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Note

NAFTA'S PROVISION FOR COMPENSATION IN THE EVENT OF EXPROPRIATION: A REASSESSMENT OF THE "PROMPT, ADEQUATE AND EFFECTIVE" STANDARD

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I. Introduction

United States Senate ratification of the North American Free-Trade Agreement (NAFTA) [FN1] engendered enormous controversy. Though the public debate over NAFTA focused primarily on environmental and labor issues, one of the most interesting and important NAFTA provisions addressed compensation in the case of expropriation. This provision represents a major turning point in U.S.-Mexico relations, yet it received little media attention. [FN2]

In NAFTA, Mexico has finally accepted what is essentially the "prompt, adequate and effective" standard of compensation for expropriated foreign properties. Although NAFTA does not specifically mention the words "prompt," "adequate," or "effective," NAFTA's expropriation provision requires compensation on the terms traditionally demanded by the United States. This standard has been asserted by the United States, and refuted by Mexico, since the 1938 exchange of diplomatic notes in response to the Mexican expropriation of U.S.-owned property. [FN3] The fact that Mexico acceded, some fifty years later, to U.S. terms illustrates changing global economic realities [FN4] and Mexico's interest in making concessions to attract U.S. investment.

This note addresses the Mexican concession to U.S. characterizations of the international law of expropriation and compensation in the broader context of the historical international debate on the issue. Part II focuses on the U.S.-Mexico controversy dating from 1938. Part III sketches the larger context of the international law of compensation for expropriation. Part IV uses both intrinsic and extrinsic interpretation methods to examine Article 1110 of NAFTA, [FN5] the specific provision dealing with compensation for expropriated property. Finally, Part V briefly addresses the dispute settlement mechanism of NAFTA's Investment Chapter.

II. The Historical U.S.-Mexico Debate on Standards of Compensation

The two principal aims of the Mexican Revolution of 1910 -20 were agrarian reform and land redistribution. The Revolution's rallying cry of "tierra y libertad" [FN6] ("land and liberty") carried particular force given that, by 1910, approximately 1000 families controlled the vast majority of Mexican land, leaving most of the population in the serf-like state of peones. [FN7] Article 27 of the 1917 Constitution represents a fulfillment of the revolutionary promise, providing the basis for agrarian reform, destruction of concentrated landholdings, and expropriation of property. [FN8] More profoundly, Article 27 embodies the idea of property in Mexico as "a right belonging to all of the nation . . . a function of society." [FN9] A drafter of the Mexican Constitution explained Article 27 as an assurance that "Mexican law will establish fully as a basic, solid and unalterable principle that above the rights of individuals to property there were superior rights of society, represented by the State, to regulate its distribution as well as its use and conservation." [FN10] Indeed, the Mexican Supreme Court of Justice followed this rationale when it interpreted Article 27 as an effort to:

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eliminate the classical concept which defined the right of property as an absolute untouchable right, and to replace it with a concept which recognizes private property as a social function. Thus, private property would not be the exclusive right of one individual, but a right subordinated to the common welfare. [FN11]

These revolutionary promises and ideals resulted in expropriation of Mexican agricultural property acquired and owned by U.S. citizens. In response to these agricultural expropriations, a long series of correspondence between U.S. and Mexican diplomats began, culminating in the exchange of notes between Secretary of State Cordell Hull and the Mexican Ambassador in Washington. Secretary Hull, insisting that "the American owners whose properties have been taken, are left not only without present payment, but without assurance that payment will be made within any foreseeable time," [FN12] declared that:

The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future The whole structure of friendly intercourse, of international trade and commerce, and many other vital and mutually desirable relations between nations indispensable to their progress rest upon the single and hitherto solid foundation of respect on the part of governments and of peoples for each other's rights under international justice. The right of prompt and just compensation for expropriated property is a part of this structure. It is a principle to which the Government of the United States and most governments of the world have emphatically subscribed and which they have practiced and which must be maintained. [FN13] On August 3, 1938, the Mexican Minister of Foreign Affairs responded with equal gusto, but with far less enthusiasm for the inherent value of the "whole structure of the friendly intercourse." [FN14] The Minister relied on the fact that the expropriations were carried out in the context of the Mexican Revolution, and that the economic reorganization had occurred on an equal basis between foreigners and Mexican nationals. He also disputed the Secretary's characterization of international law:

[A] transformation of the country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end [T]here does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. [FN15] The Minister did, however, admit that under domestic laws, Mexico "is indeed under obligation to indemnify in an adequate manner; but . . . the time and manner of such payment must be determined by her own laws." [FN16]

Secretary Hull responded in an August 22, 1938 note with his now-famous assertion of the international legal standard of compensation: "[U]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment" [FN17] As to the Minister's argument that the expropriations occurred on an equal basis between foreigners and Mexican nationals, the Secretary countered: "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." [FN18]

Ultimately, the diplomats agreed to a two-person Commission, which included one representative from each government, to assess the values of the U.S.-owned agrarian properties. While the United States insisted that the Commission would assure that the "adequate and effective measure of compensation [would be] paid," [FN19] the Mexican Commissioner merely stated that "respective evaluation" of the claim and value would occur. [FN20] Thus, the tumultuous diplomatic exchange ended in a resolution that ultimately resolved nothing. The U.S. government essentially agreed to disagree with Mexico over the general standards of compensation in exchange for an immediate settlement of the claims. Writing in 1940, Professor Josef Kunz surmised that "[t]he agreement was only possible because the final amount involved is relatively small." [FN21] Professor Kunz further remarked that: "The agreement has the character of a friendly and practical arrangement on both sides, leaving juridical problems aside As it so often happens in diplomacy, a practical solution has been achieved, but the legal [sic] problem remains unresolved." [FN22] Given the state in which the two governments chose to leave the international law of compensation, Professor Kunz warned that the issue would reemerge since "[t]he question remains open as to expropriations on so large a scale that even a deferred payment by installments within a

reasonable time is beyond the financial capacity of the expropriating state." [FN23]

Concurrent with the agrarian expropriations, Mexico expropriated its oil industry. Unlike the land expropriations, where foreigners and Mexican nationals suffered equally, this action harmed only foreign oil companies, since oil concerns were entirely foreign-owned. The surface land and the oil rights were primarily owned by British and U.S. citizens who had invested in the exploration for oil at the invitation of the pre-revolutionary Mexican government. [FN24] The oil expropriations were motivated by a desire to ensure that Mexicans controlled Mexican oil, and had their basis in Article 27 of the 1917 Constitution, which vested ownership of minerals and subsoil in the Mexican government. [FN25] This Article 27 provision contradicted the original oil concessions of the early 1900s, under which Mexican mining codes "put the exploitation of oil at the disposal of the owner of the surface land." [FN26] In 1938, the Mexican government expropriated all oil companies through a decree which placed the government in complete control of the production and distribution of oil products. To achieve that end, the decree ordered the expropriation of the machinery, installations, storage tanks, and other assets of the oil companies then operating in Mexico. [FN27]

Mexico's expropriation of its oil industry prompted another exchange of diplomatic correspondence in 1940, in which Secretary Hull echoed previous assertions: "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement." [FN28] The Secretary disputed the Mexican government's previous assertion that the two governments were in agreement: "[I]t is incorrect to state that there is 'no divergence of opinion between the Government of the United States and that of Mexico' on the subject of expropriation." [FN29] Secretary Hull suggested that the U.S. claims be submitted to arbitration, but the Mexican government insisted on the doctrine of exhaustion of local remedies and countered that any delay was the fault of U.S. companies which had refused to submit to Mexican valuation of the expropriated property. [FN30] Thus, in the case of the oil expropriations, the Mexican government insisted that it was willing to compensate -- but only on its own terms in accordance with its own laws.

