implemented through executive decree rather than by amendment of the underlying laws. [FN44] This process raises many doubts surrounding the permanence of the reforms. A NAFTA reinforces these reforms at an international level, thus giving foreign investors the reassurance they are seeking in relations with Mexico. [FN45] Cooperation with Mexico in a comprehensive free trade agreement such as the NAFTA serves the national economic and political objectives of the United States, will strengthen the economic capability of all of North America, and will result in enlarged opportunities for U.S. firms competing at a worldwide level. [FN46]

### C. Objectives of Mexico

Until recently, Mexico followed a protectionist trade policy based on the "import substitution" model. [FN47] According to this model, industrialization could only occur by protecting highly developed domestic industries until they were able to compete with \*1158 imports from industrially advanced countries. [FN48] In pursuing this theory, Mexico restricted foreign access to Mexican markets using several methods, including high imports tariffs, required licenses for all imports, official price lists for valuing customs duties, burdensome import approval procedures, and a domestically subsidized industrial sector. [FN49] Additionally, direct foreign investment and foreign ownership of assets were restricted, and more than one thousand business enterprises were taken over by the Mexican government. [FN50] Mexico generated a large national debt as a result of subsidizing inefficient industries and maintaining a high level of social services, which in turn led to high inflation rates. [FN51] Moreover, the Mexican unemployment rate was out of control in the

over-increasing labor force. [FN52] The economy suffered from inefficiency in the allocation of resources and lack of competition. Further, an overvalued peso led to balance-of-payment deficits, which also brought capital flight and low levels of domestic investment due to the fear of further currency devaluation. [FN53] Meanwhile, the government borrowed extensively from foreign creditors.

These problems produced the debt crisis Mexico experienced in 1982. Subsequently, President de la Madrid and Mexican policy makers embarked on a program of framing and actualizing a new economic strategy. Stabilization and internationalization took the place of import substitution. [FN54] The short-term solutions utilized in the past had failed to curb Mexico's problems. [FN55] Only after Mexican policy makers initiated a long-term restructuring of the economy \*1159 did inflation rates, real declines in domestic investment, personal income, and jobs begin to improve.

Mexico's economic transition began in 1985 with trade reforms pursuant to Mexico's accession to the GATT and IMF/World Bank Programs. The Salinas administration facilitated structural changes in the Mexican economy by encouraging foreign investment and promoting exports not related to oil. Additionally, Mexico developed an improved import policy and increased efforts at privatization. [FN56] The reforms in Mexico resulted in a significantly improved economy and represented a bold step toward a market-oriented open economy. The creation of this type of economic environment was necessary before free trade talks with the United States could be contemplated.

As an expansion of these reforms, President Salinas initiated negotiations with President Bush to establish a free trade agreement with the United States. [FN57] For Mexico, the NAFTA represents the international recognition of its modernization efforts, as well as a means for development in trade and investment. [FN58]

The precise goals announced by Mexico in entering the NAFTA are a natural extension of the goals of the 1985 reforms. First, the United States is by far Mexico's largest trading partner. [FN59] A \*1160 NAFTA would secure Mexico's access to U.S. markets and create greater opportunities for Mexican firms in addition to abating the threat of U.S. protectionism. [FN60] Second, the NAFTA would codify eight years of reforms which were carried out largely by Mexican presidential decree. [FN61] According to the Mexican Constitution, upon Senate ratification an international treaty made by the President which is consistent with the Constitution becomes the supreme law of the land. [FN62] This codification of the NAFTA dispels many fears of potential investors in the Mexican market and adds predictability and certainty to carrying out business in Mexico. [FN63] Third, Mexico needs a continued inflow of foreign investment, a repatriation of capital, and new lending from the international banking community in order to finance its economic development. A free trade regime in North America will facilitate this process. The NAFTA will also serve to ensure that future administrations do not unilaterally dismantle the post-1985 reforms. [FN64]

The North American Free Trade Agreement is a significant step forward in United States-Mexico trade relations. NAFTA provisions will benefit both economies and help create new fiscal opportunities. Each country has its own objectives for entering the agreement, but ultimately, the increased competitiveness of North American firms in the global marketplace is the paramount aspiration of all three Parties. [FN65]

### \*1161 III. INTERNATIONAL LAW REGARDING STATE RESPONSIBILITY FOR INJURIES TO ALIENS

The subject of state responsibility for injuries to aliens has been of interest to legal commentators since the late eighteenth century. Not until Emmerich de Vattel proclaimed that "[w]hoever uses a

(Cite as: 25 St. Mary's L.J. 1147, \*1161)

citizen ill indirectly offends the state, which is bound to protect this citizen," [FN66] has this area of law been recognized as a subject fit for customary international law. [FN67] Although a theoretical basis and a large body of arbitral decisions exists, state treatment of aliens is a legal topic which has eluded codification. [FN68]

The institution of diplomatic protection developed as an alternative to state-sanctioned individual self-help which had been previously used to recapture a national's private property taken by a foreign government. Diplomatic protection was recognized at an early time by de Vattel [FN69] and later was reaffirmed as an elementary principle of international law by the Permanent Court of International Justice in the Case of the Mavrommatis Palestine Concessions. [FN70] As diplomatic protection developed in the late nineteenth and early twentieth centuries, it was influenced by the "Great Powers" of Western Europe, whose influences included many instances of abuse. This abuse of diplomatic protection took the form of a more powerful nation asserting its strength over a weaker nation, \*1162 regardless of the merits of the foreign investor's claim. This domination led many critics to throw aside the entire institution as an alternative to the treatment of aliens in international law.

The European states asserted, and still claim today, that the rules regarding diplomatic protection are based on theories of justice and equality. [FN71] Critics generally assert two basic arguments against that claim. ~~Procedurally, the critics, especially in Latin America, argue against the institution of diplomatic protection itself, because they regard it as an oppressive burden.~~ At a substantive level, they argue that the state is required only to accord such treatment to aliens as it does to its own nationals. [FN72] This position, adopted mainly in Latin America, ignores any international minimum standard of treatment and allows individual nations to establish any level of treatment toward aliens, since each is free to determine at what level it will treat its own nationals. [FN73]

#### A. The Latin American View

Knowledge of the historical conditions surrounding the development of the Latin American view and the Calvo Doctrine is vital to understanding its manifestation in today's international arena. The Calvo Doctrine was the result of the exploitation by large foreign-owned corporations of natural resources in the underdeveloped world during the late nineteenth and the early twentieth centuries. [FN74] The corporations brought foreigners with them to direct and supervise operations in the underdeveloped regions of the world. [FN75] ~~A mutually profitable period of investment and migration ensued.~~ A certain amount of tension followed, however, between the foreign owners and the host governments. The increasing social, economic, and political problems experienced by the newly formed democracies of this period only intensified the tensions between foreign investors and the host governments, [FN76] especially in Latin America. The new Latin American republics found themselves in a difficult paradox-while they wholeheartedly embraced Western \*1163 ideas of democracy, they lacked experience with the democratic process. [FN77] As the new countries used nationalization as a tool to fuel economic growth, foreign investors became the victims of instability and economic injury. The foreign investors naturally questioned the foreign countries' domestic systems of justice, and their doubts were confirmed by many instances of abuse and poor administration. [FN78] These abuses led foreign investors to demand international protection from local "justice" [FN79] and ultimately to the institution of diplomatic protection. [FN80]

The purpose of diplomatic protection was to protect citizens' legitimate needs abroad when they could not obtain justice at a local level. Defects and abuses arose, however, in the operation of the institution. [FN81] Historically, recovery for a claim for diplomatic protection too often was based on **the political strength** of the foreign investor's home state rather than on the legitimate goals of diplomatic protection. [FN82] Dubious claims often were asserted, and armed intervention was

(Cite as: 25 St. Mary's L.J. 1147, \*1163)

sometimes utilized to compel recovery from weaker nations. [FN83]

In response to these abuses, Latin American nations attempted to formulate a strong moral and legal defense to fight what they viewed as "imperialistic encroachment." [FN84] The most articulate proponent against the abuse of diplomatic protection was Argentine jurist and diplomat, Dr. Carlos Calvo. The two basic tenets to his theory are as follows:

First, that sovereign States, being free and independent, enjoy the right, on the basis of equality, to freedom from "interference of any sort" by other States, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded \*1164 nationals, and that therefore they may seek redress for grievances only before the local authorities. [FN85]

These tenets are the core of the Calvo Doctrine, which was widely accepted and embraced by Latin American governments. [FN86] The Calvo Doctrine is seen in the form of the "Calvo Clause" and implemented by treaties, contractual stipulations, constitutional provisions, and municipal laws. [FN87] The Calvo Clause has not received widespread acceptance outside Latin America. The United States and Europe regard the use of the Calvo Clause as an attempt at "non-responsibility," by which host governments seek to immunize themselves from any international claims. [FN88] The Calvo Doctrine purports to eliminate the abuses found in the institution of diplomatic protection but fails to provide any acceptable alternative. [FN89] International court and arbitral decisions have, for the most part, resulted in confusing and controversial pronouncements regarding the Calvo Doctrine as a principle in international law. [FN90] Additionally, attempts by Latin American states to insert Calvo Clauses in treaties, constitutional provisions, contractual stipulations, and municipal law have been ineffective. [FN91] Most states have refused to sign international agreements which attempt to eliminate diplomatic protection as a remedy when such treaties substitute national treatment for an international minimum standard of justice. Also, because such agreements typically are based on international law, any local law or contract which incorporates the Calvo Doctrine usually fails because it is not accepted as international law. [FN92]

Mexico has traditionally been a leading proponent of the Calvo Doctrine. [FN93] The Mexican Constitution contains a provision that excludes \*1165 diplomatic protection under any circumstances. [FN94] Since the 1910 Revolution, Mexico has experienced an intense nationalistic fervor and quest for economic independence. [FN95] Every Mexican president between the Mexican Revolution and the 1985 reform movement has emphasized economic independence as a "fundamental principle and viewed foreign investment with some degree of caution." [FN96]

Eventually, oil, agriculture, railways, public utilities, and mining—all sectors of the Mexican economy which originally developed with foreign capital and technology—were closed to foreigners. [FN97] The Mexican Constitution, adopted in 1917, was "the legal expression of a new social, political, and economic philosophy." [FN98] Article 27 of the Constitution was the touchstone of Mexican reform. [FN99] Because it expressly gave direct ownership of all the minerals and subsoil to the Government, many important questions arose regarding the status of petroleum rights acquired before this declaration in the Mexican Constitution. [FN100] In 1925, the "Petroleum \*1166 Law" was passed, requiring that all mineral rights acquired before 1917 be confirmed with fifty-year concession contracts. [FN101] Ultimately, on March 18, 1938, Mexican President Cardenas signed a decree which expropriated the entire petroleum industry. [FN102]

One of the postrevolutionary government's first steps was to enact a new land-distribution policy and break up the large haciendas. It was not until 1935, however, that agrarian reform was carried out on a large-scale basis in the Cardenas Administration. At that time, a great deal of land owned by United States citizens was expropriated. [FN103] This became the focal point of the modern

international legal and diplomatic conflict between the United States and Mexico.

