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Expropriation Under Mexican Law and Its Insertion into a Global Context Under NAFTA

BY RAYMUNDO E. ENRIQUEZ*

Transcript of Remarks

Professor William S. Dodge (Moderator): I have the pleasure now to introduce Raymundo Enriquez of Baker & McKenzie in Mexico City, a professor at Universidad Iberoamericana, [a] graduate from Universidad Iberoamericana with a J.D., [who] has an LL.M. from Harvard and an I.T.P. from Harvard. I must confess, I don't know what an I.T.P. from Harvard is, so perhaps you can illuminate that for us. He's served as a panelist on a number of panels under various chapters of the NAFTA, assisted as legal counsel in numerous anti-dumping and investment matters under the NAFTA, and will talk to us about expropriation under Mexican law and its insertion in a global context under the NAFTA. Thank you very much.

Professor Raymundo E. Enriquez: Thank you. Just for the record, I.T.P. [is] the international tax program.

Let me start by thanking the *Hastings International and Comparative Law Review* for the opportunity of being here and try to share with you some of my thoughts regarding the application of Chapter Eleven of NAFTA [to] the expropriation of investment[s] in a rather not-so-practical manner, or in a [way] that would not be as practical as the ones that we have heard. . . . [And] again, I have to stress that we're very fortunate to have some of you here that do have that practical experience in this topic.

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To nobody it is a surprise that NAFTA was a turning point for Mexico in a variety of [respects], and certainly the legal scenario was not an exception. Six years now after its enactment, the benefits for the three countries certainly have been evident. [And] we're still in the process of absorbing the full impact of such a partnership at all levels in the legal system

The challenge of the NAFTA negotiators was to set rules that would apply to totally different legal systems and . . . cultural . . . backgrounds that in many instances were in [tension]. I think that was the challenge, and I think that they did a great job, but they could not perceive all of the impacts that this would have in the different cultures.

And one, in my opinion, is the institution of expropriation, which is a very . . . deep-rooted concept in Mexico. And I'm not referring to it only from a legal sense, but also from a political and historical perspective Expropriation has certainly been a tool that the Mexican government has used when . . . such mergers have created international effects, and this is clear in two instances that I can remember They have also served to foster a . . . very nationalistic spirit or sentiment within the Mexican population, so we cannot isolate the concept of expropriation in Mexico just to the legal effects without giving due care to the political and economic effects of such a measure.

[I am] here referring to the [two] most . . . visible expropriations . . . in this last century And I'm referring to the old industry, for one instance, in the thirties, and, more recently, as Professor [Frederick M.] Abbott referred to as well, to the banking industry. It did not have a huge impact, not only in Mexico, not only from a legal perspective, but also from [the] political and economic [perspectives], and that . . . gave, perhaps, a wrong signal to our trading partners. And now we're seeing the effects of that. [We saw it] when they entered into [the] negotiations [concerning] NAFTA. Certainly those measures had an impact in the investor country. [So] I think that Mexico had to agree, in some instances, to clauses or commitments that otherwise would have not been needed I am certain that those commitments that were assumed by Mexico, which are now contained in Chapter Eleven, must have [been a response to the] negotiations, where the expected ultimate economic and political benefits were greater. But as a lawyer, I cannot escape the temptation to make some observations in this regard.

In my opinion, for the reasons that I will attempt to explain, the

rules governing expropriation, and the dispute settlement mechanism contained therein, neglected a position that Mexico [had] sustained for many years, both intellectually and legally, known as the Calvo Doctrine, which is now implemented in the Mexican legislation through the Calvo Clause. And, in some instances, and this could be a little bit . . . academic . . . , [the rules may be] contrary to our constitutional principles.

When I'm referring to the Calvo Doctrine, I don't intend to enter into the different justifications of [the] doctrine, nor will I share my views on its merits. I will simply [impart] the view that the Mexican government has stated in the past on this topic.