Indeed, according to Professor Kunz, the two governments were in agreement about the oil expropriations. Professor Kunz focuses on the fundamental difference between the agricultural and oil expropriations: The former harmed Mexicans and foreigners alike, while the latter harmed only foreign nationals. The agrarian expropriations led to a divisive controversy which "concerns the existence or non-existence of an international norm requiring compensation in cases of expropriations of a general and impersonal character." [FN31] In contrast, Professor Kunz argues, with respect to the oil expropriations "we need not discuss, whether compensation is due under international law, whether the international norm in question does or does not exist, but only whether the conditions of expropriations, laid down by an international norm, fully recognized, have been fulfilled" [FN32]

Thus, contentious issues centered around what would be compensated -- just the machinery and surface rights, or the loss suffered by the expropriation of the subsoil resources -- and how much would be paid. As with the agrarian expropriations, the settlement ultimately left disputes about the international law of compensation for expropriation unresolved. The U.S. oil companies and the Mexican government disagreed on the level of appropriate compensation for the expropriated properties. The United States assessed the value of the property at \$200 million, while the Mexican government argued that a payment of \$10 million would suffice. [FN33] Ultimately, a mixed claims commission set the compensation at almost \$24 million, with an additional interest payment of three percent from the date of expropriation. [FN34]

As illustrated by the 1938 and 1940 disputes over land and oil compensation, the historical positions of the United States and Mexico have seemed irreconcilable. Instead of resolving their respective differences on the international law of compensation for expropriation, they chose to settle claims on an ad hoc basis. The fact that some fifty years later, in NAFTA, the two governments have finally agreed to a provision addressing compensation for expropriation is therefore particularly significant.

III. The International Debate on Standards of Compensation

A. Pre-World War II

International law has generally accepted the right of a sovereign state to expropriate property in its territory: "Nationalization is generally recognized as the exercise of the sovereign right of a state to dispose of natural resources and other assets located in its territory, even if they belong to foreigners." [FN35] A 1922 diplomatic note sent by U.S. Secretary of State Charles E. Hughes regarding Chinese expropriations admits this fact:

Concerning the question whether the Chinese authorities may exercise the right of eminent domain over property owned by American citizens in China, the Department may state that since the right is so essential to the existence of any sovereign state, the Department would not be inclined to question the exercise of the right by China in an appropriate case, that is, for a public purpose, but would of course be under the necessity of insisting that just compensation be made for any property taken or damaged, and that there shall be no discrimination in this respect against American citizens. [FN36] The contention in international law has revolved around the necessary steps following such expropriation. While it is a generally accepted principle of international law that compensation must be paid upon expropriation of alien property, issues of the timing and level of compensation are widely disputed. [FN37] Though the United States has consistently asserted that the "prompt, adequate and effective" standard derives from consensual and historical notions in international law, there is enormous controversy over whether that standard was ever accepted in international law.

The origin of most legal precedent concerning expropriation and compensation is *Factory at Chorzow* (Germany v. Poland), decided by the Permanent Court of International Justice in 1928. [FN38] Patrick Norton writes that "its continued vitality is the starting point for many of the recent decisions" [FN39] on a state's obligation to compensate for expropriation. *Chorzow* defined the illegal act of a taking without restitution:

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [must be made] . . . [FN40] *Chorzow* sets a high standard of compensation: that recognized by subsequent tribunals as *restitutio in integrum*. [FN41] It is important to note, however, that *Chorzow* does not mention the "prompt, adequate and effective" standard of compensation. Similarly, the 1922 Norwegian Shipowners (Norway v. United States) arbitration decision does not call for "prompt, adequate and effective" compensation, though it does hold that when foreign-owned property is taken for a public use, "just compensation is due . . . under the international law, based upon the respect for private property." [FN42] The tribunal explains that "just compensation . . . should be liberally awarded, and . . . should be based upon the net value of the property taken." [FN43]

Professor Oscar Schachter counters the notion that the "prompt, adequate and effective" standard is deeply rooted in international law. He examines *Chorzow* and *Norwegian Shipowners*, and concludes:

It is true that several "traditional" decisions of international tribunals recognize an international obligation to pay compensation when alien property is taken by a state. However, contrary to what is often asserted, these decisions contain no reference to the "prompt, adequate, and effective" standard . . . *Chorzow* . . . probably the most frequently cited opinion in this field, refers only to a duty to "payment of fair compensation." . . . *Norwegian Shipowners* . . . is also often cited . . . It is a long stretch from this qualified formula to the assertion that the case supports the "prompt and effective" standard. [FN44] Professor Rudolf Dolzer, a former consultant to the U.N. Centre on Transnational Corporations, espouses a contrary view:

It is assumed here that United States Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government asking Mexico for "prompt, adequate and effective" compensation. Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull's position. [FN45] Professor Dolzer further argues that the "prompt, adequate and effective"

standard is supported by Chorzow and Norwegian Shipowners. [FN46]

Regardless of how one casts the international law of expropriation prior to World War II -- whether by the assertions of various governments at that time, the judgments in contemporary disputes, or the reflections of today's leading scholars -- it is clear that there was and is a great deal of disagreement surrounding the issue. Thus, although the United States has consistently insisted that the "prompt, adequate and effective" standard is rooted in history, the assertion is deeply contentious.

B. Post-World War II

Even if the international legal community had accepted the Hull doctrine prior to World War II, the war plunged the international law of expropriation and compensation back into turmoil. Professor Dolzer argues that the sole remnant of U.S. assertions was the agreement that compensation of some form must be paid in order for an expropriation to be legal:

[O]ne part of Hull's concept is confirmed, i.e., that compensation must be paid for expropriated alien property as a matter of international law; as for the second part, concerning the mode and the amount of compensation, the evidence for the Hull rule's continuing validity falls short of the mark that an international court would require to be convinced that state practice confirms the existence of the old rule. [FN47] An examination of the international law of expropriation following World War II confirms Professor Dolzer's argument.