The right of a state to nationalize foreign-owned property for a public purpose is unquestioned in international law. [FN104] International law recognizes this right as an expression of sovereignty, and a state is free to nationalize just as it is free to determine its political regime and constitutional institutions. [FN105] The institution of diplomatic protection has developed not as a means to suppress the power and sovereignty of a state to exercise its right to nationalize but, rather, as a means to secure compensation or reparation in some form. [FN106] Thus, the real issue becomes proper compensation. Latin American and other developing nations take the position that compensation has to be determined by the laws and regulations of the nationalizing or expropriating state. [FN107] The United States does not maintain this view.

Since 1917, the United States, in diplomatic correspondence, has rejected Mexico's attempt to limit diplomatic protection through \*1167 the Calvo Clause. [FN108] The United States has also rejected Mexico's insistence on the equality-of-treatment principle, which maintains that under international law the maximum protection an alien can demand is that protection accorded to nationals. The United States has maintained that an international standard of justice must be accorded to all foreign investors who are the victims of an expropriation. [FN109]

#### B. The United States View

The United States and other capital-exporting countries maintain the view that the proper level of compensation for expropriated property is payment of just or full compensation. In the *Factory at Chorzow* [FN110] and the *Case Concerning German Interests in Upper Polish Silesia*, [FN111] the Permanent Court of International Justice confirmed that a government taking of an alien's property requires full compensation to the injured party. [FN112] The juridical underpinnings of this view go back to the writings of de Vattel, who formulated the principle that any injury to an alien was actually an injury to the alien's state itself. [FN113] Thus, measures taken by the alien's state to seek redress and compensation for the injury are justified. [FN114] Although the underlying injury is to the alien, liability \*1168 for that injury flows from the expropriating state to the state of the alien's nationality. [FN115] The United States also has asserted as a general proposition that all countries must conform to an international minimum standard of justice, and, although the citizens of a country may be content if their system does not conform to that standard, no other country is obligated to compel its citizens to acquiesce to these conditions. [FN116]

The conflict between the international minimum standard of justice and the principle of equality between nationals and aliens is powerfully depicted in the diplomatic correspondence exchanged between Mexico and the United States following the Mexican agrarian and oil expropriations. [FN117] In December 1937, the United States initiated communications with Mexico concerning recent expropriations by the Mexican government of property owned by U.S. citizens. [FN118] Many U.S. citizens who had invested in Mexico and whose property was expropriated were unable to reach a satisfactory solution to the question of compensation through direct negotiations with the Mexican government. [FN119] These citizens sought protection from their government. [FN120] The position of the government of the United States was that

[t]his Government has not undertaken and does not undertake to question the right of the Government of Mexico in the exercise of its sovereign power to expropriate properties within its jurisdiction ... \*1169 [but] that, in accordance with every principle of international law, of comity between nations and of equity, the properties of its nationals so expropriated are required to be paid for by compensation representing fair, assured, and effective value to the nationals from whom these properties were taken. [FN121]

(Cite as: 25 St. Mary's L.J. 1147, \*1169)

Secretary of State Cordell Hull urged "adequate, effective, and prompt compensation" for the expropriated property and proposed that countries arbitrate the issue. [FN122] Secretary Hull noted that the United States did not question the right of a government to expropriate the property of its own citizens beyond its ability or willingness to pay, but would not tolerate such a practice under international law. [FN123]

In response, Mexico declared that no universally recognized international rule existed which would determine the time and manner of compensation, but, rather, the issue of compensation was to be determined by Mexico's laws. [FN124] The Mexican Minister for Foreign Affairs continued:

The republics of our continent have let their voices be heard since the first Pan American Conference, vigorously maintaining principles of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity. [FN125]

On August 22, 1938, Secretary Hull responded:

\*1170 There is now announced by your Government the astonishing theory that this treasured and cherished principle of equality, designed to protect both human and property rights, is to be invoked, not in the protection of personal rights and liberties, but as a chief ground of depriving and stripping individuals of their conceded rights. It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape .... It is far from legitimate for the Mexican Government to attempt to justify a policy which in essence constitutes bald confiscation by raising the issue of the wholly inapplicable doctrine of equality. [FN126]

Eventually, Mexico and the United States agreed to settle their claims, while both retained their conflicting views on the level and manner of compensation required under international law. [FN127]

The United States refined what Secretary of State Hull meant by "effective" compensation by enacting the Hickenlooper Amendments, [FN128] which require "speedy compensation for such [expropriated] property in convertible foreign exchange, equivalent to the full value thereof ...." [FN129] The U.S. Department of State has declared that "prompt" is satisfied if interest is paid for the interval between the time of the taking and the date of payment, unless there is "an inordinate delay." [FN130] Additionally, the State Department expressed that compensation is "adequate" and satisfies international law if fair market value is paid. [FN131]

The above formulation for compensation under international law is known as the Hull Doctrine and is the position which the United \*1171 States asserts as customary international law. Examining these views in an historical context makes the significance of the adoption of the Hull Formula in the North American Free Trade Agreement much clearer. The implications of Mexico's decision to sign such a treaty are examined further in Part VI of this Article.

#### IV. THE AMERICAN LAW INSTITUTE AND THE UNITED NATIONS

##### A. The American Law Institute's Restatement (Third)

The American Law Institute's (ALI) Restatement (Third) of The Foreign Relations Law of the

United States (the "Restatement") purports to set forth the customary international law regarding economic injuries to foreign nationals. [FN132] The rules set forth in the Restatement are model rules for an international tribunal to use in deciding an issue under international law. [FN133] During the drafting of the current version of the Restatement, debate took place regarding the status of the Hull Doctrine and the required standard of compensation under international law. In the 1965 Restatement, "just" compensation was defined in the formal text as "prompt, adequate, \*1172 and effective." [FN134] Through the revisionary process, the Hull formula was removed from the formal text and relegated to a comment. [FN135] At a 1982 ALI meeting, a proposed amendment that considered reinstating the Hull formula as a rule of international law was defeated. [FN136] Critics of this defeat stated that, without the Hull formula, uncertainty existed as to when United States law and international law would be "clear and unambiguous" on the subject. [FN137] Without the uniformity offered by the Hull formula, the critics argued that General Assembly Resolutions of the United Nations, which adopted some other standard of compensation, would be nonbinding and would have only rhetorical effect. [FN138]

Proponents of the ALI view argued that the "prompt, adequate, and effective" standard represents the U.S. position rather than a rule of international law. [FN139] The rule adopted by the ALI supported the contention that the proposition which declared that "prompt, adequate, and effective" represented customary international law was infrequently followed. [FN140] Critics of the Hull formula \*1173 observed that pronouncing in the Restatement the Hull formula to be customary international law would be contrary to the stated principles of the Restatement. The Restatement, it was argued, does not only state the position of a consensus of states, but attempts to represent what an international tribunal would do if faced with the question. Because the courts have not been in agreement as to the proper standard of compensation, [FN141] it cannot conclusively be stated that the "prompt, adequate, and effective" standard necessarily would be applied by an international tribunal. [FN142]

One study concluded, however, that although no international tribunals had adopted the particular words "prompt, adequate, and effective," the valuation methods used to determine the awards were consistent with the U.S. State Department's definition of this formula. [FN143] Additionally, none of the tribunals had given the expropriating state the right to determine the standard for compensation under its laws alone. Even though international tribunals have followed the Hull formula, the Restatement, in order to comply with its own guidelines (i.e., stating the law that international tribunals \*1174 would apply), should have included "prompt, adequate, and effective" in the black-letter text to clear up any inconsistencies. [FN144]

Ultimately, "prompt, adequate, and effective" was not included in the black-letter text of the Restatement. [FN145] The Restatement states that, under international law, a taking of property requires just compensation in the absence of exceptional circumstances. [FN146] The Restatement also requires just compensation for "creeping expropriations." [FN147] No precise formula exists, however, for just compensation which suits all circumstances. This problem was recognized by the U.S. Supreme Court in interpreting the Fifth Amendment's requirement of just compensation. [FN148] The United Nations General Assembly has also experienced controversy in determining the precise formulation of a standard for compensation. Thus, the academic debate surrounding the exact formulation and linguistic approach taken by the Restatement becomes less important when confronted with reality.

The NAFTA thus has become the first multilateral treaty involving highly developed and lesser developed nations that incorporates Hull Doctrine ideals and consensual international arbitration mechanisms as the standard means for determining compensation. The enactment of the NAFTA represents a pivotal point in international law, especially in light of the fact that two of the parties, the United States and Mexico, historically have been adamant leaders of opposite views on the

international law of expropriations.

**\*1175 B. United Nations Declarations and Resolutions**

Prior to World War II, the determination of a compensation standard fell within the realm of international law. [FN149] Later, as the practice of determining compensation developed further, many different models were utilized. "Partially negotiated indemnification" or "compromise formulas" in the form of lump-sum agreements became the norm. [FN150] During this postwar period, newly emerging states embarked on programs of economic and social reform which often involved expropriations and nationalizations. Insisting upon the traditional approach to compensation would have undermined many of these programs. [FN151] The rationale was that a state could not be deprived of its right "to freely exploit their natural resources." [FN152] From this principle evolved the doctrine of permanent sovereignty over natural resources.