Mexico's adoption of the Calvo is quite understandable if we take a quick look at the history of the [United States] and Mexico and the routine, in Mexico, of diplomatic relationships in the past, especially in the eighteenth century. Both Europe and the United States embarked on military interventions to the Mexican Territory [due to] property or investment disputes. Such a political environment, certainly, put more emphasis on one of the principles of the Calvo Doctrine, which was to prevent foreign interventions or diplomatic pressure from states with greater strength, both . . . economic[ally] and militar[ily]. But . . . that was only one of the principles

And this is something [with which] I'm confronted very frequently [by] our clients when they want to organize a Mexican corporation. . . . [T]hey have to insert this Calvo Clause, and say, "What's this? I mean, what is my commitment, what is my commitment here?" And of course the traditional approach to this is not that they will ask the Marines to go down to Mexico in case of a dispute. So I think that at least that perception of the Calvo is no longer valid.

But, again, I don't think that was the only principle of such doctrines. Commentators, I believe, tend to agree that the Calvo Doctrine involves the following principles: (1) no alien may enjoy additional rights [beyond] those granted to nationals, and I want to stress this one; (2) the application of domestic law to aliens, or their property, shall not give rise to diplomatic protection . . . ; (3) any dispute derived from foreign investment, or negotiations in connection therewith, must be resolved by local courts, and in accordance with domestic law.

This, of course, we have learned, is no longer a valid principle under international principles. But . . . let me just quote a Mexican

diplomatic, a great Mexican diplomat and academic, Mr. Alfonso Alcia Robles, when he summarized the Calvo Doctrine in the following sentence: "The Calvo Clause commitment merely places the alien in a position of equality with the nationals." And I think that this is a much more contemporaneous approach to this principle.

[This] principle was the basis of a provision . . . in the Mexican Constitution that specifically reads, "Foreigners must agree before the Mexican government to consider themselves as Mexicans regarding their property, and to bind themselves not to invoke the protection of their governments with respect to such property." Somebody could perhaps say that the constitution was drafted in 1917, and perhaps that concept is now outdated, and perhaps that the Mexican government is no longer committed to that principle

Contrary to that position, I could argue that we note, we need to note, that the regulations of the foreign investment law, which were enacted in 1998—this is four years after signing or executing NAFTA—have two references to this constitutional provision. In the first, it prescribes that in order for a foreigner to own real estate in Mexico, he or she must agree to the Calvo Clause. Second, companies with the ability to admit foreign investors must include in their by-laws an agreement by which any foreign shareholder must abide by the terms of the Calvo Clause. This indicates to me that only three years ago this was the position of the Mexican government, and it is a valid concept, and it is a valid position that the Mexican government is willing to take.

The rationale, in my view of [this] provision, is that any foreigner wishing to invest in another country must accept the legal standards of such other country. This is part of the investment risk analysis that any investor is expected to make when committing its own resources. That's just to say due diligence, whenever you're going to a different—even locally, [and] certainly . . . international[ly]—when you are going to acquire a company, when you're going to invest, you need to do due diligence, and that's going to be part of your risk analysis. Attempting otherwise, now in a global economy such as the one we're currently experiencing, would be to neglect a reality.

From any investor's perspective, in my opinion, the only case in which it would be justifiable to seek government protection at this stage would be in those cases where the denial of justice is present. I think that's the only case in which it would be justifiable for an investor, at this stage, to seek the protection of its government.

And what should we understand by "denial of justice"? I make

reference to a definition by [a] Harvard research [study], when it said [that a “denial of justice” may consist of] “a denial, unwarranted delay, or obstruction of access to courts, [a] gross deficiency in the administration of judicial or remedial process, [a] failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifest unjust judgement.” With all due respect, I don’t believe that those conditions are present in the Mexican legal system, although I recognize that there might be some flaws, and there might be a different perspective, which I fully recognize as a Mexican practitioner, but not to the extent that would necessarily . . . justify the intervention of a foreign government.

If the above is true, the question would be, to me, why the Mexican government allowed, under Chapter Eleven of NAFTA, alternate methods of defense to foreigners from those available to local investors in the event of an expropriation. That would be, for me, the question.

As you all know, if we make a review of the provisions, we will find that a foreign resident of a NAFTA country whose investment was expropriated by the Mexican government would have the ability to challenge such action not only through the legal procedures contemplated in the domestic expropriation law, but also through the arbitration procedure, of course following the rules contained therein And to me the question would be: Wouldn’t this violate the principle contained in the Calvo Clause incorporated into . . . Mexican [law]? To me, it is clear [that the answer is yes], by not placing the alien in the same position as the national.