In *Texas Overseas Petroleum Co. v. The Government of the Libyan Arab Republic (TOPCO)*, the arbitrator held that restitution is, "under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible." [FN48] This decision upheld the Chorzow standard of *restitutio in integrum*. In contrast, in *British Petroleum Exploration Co. v. Libyan Arab Republic*, the arbitral tribunal awarded damages for an expropriation, though it ruled against *restitutio in integrum*. [FN49] Other decisions have required compensation, but disagreed as to the method of compensation. Arbitration between *The Government of the State of Kuwait and The American Independent Oil Company (AMINOIL)* required "appropriate" compensation; [FN50] in the Award in the Dispute between *Libyan American Oil Co. and The Government of The Libyan Arab Republic (LIAMCO)*, the tribunal based its award of damages on "equitable compensation"; [FN51] and the *Iran-U.S. Claims Tribunal* has, in its cases, based "full" compensation on the valuation of the "company as a going concern." [FN52]

LIAMCO specifically addressed the "classical doctrine" [FN53] of "prompt, adequate and effective" compensation. Dr. Sobhi Mahmassani, the sole arbitrator in LIAMCO, maintains that the "classical doctrine" was neither the rule during the inter-war period nor the rule following World War II. Moreover, he asserts that the "classical doctrine" has "undergone the influence of the recent evolution of the concepts of the right of property and of the sovereign right of States to nationalize their natural wealth and resources." [FN54] According to Dr. Mahmassani, the doctrine has merely the "value of a technical rule for the assessment of compensation, and a useful guide in reaching settlement agreement . . . It stands only as a maximum rarely attained in practice." [FN55] Thus, Dr. Mahmassani rejects the Hull standard in favor of "equitable compensation," measured "with the classical formula of 'prompt, adequate and effective compensation' remaining as a maximum and a practical guide for such assessment." [FN56]

Several U.N. General Assembly resolutions are relevant to expropriation and the international standard for compensation. [FN57] The Resolution on Permanent Sovereignty over Natural Resources, Resolution 1803, [FN58] is widely recognized, in arbitral decisions and in the writings of publicists, as reflective of customary international law. Resolution 1803 provides for payment of "appropriate compensation . . . in accordance with international law." [FN59] The General Assembly adopted it in 1962 by a vote of eighty-seven to two, with twelve states abstaining. [FN60]

In 1962, coincident with the adoption of Resolution 1803, both the U.S. and Mexican delegations to the U.N. submitted statements regarding their understanding of the term "appropriate compensation." The United States

had hoped that including the phrase "and in accordance with international law" in the text of the resolution would incorporate the U.S. view of international law. Philip M. Klutznick, then-U.S. Ambassador to the U.N., said that he "was confident that the expression 'appropriate compensation' . . . would be interpreted as meaning, under international law, prompt, adequate and effective compensation." [FN61] The Mexican delegate, Armando Amador, explained Mexico's vote against the Soviet Union's proposed language of the "inalienable rights . . . to the unobstructed execution of nationalization, expropriation and other essential measures," [FN62] noting that "in the two most outstanding cases concerning land and oil expropriation in Mexico, my Government promptly paid the appropriate compensation and, as always, has faithfully fulfilled its commitments." [FN63] Interestingly, the Reporter's Note to the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States [FN64] cited Mr. Amador's statement as an assertion "that 'appropriate compensation' was satisfied by the standard it had applied in 1938, i.e., if aliens were compensated to the same extent as nationals." [FN65]

The major arbitration cases consider Resolution 1803 to be the most recent consensual statement of international law on the matter of expropriation and the standard of compensation. [FN66] The AMINOIL tribunal recognized this Resolution as "[t]he most general formulation of the rules applicable for a lawful nationalization." [FN67] Similarly, Rene-Jean Dupuy, the sole arbitrator in TOPCO, held that: "Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary international law existing in this field. . . . The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated." [FN68] Professor Schachter points to the fact that Dupuy's holding makes no mention of the U.S. understanding of "appropriate compensation," which Ambassador Klutznick, in 1962, had been confident would be interpreted as meaning "prompt, adequate and effective": "It would be difficult to read into Dupuy's endorsement of the standard of 'appropriate compensation' an acceptance of the interpretation the United States hoped would be given to it. It is significant that Dupuy made no mention of the U.S. interpretation in this context." [FN69]

Capital-exporting states have vehemently opposed subsequent U.N. General Assembly resolutions on the matter of compensation for expropriation. [FN70] The General Assembly passed the Charter of Economic Rights and Duties of States, Resolution 3281, but all sixteen capital-exporting nations voted against Article 2(2)(c) of the Charter, which provided:

Article 2. (1) Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

(2) Each State has the right: . . .

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. [FN71]

The General Assembly passed the Declaration on the Establishment of a New International Economic Order, Resolution 3201, but with reservations by France, Japan, the United Kingdom, the United States, and West Germany. Without any mention of a compensation requirement, the resolution granted to each state "[f]ull permanent sovereignty . . . over its natural resources and all economic activities . . . including the right to nationalization or transfer of ownership to its nationals." [FN72]

Major arbitral decisions have held Resolutions 3201 and 3281 inapplicable due to the dissent of the majority of developed nations. TOPCO held that, "[w]hile Resolution 1803 (XVII) appears to a large extent as the expression of a real general will, this is not at all the case with respect to the other Resolutions . . ." [FN73] It is thus clear that Resolutions 3201 and 3281 have not been accepted as general international law. Equally clear, however, is

that the Hull doctrine -- whether or not it embodies international law prior to World War II -- does not reflect the international law of expropriation and compensation in the years following the war.

By 1987, the Restatement (Third) replaced the "prompt, adequate and effective" standard with a requirement of "just compensation" in the case of expropriation. [FN74] A careful reading of the definition of "just compensation" reveals that the drafters incorporated the meaning of "prompt," "adequate," and "effective" into the definition of "just":

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. [FN75] Significantly, the Comments to the Restatement (Third) modify "appropriate compensation" and make reference to the dispute over "prompt, adequate and effective" compensation. [FN76] As a result, the Restatement (Third) reflects the attempt to reconcile the U.S. position with accepted international law by incorporating the desire for "prompt, adequate and effective" compensation within the definition of "just".

C. The Bilateral Investment Treaty Program

Perhaps recognizing that events following World War II had brought about a shift in the international law of expropriation, many capital-exporting states began to enter into Bilateral Investment Treaties (BITs). In this way, the capital-exporting states could protect their citizens' investments abroad on their own terms, despite the changes to customary international law represented by the increasingly hostile U.N. General Assembly resolutions.