These realities were reflected in the post-World War II discussions regarding "economic development" and "self-determination" in United Nations General Assembly sessions. [FN153] For the first time, the newly emerging and developing states represented a majority in the United Nations (U.N.), and they began an attack on the traditional view concerning the required compensation for a taking. General Assembly Resolution No. 1803 (XVII) on Permanent Sovereignty over Natural Resources, which passed on December 14, 1962, [FN154] stated that when property is expropriated, "appropriate" compensation must be determined by international law. [FN155] The United States voted in favor of adopting Resolution 1803, with the caveat that "appropriate" compensation is the equivalent of "prompt, adequate, and effective" compensation. [FN156] On the other \*1176 hand, Mexico asserted that "appropriate" was satisfied if aliens were treated the same as nationals. [FN157]

With prompting by Communist and Latin American states, there was a strong push to allow expropriating states to determine any issue of compensation, leaving the matter outside the realm of international law. In fact, a United Nations Resolution confirmed this position, finding that "it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts." [FN158] Later, in 1974, the U.N. General Assembly adopted Resolution 3171, which reaffirmed the principles set out in Resolution 1803. Resolution 3171 also appeared to invite nationalizing states to legislate measures ensuring that their domestic courts would be the final arbitrators in the case of any dispute, stating that "each State is entitled to determine the amount of possible compensation and the mode of payment ...." [FN159]

As the membership of the U.N. began to change, the call for a new international economic order strengthened. The gap that persisted between the developed and the developing worlds was seen as evidence of inequality and injustice. As a result, on May 1, 1974, the General Assembly passed the "Declaration on the Establishment of a New International Economic Order," [FN160] which stated in part that under the prevailing circumstances, "[i]t has proved impossible to achieve an even and balanced development of the international community ...." [FN161]

On December 12, 1974, the General Assembly adopted the Charter on Economic Rights and Duties of States (CERDS) [FN162] that, in part, dealt with the issue of nationalization of foreign-owned property. Under the Charter, "appropriate" compensation was to be paid in the event of a taking, which was recognized as a sovereign right of the state. Additionally, all disputes were to be \*1177 settled in the domestic courts of the nationalizing state, including determination of the "appropriate" standard of compensation. [FN163]

These U.N. actions were seen by some commentators as no more than "a thinly disguised attempt

to endow the Calvo Doctrine ... with limited international status." [FN164] The arguments asserted by the developing states in favor of the Calvo Doctrine no longer had viability because, if a state's conduct conformed with international standards, there would be little to fear from diplomatic protection. [FN165] In the modern marketplace, a state has an international responsibility to foreigners who invest in and assist in developing its economy; accepting the benefits of that investment while rejecting the burdens is unacceptable. [FN166]

At first glance, it may seem that the intent of these U.N. declarations, as supported by their legislative histories, is to exclude any international minimum standard of compensation. [FN167] However, developing countries which engage in economic programs involving nationalizations have a vested interest in maintaining decent relations with foreign investors and their states. This situation is true regardless of any theoretical commitment to the Calvo Doctrine or rejection of the doctrine of diplomatic protection. The actions taken by nationalizing states are likely to mirror those actions of capital-exporting states because of their need for assets and technology. [FN168] When economic realities outweigh the benefits of embracing a doctrinal stance, the true position of a state crystallizes. For example, Mexico, formerly the premier supporter of the Calvo Doctrine, has set aside that conviction to gain economically from the NAFTA, even though the Mexican Constitution still contains a \*1178 Calvo Clause. This action is a prime example of a political struggle temporarily being set aside to gain an economic benefit for the country as a whole.

## V. THE NORTH AMERICAN FREE TRADE AGREEMENT, CHAPTER ELEVEN, INVESTMENT

### A. Introduction

On August 12, 1992, negotiations were completed and an agreement was reached by Canada, Mexico, and the United States for a North American Free Trade Agreement. [FN169] These three countries have long been united by an extensive network of cross-border investment. [FN170] Bilateral trade between Canada and the United States increased substantially after the negotiation of the CFTA. [FN171] As the result of free trade negotiations, United States direct investment in Mexico by U.S. firms increased from \$4.9 billion in 1987 to \$11.6 billion by the end of 1991. [FN172] The NAFTA is important to all three trading partners for several reasons. First, regional production is distributed on a rational basis which allows firms in all three countries to take advantage of local opportunities which allow them to be more globally competitive. [FN173] Second, recent investment-liberalization regulations in Mexico have given foreign investors greater assurance that the business climate will remain intact when a new administration enters office. [FN174] Third, the NAFTA authorizes the Parties to impose strict environmental standards on investments. \*1179 [FN175] Finally, the NAFTA protects the rights of investors by providing a strong international dispute resolution mechanism, which is found in Chapter Eleven. [FN176]

Chapter Eleven of the NAFTA is divided into two sections. [FN177] One covers investments by nationals of one NAFTA country in another NAFTA country. [FN178] An investment under the NAFTA includes all forms of ownership and interests in a business enterprise, property (tangible and intangible), or contractual investments. [FN179] The other section of Chapter Eleven details the dispute resolution mechanisms to be utilized in the event of a breach of a NAFTA obligation. Under this section, an investor may seek either the remedies provided by the domestic courts of the host country or monetary damages through binding arbitration under the NAFTA. [FN180] This chapter details standards of treatment, performance requirements, responsibilities of corporate representatives, expropriation guidelines, environmental measures, dispute resolution measures, and inclusions and exclusions to the protection of the NAFTA.

### B. What Position Does the NAFTA Take-the Hull Doctrine or the Calvo Doctrine?

(Cite as: 25 St. Mary's L.J. 1147, \*1179)

The NAFTA incorporates international law standards regarding **expropriation** and **compensation**. [FN181] The **compensation** obligation for an **expropriation** as set forth in the NAFTA "embodies" the position which the United States continuously has asserted as customary international law: [FN182] No Party shall nationalize or **expropriate** \*1180 an investment of an investor of another Party or take measures which amount to an **expropriation** of such investments (i.e., creeping **expropriation**) except (1) for a **public purpose**, (2) on a **nondiscriminatory** basis, (3) in accordance with due process of law, and (4) upon prompt payment of fair market value (plus applicable interest). [FN183] These requirements found in the NAFTA mirror the requirements found in the Restatement, including provisions regarding actions of the government that have the effect of a taking. [FN184] Some NAFTA experts have gone as far as saying that the new investment provisions "amount to a repudiation of the Calvo Doctrine." [FN185] In addition to requiring **compensation** according to the Hull formula, the NAFTA refers investment disputes to international arbitration. [FN186]

### C. Steps Taken by Mexico

The Mexican Constitution of 1917 contains strong restraints on foreign investments which have been followed by subsequent regulations and laws. [FN187] To overcome such restrictions on foreign investment, which would be prohibited by the NAFTA, Mexico has passed many liberalizing reforms. Since 1985, Mexico has embarked on a program that has led to an extensive increase in trade with the United States and, more importantly, the negotiation of the NAFTA. [FN188] Mexico has achieved trade-liberalizing reforms by utilizing several devices, including unilateral regulations and initiatives and bilateral and multilateral agreements. [FN189] Among the most important of the multilateral agreements was the Mexico-United States "Framework Understanding on Bilateral Trade and Investment." \*1181 [FN190] This agreement marked a critical step in broadening economic cooperation between Mexico and the United States by establishing a consultative mechanism to resolve disputes. [FN191]

In 1992, Mexico further reassured the global community of its commitment to international law when it enacted the Law Regarding the Making of Treaties. [FN192] This law established rules regarding international settlement of disputes. The Mexican Chamber of Deputies directly addressed the issue of any conflict that these rules may pose with the Calvo Clause as found in Article 27 of the Mexican Constitution. The law authorizes Mexico to negotiate international dispute resolution mechanisms in treaties and other institutional agreements. It specifically states, however, that submission to international dispute resolution is in no manner an invocation of diplomatic protection by a foreign government. With the implementation of this law, "all doubts about the scope of the 'Calvo Clause' in the Constitution are cleared." [FN193] These laws, together with Mexico's foreign investment reforms, represent a new era in Mexico's international relations.

## VI. ANALYSIS

### A. Introduction

The adoption of national treatment, most-favored-nation treatment (MFN), a policy of nondiscrimination, and the insertion of prompt, adequate, and effective compensation standards in the NAFTA, are developments never seen before in international law. [FN194] These developments raise many critical questions about the continued validity of the Calvo Clause and the long-standing debate between developed and less developed countries regarding \*1182 the level, manner, and place of compensation for a taking of a foreign investor's property.

At first glance, the signing of the NAFTA by Mexico indicates that it has given up some of its long-embraced doctrinal principles in order to fit into a new North American economic vision. A closer

examination reveals, however, that Mexico probably has not really given up anything, but has only gained.

The opening up of free trade markets in Mexico has led to growth in the Mexican economy. [FN195] Since 1986, the Mexican government has taken affirmative steps and has reformed Mexico's foreign investment scheme to encourage foreign investment. [FN196] The Calvo Clause, though, is still enshrined in the Mexican Constitution of 1917, while the foreign investment laws and regulations enacted since 1985 can be changed by future administrations. [FN197] Instead of letting the promise of economic gain outweigh traditional principles, perhaps Mexico has not changed its historically adamant position regarding the Calvo Doctrine at all. [FN198] Possibly Mexico agreed to the NAFTA dispute resolution mechanisms to avoid any political interference in the resolution of disputes, thus eliminating the need for foreign governments' asserting diplomatic protection on behalf of their investors. If true, this interpretation \*1183 would indicate that Mexico actually has reaffirmed rather than abandoned its commitment to noninterference, a basic tenet of the Calvo Doctrine. Future Mexican administrations may assert that Mexico still adheres strongly to the Calvo Doctrine notwithstanding the effect that the NAFTA may have on some international relations.

#### B. Has Mexico Accepted the Hull Doctrine as Customary International Law?

As a consequence of the failure to reach a worldwide consensus on the issue of compensation for expropriation, many nations have turned to alternative arrangements to establish standards for such compensation. [FN199] These alternatives have included lump-sum settlement agreements, bilateral investment treaties (BITs), and treaties of Friendship, Commerce, and Navigation (FCNs). [FN200] These arrangements are designed to avoid compensation disputes as well as provide mechanisms for dispute settlement. [FN201]

Some scholars argue that lump-sum settlement agreements generally have been considered proper examples of customary international law. [FN202] There are several reasons why this may be true. First, nonlegal considerations, such as resumption of diplomatic relations between the parties to the dispute, often enter into the settlement process. Second, these agreements are products of \*1184 bargaining. [FN203] Larger political or economic reasons often factor into each negotiation, and, as a result, it is questionable whether an international standard can be developed to fit every situation. [FN204] An argument can be made, though, that practical political, social, and economic considerations are exactly what should be considered to determine what customary international law is and that precisely because of this, lump-sum agreements are probative evidence of the law. The outcome of this argument depends on how law is defined—a particularly difficult task in the international arena.

Bilateral treaties typically reflect recognized ideals of customary international law. [FN205] These treaties are generally more indicative of what is considered customary international law than are lump-sum agreements. [FN206] Many bilateral investment treaties contain clauses using the Hull formula as the standard for compensation, which indicates its acceptance as an international law standard. [FN207] Scholars argue that insertion of the Hull formula into these treaties serves to reinforce customary rules of international law, [FN208] as treaty practice and arbitral decisions are indicative of such customs. [FN209] The negotiation of many FCNs and BITs in recent years has served to reaffirm the traditional standard of "prompt, adequate, and effective" compensation, by the explicit inclusion of the law in the agreements. [FN210]

However, the contention that treaties which incorporate the Hull formula as the standard for compensation are evidence of customary \*1185 international law is open for debate. Such treaties represent bargained-for arrangements in which both sides receive benefits. The potential

(Cite as: 25 St. Mary's L.J. 1147, \*1185)

expropriating states that agree to protect investors do so with the promise of trade or financial aid in return. [FN211] The very fact that these arrangements are negotiated agreements negates the contention that they are merely declarations of what is already the law.

This argument must be considered in order to answer whether Mexico, by signing the NAFTA, has accepted the Hull standard as customary international law. The NAFTA breaks new ground by being the first comprehensive multilateral treaty to include investment provisions. Previously, only FCNs and BITs approximated this inclusion. As a result, "[t]he NAFTA text will become a useful model for future GATT accords and U.S. bilateral free trade agreements." [FN212]

### C. Is the Calvo Doctrine Moot?

Mexico's past with the United States regarding compensation for expropriation has been rocky at best. Respect of the United States for Mexican judicial process and Mexican adherence to democratic ideals has been lukewarm at best. [FN213] During the negotiating stage of the NAFTA, one U.S. Senator observed, "We must write into any agreement due process protection; we cannot rely upon the Mexican courts or the Mexican government. Consequently, our dispute settlement arrangements will necessarily break new ground." [FN214] Others have joined in these concerns regarding corruption in Mexico. [FN215] Before entering into the NAFTA, the United States has had to address and eliminate these concerns.

\*1186 Mexico's concerns regarding intervention by the United States had to be dispelled. The NAFTA achieved these goals by providing for adequate protection for U.S. investors from any denial of justice through utilization of the dispute resolution procedures provided in Chapter Eleven and, if necessary, Chapter Twenty. Chapter Eleven provides for a juridical process of exhaustion of remedies that meets the requirement for diplomatic protection customary under international law. Additionally, if a satisfactory resolution proves unattainable under this Chapter, remedies are available under Chapter Twenty, which appears to be an enactment of the institution of diplomatic protection in an international treaty. [FN216] For example, if a U.S. investor is given an award under Chapter Eleven of the NAFTA as the result of an expropriation by the Mexican government, and Mexico does not comply with the award, an insured investor can appeal to the U.S. government to assert a claim by alleging that the noncompliance with the award is a breach of a NAFTA obligation. Violation of a Chapter Eleven award automatically triggers Chapter Twenty dispute settlement procedures. Under Chapter Twenty dispute resolution, the Parties are involved in a panel selection process that is designed to ensure fair and neutral procedures, so that any fears Mexico may have concerning political interference by the United States are dispelled.

The NAFTA is the first multilateral treaty in which a developing country has agreed to use the Hull Formula for the resolution of compensation issues. [FN217] Mexico seemingly has released its hold on the doctrinal principles encompassed in the Calvo Doctrine. There are two basic reasons for this release: first, principles often become secondary when an economically advantageous opportunity presents itself; [FN218] second, the basic motives for which the Calvo \*1187 Doctrine initially developed have disappeared as Latin American countries have turned into market economies with stable judiciaries, and the fear of abuse by more powerful states is no longer so prevalent. [FN219] Also, if such abuse does occur, the Latin American governments are now more experienced in the democratic process and therefore can adequately handle any abuses through their own or international court systems. [FN220] As a result, self-sufficient states such as Mexico no longer need to stand behind the Calvo Doctrine and have nothing to fear from adhering to an international standard of justice. Consequently, the importance of the Calvo Doctrine will continue to diminish.

Nonintervention, a basic postulate of the Calvo Doctrine, has become a universally accepted

(Cite as: 25 St. Mary's L.J. 1147, \*1187)

principle in the law of nations. [FN221] As a matter of practice, the United States and other capital-exporting states have adhered to this principle, except in the instance of a clear denial of justice. [FN222] Thus, regarding the NAFTA, the dispute settlement mechanisms incorporated into the agreement are designed to dispel fears from both sides of a debate. These mechanisms ensure due process of law, as well as the prevention of political interference by any of the governments. Therefore, the motives behind the Calvo Doctrine, the use of Calvo Clauses, and the motives behind opposition to the Doctrine have been effectively dealt with, making the issue moot. The adoption of the North American Free Trade Agreement has superseded the Calvo Clause by safeguarding the rights of North American citizens throughout the continent. [FN223]

**\*1188 D. The Permanence of Mexico's Changed Stance Regarding the Calvo Doctrine**

Mexico has experienced many economic stages, with different administrations attempting to utilize different strategies to achieve economic development and growth. If after the initial euphoria over the NAFTA has passed and no real changes occur in the Mexican economy, it is certainly conceivable that an incoming administration will change direction and return to a more protectionist attitude toward international trade. Attempting to assert Calvo Doctrine principles to support this change will be easy if Article 27 of the Mexican Constitution is used as a basis.

The mootness of the Calvo Doctrine hinges on the certainty that Mexico's future administrations will continue to follow an investment liberalization scheme. The current Salinas Administration has opted for economic realities and benefits, instead of adherence to traditional legal principles. [FN224] Because Mexico has agreed to the Chapter Twenty dispute resolution procedures, which are a form of diplomatic protection, any future Mexican administration could not attempt to reject diplomatic protection or assert the Calvo Doctrine without being in breach of the NAFTA. While Article 27 was in place at the time the NAFTA was signed, it seems that, in agreeing to the NAFTA, Mexico inherently has compromised traditional Calvo Doctrine principles and probably has foreclosed reliance on the Doctrine entirely.

**E. What Does the NAFTA Do to the Calvo Clause Found in the Mexican Constitution?**

As previously discussed, the Calvo Clause in the Mexican Constitution bars diplomatic protection of resident aliens in all circumstances. Under the Constitution, when an alien decides to conduct business in Mexico, the alien agrees to be considered a Mexican national for purposes of property acquired while in Mexico. [FN225]

The dispute settlement mechanisms, as well as the standards for compensation found in Chapter Eleven of the NAFTA, do not violate **\*1189** the Mexican Constitution. [FN226] In fact, in anticipation of such an arrangement, the Mexican government ensured that the NAFTA would not be subject to constitutional attack. [FN227] The Law Regarding the Making of Treaties resolves any doubts about the scope of the Calvo Clause in the Constitution by expressly authorizing the negotiation of international dispute resolution mechanisms in treaties in addition to directing that all decisions and awards made by such tribunals established under treaties be enforced and recognized by Mexico. [FN228]

**F. What Does a Calvo Clause in a Contract Do to the NAFTA?**

The subject of Calvo Clauses in contracts has been the focus of many conflicts in international law. [FN229] The United States asserts that an individual cannot give up a right in a contract which is not hers to give away, because the injury is to the state; therefore the state has a right to a remedy under international law. [FN230] Because individuals are not the subjects of international law, waiver rights granted to nations under international law cannot be used by individuals. [FN231]

Latin American states take the opposite view—an individual is a subject of international law and, as such, has the capability to waive the right to diplomatic protection in a contract. [FN232] Because the NAFTA provides for a fair system of arbitration to resolve disputes between an investor and an expropriating state, resort to a Calvo Clause in a contract is unnecessary. [FN233] First, \*1190 the NAFTA specifically directs arbitration at an international level. [FN234] Second, an aggrieved investor most likely will not have any opportunity or desire to ask for diplomatic protection, because implementing diplomatic protection under the NAFTA requires exhaustion of remedies, and the NAFTA provides additional steps in the established process. Chapter Eleven of the NAFTA offers different enforcement mechanisms that can be used without an investor's having to request that a claim be brought to an international tribunal. Upon signing the NAFTA, each Party has agreed to enforce awards in its territory. [FN235] If a Party fails to abide by an award, the Free Trade Commission provided for in Chapter Twenty may make a determination that the Party's failure to comply with the award is a breach of a NAFTA obligation and may impose sanctions accordingly. [FN236] These provisions amount to a substitute for traditional diplomatic protection. In addition, an investor may seek enforcement under the ICSID Convention, the New York Convention, or the Inter-American Convention on International Arbitration. [FN237] Therefore, with these enforcement mechanisms in place, along with due process guarantees, requests for traditional diplomatic protection by investors who have been wronged are unlikely, even if the contract in question does contain a Calvo Clause, because of the protection already built into the system. Also, it would be difficult, if not impossible, to assert a claim of denial of justice when the investor's country is actively involved in the dispute resolution and enforcement process. [FN238]

#### G. The NAFTA's Role in Settling Questions of Diplomatic Protection Under Customary International Law

Chapter Eleven of the NAFTA is designed to end investment disputes quickly and fairly, which, of course, will not always be the \*1191 outcome. In any international law context, enforcement of awards normally creates the most conflicts. The drafters of the NAFTA, aware of this difficulty, incorporated solid enforcement mechanisms within the investment chapter itself. Chapter Eleven refers to Chapter Twenty dispute resolution, as well as to conventions to which all Parties are signatories. [FN239] While Chapter Eleven remedies will not always end a dispute under Chapter Twenty, the Parties are authorized to suspend NAFTA benefits when an appointed panel has determined that there has been a breach of a NAFTA obligation and that a Party has failed to comply. [FN240] All three Parties are obliged to provide that awards will be enforced within their territories. The respective arbitration rules provided for in Chapter Eleven also include methods for enforcing the awards. Under Article 54.1 of the ICSID Convention, each signatory must enforce awards and the obligations imposed by such awards as if they were a final judgment in a court of that state. [FN241] Although nothing in the NAFTA itself prohibits assertion of a claim of diplomatic protection at a level beyond the NAFTA, such prohibitions appear to be unnecessary because of the protections found in Chapter Twenty, which are triggered after Chapter Eleven remedies are exhausted. [FN242] Any such claim, however, would not be based on a breach of a NAFTA obligation, but on a breach of customary international law, because the NAFTA does not alter an investor's rights under customary international law. Under the NAFTA, an investor has rights which are not available or specifically enumerated under customary international law, but which may be specifically referred to and upheld. These rights include the right to nondiscriminatory treatment [FN243] and the right to compensation for \*1192 an expropriation at "fair market value," "paid without delay," and in "freely transferable" currency. [FN244] Under the NAFTA, the aggrieved entity has the opportunity to file a claim against the breaching state itself without having to rely on its own government's asserting a claim on its behalf. [FN245] Even after receiving a Chapter Eleven judgment, the aggrieved entity has remedies under Chapter 20 if a breaching state does not comply with the award. The NAFTA gives the aggrieved entity assurance of at least procedural due process. It also has enforcement mechanisms that go above and beyond

what is guaranteed by customary international law. Thus, although diplomatic protection is not prohibited by the NAFTA, it is most likely unnecessary.