Professor Jeswald W. Salacuse believes this phenomenon reflects the growing reality that "[i]nternational law offered foreign investors little effective protection": [FN77]

The movement to conclude BITs has been initiated and driven by Western, capital-exporting states. Their primary objective has been to create clear international legal rules and effective enforcement mechanisms to protect investment by their nationals in the territories of foreign states. The essence of this protection is to defend the investment and the investor from exercises of state power by host governments with respect to such matters as expropriation, treatment, transfer of currency abroad, and restrictions on operations. These treaty rules and enforcement mechanisms are intended to supplant local legislation and institutions and also to avoid disputes over the content and applicability of customary international law. [FN78] Professor Malcolm Shaw examines, as an example, the 1989 U.K.-U.S.S.R. BIT, which provides for "payment, without delay, of prompt and effective compensation," [FN79] and specifies that the amount paid must equal "the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge . . . and shall be effectively realizable and be freely transferable." [FN80] Furthermore, the BIT calls for payment within two months of the expropriation, after which interest will accrue. Professor Shaw observes that "the traditional principles dealing with the conditions of a lawful expropriation and the provision for compensation are reaffirmed" [FN81] in this BIT.

In light of the previous discussion of the international law of expropriation, it is clear that the United States, despite its assertions, recognized that the developing world was not willing to accept the Hull formula of "prompt, adequate and effective" compensation. Thus, instead of relying on the forcefulness of its assertions of "general practice accepted as law," [FN82] or of the "general principles of law recognized by civilized nations," [FN83] the United States set out in its BIT program to enter into particular international conventions, "establishing rules expressly recognized by the contesting states." [FN84] The United States could rely on the particular BIT agreements, many of which provided for the Hull standard, as the source of international law. The U.S. Model BIT [FN85] requires "prompt, adequate and effective" compensation in the case of expropriation, and further requires that the compensation shall:

be equivalent to the fair market value of the expropriated investment immediately before the expropriatory

action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation. [FN86] These compensation requirements set out what the United States considers to be "prompt, adequate and effective."

Professor Shaw warns that "[t]he provisions of such agreements indeed constitute valuable state practice, but great care has to be taken in inferring the existence of a rule of customary international law from a range of bilateral treaties." [FN87] Similarly, Professor Dolzer argues that while "under certain circumstances, the existence of identical regulations in a large number of international treaties can lead to the formation of customary law," [FN88] the system of BITs providing for compensation in accordance with the Hull doctrine has not created a change in customary international law:

[I]t may not be assumed that the property protection clauses in existing bilateral treaties may be seen as evidence of a corresponding rule of customary law. . . . [T]here is, therefore not sufficient evidence at this point for the proposition that developing states will assume that delictual conduct has occurred when the treatment of alien property differs from that typically guaranteed by investment treaties. [FN89] Although -- indeed, because -- the BIT programs do not change the customary international law of compensation for expropriation, the United States has actively continued to negotiate BIT agreements with numerous states.

IV. NAFTA, Article 1110

The North American Free-Trade Agreement is an expansive agreement that goes far beyond trade. NAFTA encompasses the elimination of tariff and non-tariff barriers, intellectual property protection, dispute settlement, and includes supplemental agreements on labor and the environment. Additionally, Chapter 11 of NAFTA provides for the regulation of investment between the United States, Mexico, and Canada. Within that context, NAFTA sets out the rules of compensation for expropriation in Article 1110. Part IV focuses on the interpretation of Article 1110.

A. Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties explicitly addresses treaty interpretation. According to Article 31 of the Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." [FN90] Article 31 further provides that "any relevant rules of international law applicable in the relations between the parties" should be taken into account, "together with the context" of the treaty. [FN91] Thus, the Convention places primary emphasis on examining the plain language, or intrinsic interpretation, of a treaty.

Supplementary, or extrinsic, means of interpretation are generally not used in interpreting treaties. However, "the preparatory work of the treaty and the circumstances of its conclusion" [FN92] may be consulted in order to confirm the meaning arrived at from the application of Article 31, or when Article 31 interpretation results in "ambiguous or obscure" [FN93] meaning, or "leads to a result which is manifestly absurd or unreasonable." [FN94]

B. Intrinsic Interpretation of NAFTA

In accordance with Article 31 of the Vienna Convention, Article 1110 must be interpreted according to its ordinary meaning. In order to understand the plain meaning of the terms used in Article 1110, those terms must be compared to previously asserted standards of compensation, [FN95] the U.S.-Canada Free-Trade Agreement (FTA), [FN96] and the U.S. Model BIT program. Each of these bases for comparison constitutes both the "relevant rules of international law applicable in the relations between the parties" and the "context" of NAFTA. [FN97]

While NAFTA is in some ways an expansion of the U.S.-Canada FTA to include Mexico, Article 1110 is closer

to the texts of the Model BIT and the Restatement (Third) than it is to the FTA. Without any additional provisions to explain its terms, the FTA adopted the rule of "prompt, adequate and effective compensation," described by one commentator as "essentially the 'U.S.-preferred international law standard.'" [FN98] Although Article 1110 does not use the terms "prompt," "adequate," or "effective," an examination of the ordinary meaning of the language used in the provision implies that Article 1110 essentially adopts the "prompt, adequate and effective" standard of compensation.

Article 1110 in effect demands "prompt" payment of compensation by requiring payment "without delay." [FN99] By way of comparison, the Restatement (Third) defines "just compensation" as requiring payment "at the time of the taking, or within a reasonable time thereafter." [FN100] In addition, the U.S. Model BIT requires that the "prompt, adequate, and effective" compensation "be paid without delay." [FN101] Clearly, the NAFTA requirement for the timing of compensation payments adopts the Model BIT explanatory language wholesale. Since the Model BIT provides for the Hull standard, it can be assumed that "paid without delay" is equivalent to Secretary Hull's call for "prompt" payment.

Article 1110 also effectively provides for "adequate" compensation by specifying that the compensation must be "equivalent to the fair market value of the investment." [FN102] Article 1110(2) addresses the adequacy of the compensation by assuring that the fair market value of the investment prior to expropriation is calculated according to "appropriate" valuation criteria. [FN103] Article 1110 goes into greater detail than either the Restatement (Third) ("amount equivalent to the value of the property taken") [FN104] or the Model BIT. Similar to the Model BIT, which requires that the "fair market value" be assessed as the value of the investment prior to the expropriatory action, [FN105] Article 1110 assures that the expropriating government does not drive down the value of the foreign-owned investment by publicizing its plans in an effort to reduce the compensation payment. The ordinary meaning of this provision is certainly intended to assure "adequate" compensation.

Finally, Article 1110 essentially requires "effective" compensation by setting out specific and detailed terms in order to assure that the compensation is "fully realizable." Article 1110(4) requires calculation of "interest at a commercially reasonable rate" from the date of expropriation to the date of payment. This language exactly mirrors the language defining "effective" compensation in the Model BIT and the Restatement (Third). NAFTA goes further than the Restatement (Third) in providing greater content for effective compensation. The Restatement (Third) merely requires that the form of payment be "economically usable." [FN106] Similar to the Model BIT, Article 1110(6) requires that the compensation be freely transferable. Moreover, Article 1110(5) ensures that fluctuations in the currency market do not reduce the foreign owner's compensation. This provision, though more detailed in providing a procedure if payment is made in Group-of-Seven currency, [FN107] achieves a purpose similar to the Model BIT, which specifies "the prevailing market rate of exchange on the date of expropriation." [FN108] Again, these provisions in NAFTA evidence a purpose to provide for "effective" compensation.