## VII. CONCLUSION

The debate between Mexico and the United States theoretically still lingers. Mexico still has a Calvo Clause in its constitution. The United States Congress and State Department continue to adhere to the Hull Doctrine and the right of the United States to assert a claim of diplomatic protection on behalf of its citizens. Mexico's decision to negotiate and enter a free trade agreement which specifies the Hull Doctrine as the standard for compensation is significant. But, it was a necessary step in Mexico's economic development. The United States would not enter into an international treaty with comprehensive investment provisions without assurance that its foreign investors would be adequately protected. Entering into the NAFTA is important for Mexico because of the short- and long-term gains that its economy will experience. Upon examination of the historical motives behind the debate, Mexico's abandonment of the Calvo Doctrine may be seen as insignificant.

First, the Calvo Clause is still found in Article 27 of the Mexican Constitution. Second, by entering into the NAFTA, Mexico's fears that the United States will assert diplomatic protection may have been dispelled. With adequate dispute resolution mechanisms in place, it is highly improbable that the United States would resort to diplomatic protection. Additionally, in this context, the Calvo Clause is moot because the underlying motives of the doctrine are \*1193 adequately dealt with within the NAFTA investment and dispute resolution provisions.

The North American Free Trade Agreement represents a major step for world trade. The investment chapter negotiated between the NAFTA countries is an affirmative step in the direction of a future of worldwide free trade. By negotiating an agreement that has cut through decades-old mistrust and preconceptions, the NAFTA Parties have staked their claim to the economic priorities and competitive strategies that will be necessary to gain preeminence in a global trading market.

FNa. B.A., Texas A&M University; J.D., St. Mary's University School of Law; LL.M. (International Law), University of Miami School of Law.

FN1. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187 [hereinafter GATT].

FN2. C. Douglas Dillon, United States Foreign Trade and Investment Policies, in LEGAL PROBLEMS OF INTERNATIONAL TRADE 107, 109 (Paul O. Proehl ed., 1959); Henry Zheng, Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and GATT, 25 STAN. J. INT'L L. 45, 61 (1988).

FN3. See C. Douglas Dillon, United Foreign Trade and Investment Policies, in LEGAL PROBLEMS OF INTERNATIONAL TRADE 107, 109 (Paul O. Proehl ed., 1959) (detailing participation and effect of GATT). United States tariff duties have decreased under GATT and related treaties so that the weighted average tariff charged by the United States is about 4%. Sidney Weintraub, The Promise of United States-Mexican Free Trade, 27 TEX. INT'L L.J. 551, 560 n.24 (1992).

FN4. Henry R. Zheng, Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and GATT, 25 STAN. J. INT'L L. 45, 62 (1988). Under the theory of comparative advantage, a nation exports the products that it produces most efficiently and imports the products that it produces less efficiently. Thus, overall welfare in all nations presumably is increased. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND

(Cite as: 25 St. Mary's L.J. 1147, \*1193)

ECONOMIC RELATIONS 195 (1991); see Theresa A. Amato, Labor Rights Conditionality: United States Trade Legislation and the International Trade Order, 65 N.Y.U. L. REV. 79, 92 n.85 (1990) (finding that doctrine of comparative advantage was first announced by David Ricardo in 1817).

FN5. Sharon D. Fitch, Comment, Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?, 22 CAL. W. INT'L L.J. 353, 356 n.9 (1992).

FN6. GATT, *supra* note 1, art. XXIV § 8(b).

FN7. Israel-United States: Free Trade Area Agreement, April 22, 1985, U.S.-Israel, reprinted in 24 I.L.M. 653 (1985).

FN8. Canada-United States: Free Trade Agreement, January 2, 1985, U.S.-Canada, reprinted in 27 I.L.M. 281 [hereinafter CFTA].

FN9. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 7 (1993).

FN10. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts.



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ECONOMIC RELATIONS 195 (1991); see Theresa A. Amato, Labor Rights Conditionality: United States Trade Legislation and the International Trade Order, 65 N.Y.U. L. REV. 79, 92 n.85 (1990) (finding that doctrine of comparative advantage was first announced by David Ricardo in 1817).

FN5. Sharon D. Fitch, Comment, Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?, 22 CAL. W. INT'L L.J. 353, 356 n.9 (1992).

FN6. GATT, *supra* note 1, art. XXIV § 8(b).

FN7. Israel-United States: Free Trade Area Agreement, April 22, 1985, U.S.-Israel, reprinted in 24 I.L.M. 653 (1985).

FN8. Canada-United States: Free Trade Agreement, January 2, 1985, U.S.-Canada, reprinted in 27 I.L.M. 281 [hereinafter CFTA].

FN9. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 7 (1993).

FN10. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts. 4-8 & annexes) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

FN11. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 7 n.2 (1993).

FN12. Gist: North American Free Trade Agreement, 3 DISPATCH 28, 28 (Supp. 5 1992).

FN13. *Id.*

FN14. State taxes and regulatory measures that impair the economic viability of a business enterprise sometimes result in what is effectively a taking or expropriation. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 95, 786 (1991). Often, the imposition of taxes and regulation is referred to as "creeping expropriation" and is also included in the law of state responsibility for economic injuries to aliens. *Id.* at 786-87.

FN15. DONALD R. SHEA, THE CALVO CLAUSE 5-6 (1955).

FN16. F.V. GARCA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 123 (1990). This right dates back to the early writings of Grotius (1583-1645) and others, recognizing a state's right of eminent domain over private property. *Id.* (citing H. NEUFELD, THE INTERNATIONAL PROTECTION OF PRIVATE CREDITORS FROM THE TREATIES OF WESTPHALIA TO THE CONGRESS OF VIENNA (1648-1815), at 55 (1971); see HUGO GROTIUS AND INTERNATIONAL RELATIONS 1-2 (Hedley Bull et al. eds., 1990) (giving background on Grotian thought in international relations)).

FN17. DONALD R. SHEA, THE CALVO CLAUSE 19 (1955); see *infra* note 85 and accompanying text (detailing Calvo Clause).

FN18. See *id.* at 38-39 (refusing to abolish right of diplomatic intervention). Diplomatic protection gives aliens who have suffered injury to their persons or properties abroad the right to appeal to their government for protection if local remedies fail to produce satisfactory results. See *id.* at 5 (signifying lack of faith in certain international agreements).



FN19. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 17-19, 21 (1984).

FN20. NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1101(1), 32 I.L.M. at 639.

FN21. The specific relationship concerning the Calvo Doctrine and the responsibility for injuries to aliens as it pertains to Canada are beyond the scope of this Article.

FN22. See NAFTA, *supra* note 10, pmb., 32 I.L.M. at 297. For the chronology of the commitment to enter and negotiate a free trade agreement, see Commitment to Reach North American Free Trade Agreement, 3 DISPATCH 565, 565-67 (1992), which notes that the United States and Mexican initiation was followed by joint Canadian-United States-Mexican approval.

FN23. NAFTA, *supra* note 10, pmb., 32 I.L.M. at 297.

FN24. The objectives set forth in Article 102 are as follows:

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and the resolution of disputes; and
- (f) establish a framework for further trilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

NAFTA, *supra* note 10, ch. 1, subsec. A., art. 102(1)-(2), 32 I.L.M. at 297.

FN25. NAFTA, *supra* note 10, ch. 10, subsec. A, art. 103, 32 I.L.M. at 297. There are exceptions to this rule. For example, the trade provisions of certain environmental and conservation agreements will prevail over the NAFTA, subject to a requirement to minimize any inconsistencies with the NAFTA. *Id.* art. 104, 32 I.L.M. at 297-98.

FN26. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 4 (1992).

FN27. Gist: North American Free Trade Agreement, 3 DISPATCH, 28; 28 (Supp. 5 1992).

FN28. SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES? 13 (1984).



FN29. Id.

FN30. Id. at 15. This treaty ended the war in February 1848. The New Mexico and California territories were taken away from Mexico and title to Texas vested in the United States. This resulted in Mexico's territory being reduced by almost one-half. Id.

FN31. Id. at 14-16.

FN32. SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES? 15 (1984). Mexico was left with a very strong anti-American sentiment, sometimes verging on an "almost pathological Yankeeophobia" which has been perpetuated in Mexican literature and culture. Id.

FN33. Id. at 23.

FN34. Id. at 27-29.

FN35. Id. at 38.

FN36. SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES? 38 (1984).

FN37. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 10 (1992).

FN38. SIDNEY WEINTRAUB, FREE TRADE BETWEEN MEXICO AND THE UNITED STATES? 29 (1984).

FN39. The North American FTA: The New World Order Takes Shape in the Western Hemisphere, 3 DISPATCH 290, 291 (1992).

FN40. Id. at 290. "NAFTA would be a key component of a network of global, regional, and bilateral arrangements that promote American interests. It can strengthen the capabilities of North America, enhancing our ability to compete globally." Id.

FN41. Gist: NAFTA, 3 DISPATCH 110, 110 (1992).

FN42. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 11 (1992).

FN43. Id.

FN44. Id.

FN45. Id.

FN46. Robert B. Zoellick, The North American FTA: The New World Order Takes Shape in the Western Hemisphere, 3 DISPATCH 290, 290 (1992).

FN47. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 9 (1993).

FN48. Id.

FN49. Id.



FN50. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282 (Apr. 1990). Although the policies of the Mexican government contributed to the development of the manufacturing sector of the economy, they eventually led to the economic crisis which Mexico experienced in the early 1980s. Id.

FN51. Id. at 1-2.

FN52. Id.

FN53. Id.

FN54. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States Mexican Relations, U.S.I.T.C. Pub. 2275, at xi (Apr. 1990).

FN55. Id. For further information regarding Mexico's economic reform, see generally Julio C. Trevino, Direct Foreign Investment in Mexico, 18 INT'L LAW. 297 (1984); Ignacio Gomez-Palacio, The New Regulation on Foreign Investment in Mexico: A Difficult Task, 12 HOUS. J. INT'L L. 253 (1990); Fernando Sanchez-Ugarte, Mexico's New Foreign Investment Climate, 12 HOUS. J. INT'L L. 243 (1990).

FN56. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States Mexican Relations, U.S.I.T.C. Pub. 2275, at xi (Apr. 1990). Mexico became the 92nd Contracting Party to the General Agreement on Tariffs and Trade on August 24, 1986, when the protocol to accession took effect. Id. at 2-1; see Richard D. English, The Mexican Accession to the General Agreement on Tariffs and Trade, 23 TEX. INT'L L.J. 339, 340 (1988) (noting that contracting parties to GATT permitted Mexico to accede to General Agreement on July 18, 1986).

FN57. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 15 (1993). The long-term structural changes in the Mexican economy are the result of explicit policies set forth by the Mexican government. Specifically, these policies include: (1) adjustment of the Mexican legal system to attain international competitiveness; (2) opening to trade; (3) liberalization and promotion of foreign investment; and (4) austerity in public finances and expense and increase of the tax base. Miguel Jauregui-Rojos, Liberalization of Foreign Investment in Mexico: Present and Future Challenges, in PRIVATE INVESTMENTS ABROAD-PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1992, at 2-20 (Carol J. Holgren ed., 1992).

FN58. Miguel Jauregui-Rojos, Liberalization of Foreign Investment in Mexico: Present and Future Challenges, in PRIVATE INVESTMENTS ABROAD-PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1992, at 2-21 (Carol J. Holgren ed., 1992).

FN59. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 4, 12 (1992).

FN60. Id. at 12.

FN61. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 33 (1993).

FN62. XI MEX. CONST. art. 133 cited in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 112, 230 (Albert P. Blaustein & Gilbert H. Flanz eds., 1988).

FN63. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 32-33 (1993).



FN64. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 16 (1992).

FN65. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 33 (1993).

FN66. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 9 (1984), quoting EMMERICH DE Vattel, LAW OF NATIONS 161 (J. Chitty ed., 1833).

FN67. Scholars say that the history of this doctrine begins with the natural rights theory developed by the English philosopher John Locke during the 17th century. Under this theory, the only purpose of a government is to protect the natural rights of life, liberty, and property. Utilitarianism, which posits that every political decision should result in the outcome which effectuates the greatest good for the greatest number of people, is another historically important theory. Although the two theories seem to conflict, they are actually mutually reinforcing. Utilitarians bolster the natural rights theory because they believe that individuals with security, i.e., property rights, are productive and thus more beneficial to society. See ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 772-73 (1991) (describing natural-rights theory and utilitarian theory).

FN68. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 11-14 (1984).

FN69. EMMERICH DE Vattel, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 222 (1820).

FN70. See MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE § 420, at 397 (Arno Press 1972) (1943) (discussing first Mavrommatis Case).

FN71. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 17-19, 21 (1984).

FN72. *Id.* at 18-19.

FN73. *Id.*

FN74. DONALD R. SHEA, THE CALVO CLAUSE 9 (1955).

FN75. *Id.*

FN76. *Id.*

FN77. *Id.* at 10.

FN78. DONALD R. SHEA, THE CALVO CLAUSE 10 (1955).

FN79. *Id.* Procedures were created in which aliens could appeal to their home state for protection of their personal and property rights. Originally based on the principles of comity, protection was eventually asserted as a matter of legal right. *Id.*

FN80. *Id.*

FN81. *Id.* at 11.



FN82. DONALD R. SHEA, THE CALVO CLAUSE 12 (1955).

FN83. *Id.* at 12-13. Powerful nations abused international claims by using the claims as a justification for armed intervention, e.g., the 1838 and 1861 French interventions in Mexico; the 1904 United States intervention in Santo Domingo; and the 1902-03 intervention in Venezuela by Germany, Great Britain and Italy. *Id.*

FN84. *Id.* at 14.

FN85. DONALD R. SHEA, THE CALVO CLAUSE 19 (1955).

FN86. *Id.* at 20-21.

FN87. *Id.* at 21.

FN88. See generally *id.* at 37-55 (detailing positions of United States and countries worldwide regarding Calvo Clause).

FN89. DONALD R. SHEA, THE CALVO CLAUSE 20 (1955).

FN90. See *id.* at 122-24 (finding that Calvo Clause has been indirectly involved in more than 30 international arbitrations that have resulted in confusing decisions).

FN91. See generally DONALD R. SHEA, THE CALVO CLAUSE 21-32 (1955) (detailing numerous attempts which have been rebuffed by outside law).

FN92. See generally *id.* at 21-22 (1955) (indicating favorable attitude towards Calvo Clause by Latin American countries, but total refusal of United States and Europe to accept such treaty provisions).

FN93. Manuel R. Garcia-Mora, THE CALVO CLAUSE IN LATIN AMERICAN CONSTITUTIONS AND INTERNATIONAL LAW, 33 MARQ. L. REV. 205, 206 (1950). In 1861, Napoleon III sent an expedition to Mexico to secure payment of claims that French citizens had against the Mexican government. Such interventions led Mexico to advocate strongly for the Calvo Doctrine. *Id.*

FN94. Regarding the ability to acquire lands and waters in Mexico, the Mexican Constitution states in Article 27:

1. Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters and their appurtenances, or to obtain concession for the exploitation of mines or waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Affairs to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their Governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the acquired property to the Nation. Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country.

MEX. CONST. art. 27 as cited in XI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 23-32, 143-153 (Albert P. Blaustein & Gilbert H. Flanz eds., 1988).

FN95. ERIC N. BAKLANOFF, EXPROPRIATION OF UNITED STATES INVESTMENTS IN CUBA, MEXICO, AND CHILE 34 (1975) (finding that prior to Mexico's revolution, United States, British, and other foreign investors dominated virtually all sectors of Mexican industry).

FN96. *Id.* at 43.



FN97. *Id.* at 38. Approximately \$300 million of U.S.-owned property was expropriated between 1935 and 1940. *Id.* at 37-38.

FN98. *Id.* at 43.

FN99. ERIC N. BAKLANOFF, *EXPROPRIATION OF UNITED STATES INVESTMENTS IN CUBA, MEXICO, AND CHILE* 43 (1975).

FN100. *Id.* at 50. On the eve of expropriation of the petroleum industry in Mexico, more than 70% of Mexico's crude production was in the hands of foreign owners. *Id.*

FN101. *Id.* at 63.

FN102. *Id.*

FN103. See generally JOSEF L. KUNZ, *THE MEXICAN EXPROPRIATIONS*, reprinted in *CONTEMPORARY LAW PAMPHLETS* 15, 16-20 (N.Y. Univ. Sch. of Law Int'l Law Series 5, No. 1, 1940) (discussing land expropriations of Mexican government).

FN104. *Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic* [TOPCO/LIBYA Case], 53 I.L.R. 389 (1977), reprinted in 17 I.L.M. 1, 21 (1978).

FN105. *Id.*

FN106. *Id.* at 22.

FN107. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1046 (1987).

FN108. Memorandum of Conversation, by the Chief of the Division of the American Republics (Duggan) (Dec. 14, 1937), in 5 *Foreign Relations of the United States* 657-60 (1938).

FN109. JOSEF L. KUNZ, *THE MEXICAN EXPROPRIATIONS*, reprinted in *CONTEMPORARY LAW PAMPHLETS* 16, 16-20 (N.Y. Univ. Sch. of Law Int'l Law Series 5, No. 1, 1940).

FN110. *The Factory at Chorzow (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, cited in Patrick M. Norton, *A Law of the Future or a Law of the Past: Modern Tribunals and the International Law of Expropriation*, 85 *AM. J. INT'L L.* 474, 476 (1991).

FN111. *Case Concerning German Interests in Polish Upper Silesia (Ger. & Pol.)*, 1926 P.C.I.J., (ser. A) No. 7, cited in Michael J. Volkovitsch, Comment, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 *COLUM. L. REV.* 2162, 2203-05 (1992).

FN112. Michael J. Volkovitsch, Comment, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 *COLUM. L. REV.* 2162, 2203-05 (1992). The decisions recognize that aliens are vested with "incidents of citizenship" that give them the right to bring an action that will be adjudicated to see that their interests are protected. *Id.* at 2205.

FN113. RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 9 (1984).

FN114. DONALD R. SHEA, *THE CALVO CLAUSE* 11 (1955). State practice was to intervene on behalf of the alien. These interventions took the form of negotiations, arbitrations, economic and political pressure, and sometimes,



armed intervention. *Id.*

FN115. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1042 (2d ed., 1987). The derivative nature of a state's claim as well as the nationality of an alien are important factors in the determination of the measure of reparation, the effectiveness of an individual's waiver of diplomatic protection, and the state's responsibility. See generally *North American Dredging Co. (U.S. v. Mex.)*, 4 U.N. Rep. Int'l Arb. Awards 26, 26-27 (1951) (ruling on contract clause that forced aliens to give up their rights as nationals of another country while employed in Mexico), cited in LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1065 (2d ed. 1987); *Nottembohm Case (Liech v. Guat.)* 1955 I.C.J. 4 (dealing with German native who had been naturalized in Liechtenstein and whose assets were seized in Guatemala), cited in LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 374-78 (2d ed. 1987).

FN116. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1042-43 (2d ed. 1987).

FN117. See ERIC N. BAKLANOFF, EXPROPRIATION OF UNITED STATES INVESTMENTS IN CUBA, MEXICO, AND CHILE 26-29 (1975) (discussing Mexican oil expropriations).

FN118. Memorandum of Conversation, by the Chief of the Division of the American Republics (Duggan) (Washington, D.C., Dec. 14, 1937), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 657-58 (1956).

FN119. *Id.* at 658-59.

FN120. *Id.* at 658.

FN121. Statement for the Press by the Secretary of State (Washington, D.C., Mar. 30, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 662 (1956).