An examination of Article 1110 demonstrates that, although the drafters did not include the actual words used by Secretary Hull in 1938, they intended to incorporate the meaning of the Hull doctrine by using similar words whose plain meanings reflect the "prompt, adequate and effective" standard of compensation.

C. Extrinsic Interpretation of NAFTA

As discussed, extrinsic interpretation of treaties is allowed only in exceptional circumstances by the Vienna Convention, and would thus not be ordinarily used by a tribunal in construing NAFTA. However, extrinsic methods remain useful in shedding light on the parties' motivations in agreeing to the final language.

Mexico's willingness to accept the language of Article 1110 arguably stems from its interest in attracting foreign investment. Indeed, parties on both sides of the NAFTA debate agree that Mexico's implicit goal was to attract foreign capital in order to transform itself into a dynamic, industrialized nation. [FN109]

From Mexico's perspective, the perceived economic advantages of NAFTA evidently outweighed the potential

disadvantages of the treaty. Aside from the concession to accept the U.S. version of international law on the issue of compensation, Mexico, like all states entering into binding treaties, conceded to a degree of decreased sovereignty. An example of NAFTA's likely impact on Mexican sovereignty can be found in Canada's experience with the compensation provision (Article 1605) of the FTA. [FN110] Bruce Campbell, of the Canadian Centre for Policy Alternatives, argues that the FTA has constrained Canadians by "thwarting the power of intervention-minded governments," [FN111] citing the Ontario government's effort to carry out its 1990 election promise of installing a system of public automobile insurance. The promise went unfulfilled because in August 1991, U.S. Trade Representative Carla Hills pointed to the policy as violating the FTA because of the threat to U.S. firms with a stake in the private automobile insurance industry. The proposed policy was deemed "tantamount to expropriation" under Article 1605. Campbell countered:

The auto insurance example demonstrates concretely how the FTA operates as a mechanism through which the US can scrutinize, apply pressure and retaliate against Canadian policies which threaten the interests of its corporations. It frustrates democratic choices by reducing the power of federal and provincial governments [T]he FTA transfers power to the corporations, and establishes the United States as the enforcer of the new order. [FN112] This example suggests that Canada and Mexico have been willing to accept a loss of a certain degree of sovereignty in order to gain economic benefits. [FN113]

Mexico is certainly aware of the threat to sovereignty posed by NAFTA. Nevertheless, Mexico has been willing to make concessions, including the acceptance of the language in Article 1110. This can be inferred from Mexico's willingness to concede, in addition to its economic situation, that Article 1110 forms part of Mexico's economic strategy. Indeed, given Mexico's goal of increasing foreign investment, Article 1110 may be less of a concession than an acceptance of reality. According to one report, "[t]he investment provisions of NAFTA will further serve to strengthen Mexican economic reforms, said Fernando Sanchez-Ugarte, Undersecretary of Industry and Foreign Investment in Mexico's Secretariat of Commerce and Industry. Mexico is 'very satisfied' with the investment chapter, he said." [FN114]

A major U.S. aim in entering into NAFTA was to protect its citizens' investments in Mexico. Significantly, the State Department, in identifying the U.S. goals in NAFTA, identified the "[e]stablishment of an open investment climate" as one of the four primary aims. [FN115] In furthering this purpose, U.S. negotiators aimed to secure treaty language which adequately reflected U.S. interpretations of the international law of expropriation and compensation. In fact, the State Department's description of the NAFTA Investment chapter specifically mentions the U.S. BIT program: "The United States seeks to establish principles customarily included in bilateral investment treaties, such as national treatment, the right of establishment, the right to repatriate profits, guarantees against unfair expropriation, and access to arbitration for the settlement of disputes." [FN116]

Bill Barrera, Deputy Assistant Secretary for Trade and Investment Policy at the U.S. Treasury Department and former NAFTA negotiator, described the U.S. goal in the negotiations as "clarifying" and more fully developing the BIT provisions for compensation in the case of expropriation. According to Mr. Barrera, the Investment Chapter negotiators relied more on the U.S. Model BIT than on the U.S.-Canada FTA. Mr. Barrera explained the absence of the "prompt, adequate and effective" language in Article 1110 as a result of the U.S. negotiators' cognizance of Mexican "sensitivity" to the language. The solution, according to Mr. Barrera was not to insist on the particular Hull doctrine which carried with it "certain baggage," but rather to effectively achieve the substantive meaning with different language. Furthermore, Mr. Barrera reasoned that the provision is in some sense better than "prompt, adequate and effective" in that Article 1110 details the compensation requirement in greater detail, in order to provide "more of a guide to an arbitrator." [FN117]

Daniel Price, a former U.S. Trade Representative NAFTA negotiator, called the Investment Chapter of NAFTA a decided success for the United States because it resolved some major issues in U.S.-Mexico investment relations. Mr. Price described Article 1110 as "one of the truly significant provisions of the agreement." [FN118] It is significant because the "provision embodies what for the United States has been the customary international law principle that property may only be taken for a public purpose in a non-discriminatory fashion, and upon prompt payment of fair market value, with interest from the date of expropriation" [FN119] Though Mr.

Price does not use the terms "adequate" or "effective" to describe Article 1110's success, he does say that the U.S. assertions of customary international law have been achieved in that provision. The comments of Mr. Price and Mr. Barreda indicate that the United States successfully achieved the goals of the Hull doctrine without employing its specific terminology. This fact, in combination with the intrinsic interpretation of Article 1110 above, demonstrates that the United States has essentially achieved -- and Mexico has conceded to -- a requirement of "prompt, adequate and effective" compensation in the case of expropriation.

Through an examination of the "context" of NAFTA, it seems clear that the United States accomplished its objectives in the Investment Chapter. The reason for this U.S. victory in the compensation for expropriation provision is directly related to two overall Mexican objectives: attracting foreign investment, and entering into an expansive trade agreement with the United States and Canada.

V. Dispute Settlement Under NAFTA in Cases of Expropriation

The protections Article 1110 affords foreign investments have little weight without adequate enforcement. Thus, it is crucial that NAFTA contain a mechanism for adequately settling disputes between foreign investors and expropriating states. Indeed, according to Professor Salacuse, international law alone will not provide the mechanism: "For foreign investors and their governments, one of the great deficiencies of customary international law is that it does not afford an effective and binding mechanism for the resolution of investment disputes. One aim of the BIT movement is to remedy this situation." [FN120] The NAFTA Investment Chapter contains a separate dispute settlement section. [FN121] Section B, "Settlement of Disputes between a Party and an Investor of Another Party," is described in the NAFTA Implementation Act summary:

Section B of Chapter Eleven provides a mechanism for an investor to pursue a claim against a host government that it has breached its obligation under Section A. This mechanism is patterned after the investor-State dispute settlement mechanism of the standard U.S. bilateral investment treaty and permits an investor to submit its claim to binding arbitration under internationally-accepted rules. [FN122] Section B encourages settlement through consultation and negotiation, [FN123] followed by submission of the claim to arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, the ICSID "Additional Facility Rules," or the arbitration rules of the United Nations Commission on International Trade Law. [FN124] Most importantly, Article 1122 codifies the prior consent of the governments to submit claims to arbitration. [FN125] The NAFTA Implementation Act summary explains: "To ensure that a host country cannot frustrate an arbitration by withholding its own consent, Article 1122 itself constitutes advance consent by the three NAFTA governments to arbitration." [FN126]

Section B gains particular importance in light of the fact that Mexico has historically insisted on the right to treat foreigners and nationals equally and to settle investment disputes domestically. In fact, this insistence on domestic settlement, according to Professor Salacuse, is relevant because the compulsory arbitration provisions in BITs "may be the reason that so few Latin American countries have signed BITs, since international arbitration conflicts with the Calvo doctrine, an important element in the legal systems of most countries in the region." [FN127] In this light, the fact that the drafters patterned Section B after the Model BIT increases in significance.

VI. Conclusion: Who Won?

Ultimately, a state acts to further its interests, whether deciding to make war, implement a certain interpretation of international law, or enter into a given treaty. Mexico has, after a half century, consented to the U.S. version of the international law of compensation for expropriation. This decision reflects Mexico's changing economic realities and its adaptable view of self-interest. At one time, Mexico preferred to assert sovereignty over its natural resources and to contest any obligation to pay compensation according to U.S. terms. Today, in an era of global markets, regional trading blocs, and an increased need for foreign investment, Mexico has found the concession to the U.S. terms tolerable. Swallowing the bitter pill of what is effectively a "prompt, adequate and effective" compensation provision presumably poses less damage to national interests than missing out on a broad agreement with two important trade and investment partners.

The U.S. goal of protecting its citizens' foreign investments remains vital, although the United States understood that insisting on semantic assertions of "prompt, adequate and effective" would undermine its efforts to achieve that protection. NAFTA represents a resolution to the diplomatic exchange that began over fifty years ago. Both Mexican and U.S. negotiators can claim a victory in this agreement: Mexico has achieved its objective of attracting investment and the United States has assured that such investment will receive adequate protection. Though no controversies or disputes have yet tested NAFTA's provision for compensation in the event of expropriation, Mexico, the United States, and Canada will benefit from a codified framework to address such issues if disputes do arise. Instead of hurling assertions of international law at one another, the parties will seek resolution of conflicts through a mechanized system to which they have all consented.

**Appendix A: NAFTA Part Five Investment, Services and Related Matters
Chapter Eleven Investment Section A - Investment Article 1110: Expropriation
and Compensation 1. No Party may directly or indirectly nationalize or
expropriate an investment of an investor of another Party in its territory or
take a measure tantamount to nationalization or expropriation of such an
investment ("expropriation"), except:**

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

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

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

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

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

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

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

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
[FN128]

**Appendix B: U.S. Restatement: Restatement (Third) of the Foreign
Relations Law of the United States Part VII Protection of Persons (Natural and
Juridical) Chapter Two Injury to Nationals of Other States s 712. State
Responsibility for Economic Injury to Nationals of Other States**

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 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 . . . [FN129]

**Appendix C: U.S. Model BIT Model Bilateral Investment Treaty (BIT)
Treaty Between the United States of America and -- -- -- Concerning the
Reciprocal Encouragement and Protection of Investment Article III 1.**

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate, and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the principles of international law. [FN130]

**Appendix D: U.S.-Canada Free-Trade Agreement U.S.-Canada Free-Trade
Agreement Article 1605: Expropriation Neither Party shall directly or
indirectly nationalize or expropriate an investment in its territory by an
investor of the other Party or take any measure or series of measures
tantamount to an expropriation of such an investment, except:**

- (a) for a public purpose;
- (b) in accordance with due process of law;
- (c) on a non-discriminatory basis; and
- (d) upon payment of prompt, adequate, and effective compensation at fair market value. [FN131]

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FN1. North American Free-Trade Agreement, Dec. 12, 1992, U.S.-Mex.-Can., Texts of Agreement, 32 I.L.M. 605 [hereinafter NAFTA].

FN2. Where NAFTA's critics referred to the expropriation provision at all, they generally cited it as further evidence that the Agreement would entail a substantial loss of U.S. jobs to Mexico. For example, Pat Choate, co-author of Ross Perot's Save Your Job, Save Our Country, said "If Congress ratifies NAFTA thousands of U.S. factories and millions of U.S. jobs will be lost to Mexico ... NAFTA's real purpose is to attract capital to Mexico by making the country safe for foreign investors." The Great NAFTA Debate, Wash. Post, Oct. 3, 1993, at C3.

FN3. For a reprinting of the 1938 exchange of notes between U.S. Secretary of State Cordell Hull and the Mexican Embassy, see 3 Green H. Hackworth, Digest of International Law s 288 at 655 -65 (1942).

FN4. Professor Jaime Ros explains the changing economic forces pushing Mexico towards NAFTA:

[NAFTA's] enthusiastic adoption by the Mexican government is thus not only a result of a long process of 'silent integration,' coupled with global trends towards the formation of regional trade blocs in the world economy, but it is also a consequence of the new economic problems brought about by the adjustment and reform processes of the 1980s. Jaime Ros, Free Trade Area or Common Capital Market? Notes on Mexico-US Economic Integration and Current NAFTA Negotiations, 34 J. Interamerican Stud. & World Aff. 53, 67 (1992).

FN5. The text of NAFTA Article 1110 appears in Appendix A.

FN6. Josef L. Kunz, The Mexican Expropriations 17 (photo. reprint 1976) (New York University School of Law, Contemp. L. Pamphlets Series 5, No. 1, 1940).

FN7. Id.

FN8. Id.

FN9. Julio C. Treviño, Mexico, in Expropriation in the Americas 113, 119 (Andreas F. Lowenfeld ed., 1971).

FN10. Pastor Rouaix, Genesis of Articles 27 and 123 of the Political Constitution of 1917, at 135 (1945), quoted in Treviño, supra note 9, at 120.

FN11. Mercedes Castellanos Vda. de Zapata, Amparo Administrativo en Revision, 603 1932, s 1A (Dec. 8, 1936), 50 Semanario Judicial de la Federación (5th Epoca) 2568, 2950, quoted in Treviño, supra note 9, at 120.