FN122. The Secretary of State to the Mexican Ambassador (Castillo Najera) (Washington, D.C., July 21, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 674, 678 (1956). Secretary of State Hull declared that prompt reimbursement in cash to the owners of the expropriated properties embodied the principle of just compensation. *Id.* at 675.

FN123. *Id.* at 677. Secretary Hull argued that "the taking of property, without compensation, is not expropriation. It is confiscation." *Id.* at 676.

FN124. The Mexican Minister for Foreign Affairs (Hay) to the American Ambassador (Daniels) (Mexico, Aug. 3, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 679 (1956).

FN125. *Id.* at 682.

FN126. The Secretary of State to the Mexican Ambassador (Castillo Najera) (Washington, D.C., Aug. 22, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 693 (1956).

FN127. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 775 (1991). Mexico agreed to pay \$10 million in agrarian claims in 1938. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 689 (1980). In the 1941 Mexican-American Agreement, Mexico promised to pay over \$350 million in petroleum claims with installment payments. *Id.* These were duly paid. *Id.* After the diplomatic exchange, an agreement was finally realized and all claims arising from the oil expropriations were settled by 1942. *Id.*

FN128. 22 U.S.C.A. § 2370(e)(1) (1990).



FN129. Id.

FN130. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 779 (1991).

FN131. Id. at 778. Fair market value can be determined by at least three methods: (1) the going-concern approach, (2) the replacement cost, or (3) the book value. Id.

FN132. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987). The RESTATEMENT provides:

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that
  - (a) is not for a public purpose, or
  - (b) is discriminatory, or
  - (c) is not accompanied by a provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;

- (2) a repudiation or breach by the state of a contract with a national of another state
  - (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or
  - (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or
- (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

Id.

FN133. Oscar Schachter, Editorial Comment, Compensation for Expropriation, 78 AM. J. INT'L L. 121, 125 (1984).

FN134. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1046, 1113 (1987) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185, 187 (1965)).

FN135. Id.

FN136. Oscar Schachter, Editorial Comment, Compensation for Expropriation, 78 AM. J. INT'L L. 121, 122 (1984). Mr. Schachter was an advisor to the draft Restatement. Davis R. Robinson, the Legal Advisor to the State Department and presently an advisor to the draft Restatement, argued that dropping "prompt, adequate, and effective" from the text would lead to an incorrect statement of the law. Id.

FN137. Id. All three branches of the U.S. government have asserted consistently that "prompt, adequate, and



(Cite as: 25 St. Mary's L.J. 1147, \*1193)

effective" compensation is required. Under international law, this formula has received "widespread and consistent" support as a traditional rule and has not been negated. Davis R. Robinson, Expropriation in the Restatement (Revised), 78 AM. J. INT'L L. 176, 177 (1984).

FN138. Id. at 176. Mr. Robinson alleged that an examination of state practice, treaties, and international arbitral decisions would confirm his position that the "prompt, adequate, and effective" standard is the customary international law for compensation for economic injury to aliens. Id. Mr. Robinson concluded that any other result would unduly increase the risk involved in foreign investment or reduce foreign investment overall, neither of which would be a desirable result. Id. at 178. Generally, the Resolutions regarding the standard of compensation were passed by new and developing nations with little support from the capital-exporting states. Thus, the requirement of "prompt, adequate, and effective" compensation remains unchanged. Id. at 176-77. For further discussion of the U.N. Resolutions, see *infra* pp. 42-47.

FN139. Oscar Schachter, Editorial Comment, Compensation for Expropriation, 78 AM. J. INT'L L. 121, 121-22 (1984).

FN140. Id. Schachter cited Wolfgang Freidman, who was quoted by the Court of Appeals for the Second Circuit in the *Banco Nacional de Cuba* case: "It is nothing short of absurd to pretend that the presentation of full, prompt, and adequate compensation ... in all circumstances is representative of customary international law." Id. at 124. In support of his argument, Schachter relied on the fact that no arbitral decision specifically adopted the words "prompt, adequate, and effective" as the required standard of payment. Id. at 123. "The fact that no international judicial or arbitral decision on compensation has adopted the 'prompt, adequate, and effective' rule is in itself striking evidence that it has not attained the status of customary rule through state practice." Id. at 125. Schachter rejected Robinson's assertion that state and treaty practice support the Hull formula. Id. at 123. He also disagreed with the statement that all three branches of the U.S. government have consistently maintained the "prompt, adequate, and effective" standard. Id.

FN141. See Oscar Schachter, Editorial Comment, Compensation for Expropriation, 78 AM. J. INT'L L. 121, 121-25 (1984) (discussing use of different standards in different courts). The U.S. courts have not been persuaded that the Hull formula is customary international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964) (recognizing disagreement among states regarding required standard of compensation for expropriation).

FN142. Oscar Schachter, Editorial Comment, Compensation for Expropriation, 78 AM. J. INT'L L. 121, 121-22 (1984).

FN143. Pamela B. Gann, Compensation Standard for Expropriation, 23 COLUM. J. TRANSNAT'L L. 615, 617 (1985). The study analyzed the valuation methods used by the tribunals in several recent cases, and included cases from the International Centre for Settlement of Investment Disputes (ICSID) arbitration, the Iran-United States Claims Tribunal, and other forums. See generally *id.* at 615-53.

FN144. See *id.* at 649 (indicating that even though no decision has adopted desired wording, tribunals have applied valuation methods consistent with State Department's interpretation of valuation methods under "adequate" compensation standard). Ms. Gann contended that the particular wording is unimportant because international law does require the "prompt, adequate, and effective" standard of compensation for a taking. This requirement "should not be obscured by debates within and outside the American Law Institute which focus on linguistic formulations of the standard of compensation ... rather than on concrete results achieved by these valuation methods and interest awards." Id. at 653.

FN145. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

FN146. Id. § 712 cmt. c. Normally, this compensation refers to fair market value. Id. § 712 cmt. d. Additionally,



(Cite as: 25 St. Mary's L.J. 1147, \*1193)

payment must be made at the time of the taking or with interest from that date, in "economically useful form," which may include bonds. Id.

FN147. Id. § 712 cmt. g; see supra note 14 (defining creeping expropriation).

FN148. See *United States v. Cors*, 337 U.S. 325, 332 (1949) (stating that Court has made efforts to keep concept of just compensation from becoming formulated), cited in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, reporter's note 3 (1987).

FN149. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 129 (1990).

FN150. Id. at 130.

FN151. Id. at 131.

FN152. Id.

FN153. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 132 (1990).

FN154. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). The Resolution passed with a vote of 87 in favor, 2 opposed, and 12 abstentions. Id.

FN155. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

FN156. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, reporter's note 2 (1987).

FN157. Id.

FN158. UNCTAD Res. 88, 12 U.N. TDOR, 12th Sess. SUPP. No. 1, at 1, U.N. Doc. TD/B/421 (1972), reprinted in 11 I.L.M. 1474 (1972).

FN159. G.A. Res. 3171, U.N. GAOR, 28th Sess., Agenda Item 12, at 2 (1974).

FN160. G.A. Res. 3201, U.N. GAOR, 6th Sess., Agenda Item 7, at 1, U.N. Doc. A/RES/3201 (1974).

FN161. Id. at 2.

FN162. G.A. Res. 3281, U.N. GAOR, 29th Sess., Agenda Item 48, at 1, U.N. Doc. A/RES/3281 (1975), reprinted in 14 I.L.M. 251 (1975).

FN163. 14 I.L.M. 251, 255 (1975).

FN164. Richard B. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359, 361 (1975). Lillich's statement encompassed UNTAD Resolution 88, GA Resolution 3171 and CERDS. Id.

FN165. Id. Lillich feared that this development would minimize states' potential international responsibility by denying alien claimants the right to seek the protection of their own countries. Id. at 361-62.

FN166. Id. at 362-63.



(Cite as: 25 St. Mary's L.J. 1147, \*1193)

FN167. Oscar Schachter, *The Evolving Law of International Development*, 15 COLUM. J. TRANSNAT'L L. 1, 7 (1976).

FN168. *Id.* at 8. This is not to say, however, that the principles espoused in the U.N. Charter (CERDS) and other declarations will not be invoked in exceptional circumstances, depending on the administration in power, the economic conditions in the country, and the mood of the populace.

FN169. Memo: NAFTA Approved, HOUS. POST., Nov. 18, 1993, at A16. See generally THE GOVERNMENTS OF CANADA, THE UNITED MEXICAN STATES, AND THE UNITED STATES OF AMERICA, DESCRIPTION OF THE PROPOSED NORTH AMERICAN FREE TRADE AGREEMENT (Aug. 12, 1992) (on file with the St. Mary's Law Journal).

FN170. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 79 (1993).

FN171. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 71 (1992). Canadian foreign direct investment in the United States amounted to an estimated \$43 billion by 1990. At the same time, United States direct foreign investment in Canada swelled to approximately \$106 billion. *Id.*

FN172. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 79 (1993). Much of this investment has been concentrated in the automobile and electronics industries. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 71 (1992).

FN173. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 79 (1993).

FN174. *Id.*

FN175. NAFTA, *supra* note 10, ch. 1, art. 104, 32 I.L.M. at 297-98.

FN176. *Id.* ch. 22, subsec. B, art. 1116-1138, 32 I.L.M. at 642-47. The NAFTA rules regarding dispute settlement are so well drafted that critics of the labor and environmental provisions have argued in favor of similar enforcement rules in these areas. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 79, 81 (1993).

FN177. NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1101(1)(a), 32 I.L.M. at 639.

FN178. *Id.* ch. 11, art. 1101.

FN179. *Id.* ch. 11, art. 1139.

FN180. *Id.* ch. 11, subsec. B.

FN181. Dan Price, a United States Trade Representative and negotiator for the investment chapter of the NAFTA, stated that, under NAFTA, the traditional problems between the United States and Mexico regarding investment relations have been resolved. Investment Chapter Said to Solve Long-Standing U.S.-Mexico Differences, *Int'l Trade Daily (BNA)* at 2-3 (Dec. 7, 1992). In particular, he commented that the provision regarding expropriation is "one of the truly significant provisions of the Agreement." *Id.*

FN182. *Id.*

FN183. NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1110, 32 I.L.M. at 641; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).



FN184. *Id.*

FN185. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 82 (1993).