FN12. Hackworth, supra note 3, at 656.

FN13. Id. at 656 -57 (emphasis added).

FN14. Id.

FN15. *Id.* at 658 (emphasis added).

FN16. *Id.* (emphasis added).

FN17. *Id.* at 658 -59 (emphasis added).

FN18. *Id.* at 660.

FN19. Kunz, *supra* note 6, at 21.

FN20. *Id.* at 21 n.121.

FN21. *Id.* at 23.

FN22. *Id.* at 22.

FN23. *Id.* at 23.

FN24. *Id.* at 33 -34.

FN25. *Id.* at 34.

FN26. *Id.*

FN27. Treviño, *supra* note 9, at 124.

FN28. Hackworth, *supra* note 3, at 662 (emphasis added).

FN29. *Id.*

FN30. The Mexican Minister of Foreign Affairs stated:

Your Excellency's Government insists, as on other occasions, in maintaining the opinion that to expropriate, without a just and prompt compensation, is confiscation and does not cease to be so because there may be the express desire to pay at some time in the future. Mexico considers that it is not in such a situation, since it not only has manifested its desire to pay, but also has expressed unequivocally its readiness to do so, having done everything that it should in accordance with its own laws, in order that ultimately the total amount may be fixed that is to be paid. *Id.* at 664 (emphasis added).

FN31. Kunz, *supra* note 6, at 54.

FN32. *Id.*

FN33. The Mexican government based its figure on the rationale that the U.S. companies had recovered their initial investment several times over, and that the 1917 Constitution vested rights to the subsoil resources in the Mexican people. Michael C. Meyer & William L. Sherman, *The Course of Mexican History* 604 - 05 (4th ed. 1991).

FN34. *Id.*

FN35. Martin Domke, *Foreign Nationalizations*, 55 *Am. J. Int'l L.* 585, 590 (1961).

FN36. Letter from Charles E. Hughes, U.S. Secretary of State, to Jacob G. Schurman, U.S. Minister in

China (Mar. 27, 1922) MS. Department of State, file 393.115/4, cited in Hackworth, *supra* note 3, at 654 (emphasis added).

FN37. Lee A. O'Connor, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 *Loy. L.A. Int'l & Comp. L.J.* 355, 399 (1983).

FN38. *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

FN39. 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).

FN40. *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J. (Ser. A) No. 17, at 47.

FN41. See *Texas Overseas Petroleum Co. v. The Government of the Libyan Arab Republic*, reprinted in 53 *Int'l L. Rep.* 389, 507-09 (1979) [hereinafter TOPCO]; but see *British Petroleum Exploration Co. v. Libyan Arab Republic*, reprinted in 53 *Int'l L. Rep.* 297, 337-40 (1973) (awarding damages for expropriation, but ruling against the standard of *restitutio in integrum*).

FN42. *Norwegian Shipowners (Norway v. United States)*, 1 R.I.A.A. 307, 334 (1922).

FN43. *Id.* at 339.

FN44. Oscar Schachter, *Editorial Comment, Compensation for Expropriation*, 78 *Am. J. Int'l L.* 121, 122-23 (1984).

FN45. Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 *Am. J. Int'l L.* 553, 558 (1981).

FN46. *Id.* at 558-59.

FN47. *Id.* at 561-62.

FN48. TOPCO, *supra* note 41, at 491-92.

FN49. *British Petroleum Exploration Co. v. Libyan Arab Republic*, reprinted in 53 *Int'l L. Rep.* 297, 347-48, 353 (1973).

FN50. *Award In the Matter of an Arbitration between The Government of the State of Kuwait and The American Independent Oil Company*, reprinted in 21 *I.L.M.* 976, 1032-33 (1982) [hereinafter AMINOIL].

FN51. *Award in the Dispute between Libyan American Oil Co. and The Government of The Libyan Arab Republic Relating to Concessions 16, 17, and 20*, reprinted in 20 *I.L.M.* 1, 76-77 (1981) [hereinafter LIAMCO].

FN52. Norton, *supra* note 39, at 483-84.

FN53. LIAMCO, *supra* note 51, at 72-73.

FN54. *Id.*

FN55. *Id.* at 73 (emphasis added).

FN56. *Id.* at 86.

FN57. According to Ian Brownlie, "resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions." Ian Brownlie, *Principles of Public International Law* 14-15 (4th ed. 1990) (citations omitted).

FN58. Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962) [hereinafter Res. 1803].

FN59. *Id.* (emphasis added).

FN60. The United States voted with the majority; the two dissenting votes were France and South Africa, and the abstaining votes were cast by the Communist Bloc, Cuba, Ghana, and Burma. Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463 (1963).

FN61. Consideration of the Draft Resolution of the Commission on Permanent Sovereignty Over Natural Resources, U.N. GAOR 2d Comm., 17th Sess., 850th mtg., at 327, U.N. Doc. A/C.2/S.R. (1962).

FN62. Permanent Sovereignty Over Natural Resources: Report of the Second Committee, U.N. GAOR Plenary Meeting, 17th Sess., 1193rd mtg., Agenda Item 39, at 1128, U.N. Doc A/PV. 1193 (1964).

FN63. Permanent Sovereignty Over Natural Resources (Concluded): Report of the Second Committee, U.N. GAOR Plenary Meeting, 17th Sess., 1194th mtg., Agenda Item 39, at 1136, U.N. Doc A/PV. 1194 (1964).

FN64. The text of Restatement (Third) of Foreign Relations Law of the United States § 712 (1987) appears in Appendix B.

FN65. Restatement (Third) of Foreign Relations Law of the United States § 712 reporter's note 2 (1987) [hereinafter Restatement (Third)].

FN66. Norton, *supra* note 39, at 498.

FN67. AMINOIL, *supra* note 50, at 1032.

FN68. TOPCO, *supra* note 41, at 507-11.

FN69. Schachter, *supra* note 44, at 128.

FN70. Norton, *supra* note 39, at 498.

FN71. The Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251 (1975).

FN72. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Supp. No. 1, at 4, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974).

FN73. TOPCO, *supra* note 41, at 492.

FN74. Restatement (Third), *supra* note 65, § 712(1)(c) (1987).

FN75. *Id.*

FN76. *Id.* at § 712(1)(c) comment c.

FN77. Janwald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *Int'l Law* 655, 659 (1990).

FN78. *Id.* at 661 (emphasis added).

FN79. U.K.-U.S.S.R. *Bilateral Investment Treaty*, April 6, 1989, U.K.-U.S.S.R., 29 *ILM* 366, 372.

FN80. *Id.*


FN81. Malcolm N. Shaw, *International Law* 526 (3d ed., Grotius Publications Ltd. 1991).

FN82. *Statute of the International Court of Justice*, June 26, 1945, art. 38(1)(b) 59 *Stat.* 1031 [hereinafter *Stat. of ICJ*].

FN83. *Id.* art. 38(1)(c).

FN84. *Id.* art. 38(1)(a).

FN85. The text of the U.S. Model BIT appears in Appendix C.

FN86. *Model Bilateral Investment Treaty (BIT) and Sample Provision for Negotiated BITs (Revised February 24, 1984)* [hereinafter U.S. BIT], reprinted in *Basic Documents of International Economic Law* 649 (Stephen Zamora & Ronald A. Brand eds., 1990). 

FN87. Shaw, *supra* note 81, at 525.

FN88. Dolzer, *supra* note 45, at 565.

FN89. *Id.* at 566 - 68.

FN90. *Vienna Convention on the Law of Treaties*, Jan. 27, 1980, s 3, art. 31(1), reprinted in *Basic Documents in International Law* 362- 63 (Ian Brownlie ed., 1983) [hereinafter *Vienna Convention*].

FN91. *Id.* s 3, art. 31(3)(c).

FN92. *Id.* s 3, art. 32.

FN93. *Id.* s 3, art. 32(a).

FN94. *Id.* s 3, art. 32(b).

FN95. As exemplified by the *Restatement (Third)*, *supra* note 65, s 712.

FN96. *United States-Canada Free-Trade Agreement*, Dec. 22, 1987 - Jan. 2, 1988, U.S.-Can., 27 *I.L.M.* 293 [hereinafter *FTA*].

FN97. *Vienna Convention*, *supra* note 90, art. 31(1).

FN98. Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A*

Canadian Perspective, 84 Am. J. Int'l L. 394, 419 (1990).

FN99. NAFTA, *supra* note 1, ch. 11, s A, art. 1110(3), at 642.

FN100. Restatement (Third), *supra* note 65, s 712(1)(c).

FN101. U.S. Model BIT, *supra* note 86, art. III(1).

FN102. NAFTA, *supra* note 1, ch. 11, s A, art. 1110(2), at 641- 42.

FN103. On the various methods of valuation, see 1-4 R. Lillich, *The Valuation of Nationalized Property in International Law* (R. Lillich ed., 1987).

FN104. Restatement (Third), *supra* note 65, s 712(1)(c).

FN105. U.S. Model BIT, *supra* note 86, art. III(1).

FN106. Restatement (Third), *supra* note 65, s 712(1)(c).

FN107. Note that Mexico is the only NAFTA party which is not a Group-of-Seven nation. Accordingly, the inclusion of the requirement that compensation payment be in G7 currency is clearly targeted at Mexico.

FN108. U.S. Model BIT, *supra* note 86, art. III(1).

FN109. See, e.g., *The Great NAFTA Debate*, *supra* note 2, at C3 ("NAFTA's real purpose is to attract capital to Mexico by making the country safe for foreign investors."); *The New Model Debtor*, *Economist*, Oct. 6, 1990, at 86 ("The free-trade agreement ... is not only, or even primarily, about openness to trade. It has more to do with attracting the foreign investment that Mexico will need.").

FN110. The text of Article 1605 of the FTA appears in Appendix D.

FN111. Bruce Campbell, *Free trade: Year 3, 26 Canadian Dimension 5*, available in WESTLAW, MAG-ASAP database.

FN112. *Id.*

FN113. The recent U.S. loan guarantee program for Mexico underscores the degree of interdependence between the two countries, resulting in claims that Mexico has compromised its sovereignty. See, e.g., Anthony DePalma, *Sense of Dollar Duress: With Deeper Pain Ahead, Many Mexicans Accuse President of Yielding Sovereignty*, *N.Y. Times*, Feb. 22, 1995, at A1 ("Almost before the ink dried on today's agreement to provide Mexico with \$20 billion in emergency help from the United States, President Ernesto Zedillo has found himself accused in Mexico of trading his nation's sovereignty for a sack of American dollars."). The historical irony of the arrangement is that "Mexico's international oil revenues will flow through the Federal Reserve Bank of New York, collateral that the United States can seize if a future Mexican government reneges on its debts." Doyle McManus, *Next Step: Pride, Politics and the Peso: With Currency Bailout, is Washington Becoming a "Probation Officer" to its Southern Neighbor?*, *L.A. Times*, Mar. 14, 1995, *World Report*, at 1. Cf. Pat Buchanan, *Is Wall Street Elite Pulling the Real Levers of Power?*, *Ariz. Republic*, Feb. 9, 1995, at B5 (arguing that U.S. sovereignty has been impermissibly subordinated to "dependency upon the New World Order," evidenced by NAFTA and the U.S. "bailout" of Mexico).

FN114. *Investment Chapter Said to Solve Long-Standing U.S.-Mexico Differences*, *Int'l Trade Daily (BNA)*, Dec. 7, 1992, available in WESTLAW, BNA-DNEWS database.

FN115. North American Free Trade Agreement, U.S. Dep't St. Dispatch, Feb. 17, 1992, Vol. 3, at 110(8), available in WESTLAW, MAG-ASAP database.

FN116. *Id.* at *13 (emphasis added).

FN117. Telephone interview with Bill Barreda, Deputy Assistant Secretary for Trade and Investment Policy, U.S. Department of the Treasury (Apr. 1993).

FN118. Investment Chapter Said to Solve Long-Standing U.S.-Mexico Differences, *supra* note 114.

FN119. *Id.*

FN120. Salacuse, *supra* note 77, at 672.

FN121. NAFTA, *supra* note 1, ch. 11, s B, at 642- 47. For a discussion confined to the other dispute settlement provisions in NAFTA (general dispute settlement measures in chapter 20 and special provisions for antidumping and countervailing duty cases in chapter 19), see David S. Huntington, Settling Disputes Under the North American Free Trade Agreement, 34 Harv. Int'l L.J. 407 (1993).

FN122. North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H.R. Doc. No. 103 -159, 103d Cong., 1st Sess., Vol. 1 at 594 (1993)(emphasis added).

FN123. NAFTA, *supra* note 1, ch. 11, s B, art. 1118, at 643.

FN124. NAFTA, *supra* note 1, ch. 11, s B, art. 1120, at 643.

FN125. NAFTA, *supra* note 1, ch. 11, s B, art. 1122, at 644.

FN126. The North American Free Trade Agreement Implementation Act, Chapter Eleven: Investment, *supra* note 122, at 596.

FN127. Salacuse, *supra* note 77, at 671-72. The Calvo Doctrine is composed of two concepts:

First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from "interference of any sort" ("ingerence d'aucune sorte") by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before local authorities. Donald R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* 19 (1955).

FN128. NAFTA, *supra* note 7, ch. 11, s B, art. 1110, at 641-42.

FN129. Restatement (Third), *supra* note 65, s 712.

FN130. U.S. Model BIT, *supra* note 65, art. III.

FN131. FTA, *supra* note 1, ch. 11, s B, art. 1110, at 641- 42.

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