FN186. NAFTA, *supra* note 10, ch. 11, subsec. B, art. 1120, 32 I.L.M. at 643. Under the Calvo Doctrine, all disputes would be settled in local courts. DANIEL R. SHEA, THE CALVO CLAUSE 21 (1955).

FN187. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 75 (1992).

FN188. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 11 (1993).

FN189. *Id.*

FN190. Mexico-United States Framework Understanding on Bilateral Trade and Investment, reprinted in 27 I.L.M. 438, 438 (1988).

FN191. Irwin P. Altschuler & Claudia G. Pasche, The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico, 28 WAKE FOREST L. REV. 7, 13 (1993).

FN192. Law Regarding the Making of Treaties, December 21, 1991, Mex., 31 I.L.M. 390 (1992). The official text of the law appears in CDLX Diario Oficial de la Federacion, Jan. 2, 1992 at 2.

FN193. Antonio Garza Canovas, Introductory Note, 31 I.L.M. 390, 391 (1992).

FN194. Hope H. Camp, Jr. et al., Foreign Investment in Mexico from the Perspective of the Foreign Investor, 24 ST. MARY'S L.J. 775, 793-94 (1993).

FN195. Gist: North American Free Trade Agreement, 3 DISPATCH 28, 28 (Supp. 5 1992). Mexican President Salinas continued the program of massive economic reform launched by prior administrations in the mid-1980s. *Id.* In 1989, he "expanded the percentage of allowable foreign ownership (in many cases up to as much as 100%) in sectors accounting for nearly two-thirds of Mexico's economic output. He streamlined the approval process for foreign investments." *Id.* at 29.

FN196. See *id.* at 28.

FN197. Hope H. Camp, Jr. et al., Foreign Investment in Mexico from the Perspective of the Foreign Investor, 24 ST. MARY'S L.J. 775, 792 (1993).

Once the NAFTA is ratified by the Mexican Congress, it will be superior in the Mexican legal hierarchy to the Mexican FIL [foreign investment law]. When the ratification process is complete, none of the parties to the NAFTA will be able to modify it unilaterally. Thus, the rules for trade and investment among the parties will be made permanent, subject only to changes agreed upon by the three parties. The importance of such permanency cannot be overstated. Many believe that the greatest barrier to long-term foreign investment in Mexico has been the uncertainty felt by foreigners, which stems from the changes that occur in foreign investment restrictions from one six-year presidential term to another.

*Id.*

FN198. See David E. Graham, The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection, 6 TEX. INT'L L.F. 289, 306 (1971) ("Mexico is the most outspoken of Latin States advocating the use and



(Cite as: 25 St. Mary's L.J. 1147, \*1193)

legality of the Clause.").

FN199. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 771 (1991).

FN200. *Id.* Lump-sum settlement agreements between foreign investors' states and expropriating states have been used frequently in the past. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, reporter's notes 1-2 (1987). One of the main goals of bilateral investment treaties is the protection of private parties against actions taken by states in which they have invested. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 783-84 (1980). See generally UNITED NATIONS CENTRE ON TRANSNAT'L CORPS., BILATERAL INVESTMENT TREATIES (1988) (detailing comprehensive list of such agreements). FCNs are aimed at encouraging and protecting investments abroad. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 783 (1980). Many FCNs have provisions that specifically focus on standards for compensation and protection of the investor in the event a taking. *Id.* at 784. Many developing countries have entered BITs and FCNs with developed and capital-exporting countries. *Id.* at 789.

FN201. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 772 (1991).

FN202. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, reporter's note 1 (1987). Lump-sum agreements are usually for less than full value.

FN203. Iran-United States Claim Tribunal: Interlocutory Award in Case Concerning Sedco, Inc. and National Iranian Oil Company and Iran, Award No. ITL 59-129-3 (Mar. 27, 1986), reprinted in 25 I.L.M. 629, 633 (1986).

FN204. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, reporter's notes 1-2 (1987).

FN205. See ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 806 (1991) (citing United States claims tribunal finding).

FN206. Iran-United States Claim Tribunal: Interlocutory Award in Case Concerning Sedco, Inc. and National Iranian Oil Company and Iran, Award No. ITL 59-129-3 (Mar. 27, 1986), reprinted in 25 I.L.M. 629, 633 (1986).

FN207. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 323 (1991).

FN208. Davis R. Robinson, Expropriation in the Restatement (Revised), 78 AM. J. INT'L L. 176, 177 (1984).

FN209. *Id.*

FN210. *Id.*

FN211. *Id.*

FN212. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 79, 81 (1993).

FN213. Pros and Cons: Should Congress Extend Fast Tract Negotiating Authority?, 71 CONG. DIG. 40, 61 (1992) (quoting Senator Moynihan's speech during Senate floor debate of May 24, 1991, on Senate Resolution 78, to disapprove President's request for extension of fast-track procedures under Omnibus Trade and Competitiveness Act of 1988 the Trade Act of 1974). Senator Moynihan commented on the state of the judiciary in Mexico: "We simply cannot pretend that Mexico is a democracy with an independent judiciary." *Id.*



(Cite as: 25 St. Mary's L.J. 1147, \*1193)

FN214. *Id.* at 61.

FN215. Irwin P. Altschuler & Claudia G. Pasche, *The North American Free Trade Agreement: The Ongoing Liberalization of Trade with Mexico*, 28 WAKE FOREST L. REV. 7, 32-33 (1993). See also *Pros and Cons: Should Congress Extend Fast Track Negotiating Authority?*, 71 CONG. DIG. 40, 51 (1992). Senator Helms, speaking on Senate Resolution 78, noted in disapproval of an extension of the President's fast track authority: "The issue with Mexico is not President Salinas. The issue is Mexico's lack of democracy. Mexico has been a one-party state for more than 60 years. The few positive changes made by President Salinas do not constitute freedom and democracy." *Id.*

FN216. See NAFTA, *supra* note 10, ch. 20, subsec. C, art. 2020-2022, 32 I.L.M. at 698 (outlining settlement procedures for private commercial disputes).

FN217. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. c (1987) (noting that previously the "prompt, adequate, and effective" standard met heavy resistance from developing states).

FN218. Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 8-9 (1976). "[N]ationalizing governments, even when doctrinally committed to exclusive national competence, are likely to be influenced by principles and standards followed in other countries and, broadly speaking, acceptable to capital-exporting states." *Id.* at 8.

FN219. David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L.F. 289, 308 (1971).

FN220. *Id.*

FN221. Manuel R. Garcia-Mora, *THE CALVO CLAUSE IN LATIN AMERICAN CONSTITUTIONS AND INTERNATIONAL LAW*, 33 MARQ. L. REV. 205, 219 (1950).

FN222. *Id.*

FN223. Cf. DONALD R. SHEA, *THE CALVO CLAUSE* 288 (1955) (predicting that with substitution of more effective system of safeguarding citizens' rights abroad, Calvo Clause would no longer be necessary). "With the establishment of such a system, the present practice of diplomatic protection would cease to operate, and the purpose of the Calvo Clause would be eliminated." *Id.* at 287.

FN224. See Sidney Weintraub, *The Promise of United States-Mexican Free Trade*, 27 TEX. INT'L L.J. 551, 551-52 (1992) (favoring foreign investment over traditional nationalism).

FN225. MEX. CONST. art. 27, cited in XI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Mexico 25, 145 (Albert P. Blaustein & Gilbert H. Flanz eds., 1993).

FN226. Antonio Garza Canovas, *Introductory Note*, 31 I.L.M. 390, 391 (1992).

FN227. See *id.* (reporting that Chamber of Deputies specifically addressed issue of dispute settlement mechanisms).

FN228. *Law Regarding the Making of Treaties*, December 21, 1991, Mex., 31 I.L.M. 390 (1992). The official text of the law appears in CDLX Diario Oficial de la Federacion, Jan. 2, 1992 at 2.

FN229. See *North Am. Dredging Co. v. United Mexican States*, 4 Rep. of Int'l Arb. Awards 26, 28 (1926) (recognizing validity of clause unless repugnant to international law).



FN230. David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L.F. 289, 294 (1971).

FN231. *Id.* The emergence of international human rights law has dealt a major blow to this position, which is generally no longer accepted.

FN232. *Id.* at 292. International human rights law has reaffirmed this position.

FN233. David E. Graham contends that "the contractual renunciation of diplomatic protection is not currently recognized as a valid concept under international law. The vast majority of world states do not regard the Clause as a bar to the right of diplomatic inter-position on behalf of nationals suffering denials of justice." *Id.* at 306. Some scholars go as far as saying that Calvo Clauses in contracts simply are not recognized in international law.

FN234. See NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1120(1)(a), 32 I.L.M. at 643 (allowing submission of claim to arbitration at ICSID Convention).

FN235. NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1136(4), 32 I.L.M. at 646.

FN236. See *id.* ch. 20, subsec. A, art. 2001(2)-(3), 32 I.L.M. at 693 (outlining duties and obligations of Free Trade Commission).

FN237. *Id.* ch. 11, subsec. A, art. 1136(6), 32 I.L.M. at 646.

FN238. This is not to say that rights under customary international law have disappeared. If the situation arose in which there was a clear denial of justice, the injured investor's country could assert a claim of diplomatic protection in an appropriate international tribunal.

FN239. NAFTA, *supra* note 10, ch. 11, subsec. B, art. 1138, 32 I.L.M. at 647.

FN240. *Id.* ch. 20, subsec. B, art. 2019(1), 32 I.L.M. at 697.

FN241. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 18, 1965, 575 U.N.T.S. 159, 1966 [hereinafter ICSID].

FN242. NAFTA, *supra* note 10, ch. 11, subsec. B, art. 1136(5), 32 I.L.M. at 646. ICSID contains a Calvo Clause in Article 27 of the Convention, which requires that all disputes submitted to ICSID Arbitration be resolved through the ICSID process only, without resort to diplomatic protection or other remedies. James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause: A Hindrance to Foreign Direct Investments in LDCs*, 5 J. DISP. RESOL. 75, 76 (1989). Although this provision was added to the Convention in order to strengthen its jurisdiction, the effect has been to limit its jurisdiction. *Id.* at 95.

FN243. See NAFTA, *supra* note 10, ch. 11, subsec. A, art. 1104, 32 I.L.M. at 639 (requiring each party to accord investors and investments of another party better of national or most-favored-nation treatment).

FN244. *Id.* ch. 11 art. 1110(2)(4)(6).

FN245. *Id.* ch. 11 art. 1116, 1117.

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