Furthermore, if at the time the foreigner acquired property in Mexico—either real estate or stock in a Mexican company—he or she agreed to be considered as a national with respect to such property, or such investment, wouldn’t that prevent him or her from enjoying a legal remedy available only to foreigners under NAFTA? We need to remember that, under the Calvo Clause, it [one must] agree to be treated as a national. Somebody can argue that a foreigner initiating an arbitration procedure under NAFTA is not in violation of such [a] commitment because under such a procedure, he or she is not necessarily invoking the protection of his or her government. I would agree with that perception. However, this constitutional provision contains two different and distinct [prongs]. The first one is that the foreigner should be considered as a national. And the second is [that the foreigner will] not invoke the protection of [his or her] government. Any flaw in either of these [prongs] would, in my view,

constitute a violation of the agreement entered into by the foreign individual with the Mexican government.

And I am by no means opposing the concept of arbitration. Certainly we have seen that in the past, in very different forms, . . . it [has been a] good alternative—perhaps not as expeditious based on the experience that some of our colleagues have had, but certainly it's an [area] where an investor will feel more comfortable going, rather than to the local courts, for whatever reasons. And Mexico, I think, was receptive to that. If we go back to the political situation and the need for foreign investment at the time, we cannot really put a lot of blame on the Mexican government for accepting those mechanisms. We were pursuing foreign investment before the investors. Again, as Professor Abbott mentioned . . . , they need that protection. It's a justifiable protection that they need, and I'm not opposed to that.

Mexico even enacted legislation at that time allowing the Mexican government to enter into international treaties allowing for dispute settlement mechanisms, and I'm referring to . . . the law for the execution of treaties, which was enacted in 1992 if I recall correctly. Certain other pieces of legislation were introduced in anticipation of NAFTA. In the past, for instance, . . . Pemex, the Mexican oil company and the electricity and utility company which both are owned by the Mexican government, by their own law were prohibited, in the event of entering into contracts, [from] agree[ing] to any forum other than the Mexican federal courts. Now they have the ability to enter into arbitration, if that's the case, and they agreed to that with their counterpart, and this was all in anticipation of NAFTA.

And, again, I'm not, I'm really not opposing the mechanism, but the Mexican government expressed at that time that such mechanisms were not in violation of the Calvo Clause under the argument that if the foreign government agrees to such [a] procedure as a legal avenue to resolve disputes, [that] government is in fact agreeing to not intervene in the event of a dispute with one of its citizens. I can agree with [this] view, but that is not the point. The problem is that such remedies are not available on a consistent basis. In other words, why—and I can understand the need to include those mechanisms during negotiations when we were badly needing foreign investment, and that certainly has created a lot of well-being for Mexico in terms of employment, in terms of having the security to export our trades, etc.—but the problem, to me, is that I believe a more coherent approach would have been to allow the same legal remedies to

everybody.

. . . I'm trying to put myself in the shoes of the foreign investor countries, where they might feel that in the event that either they were prevented from a dispute settlement such as arbitration and they were forced first into the local laws, they still had the Chapter Twenty avenue available for them in case they felt that the Mexican courts were, in fact, denying . . . proper justice to their investors. And perhaps another approach would have been just to maintain the same legal remedies for everybody, and to not make this discrimination, which, again, in my view, violates the principle and the legislation which is now currently in place in Mexico.

And you might say, "Well, this is highly theoretical," because who would be the beneficiary of the agreement entered into by the foreigner under the Calvo Clause but the Mexican government? So when would that happen? [That is,] when would the Mexican government, [which] signed this agreement with the NAFTA countries, consider this as a breach or [an] attempt to make any distinction based exclusively on [the] Calvo Clause? And, I would tend to say, "Yes, this could be highly theoretical—under the present circumstances."

And the present circumstances might change. For the first time, I believe that Mexico has entered into a very deep democratic process. I think that we have had a government from the same party for over sixty, seventy years. And for the first time, we will be confronted with an election where we don't know who is going to win, and this might sound a little bit weird for you in the States, but I'm just very briefly recalling a conversation where there were diplomats from the United States, Europe, etc., and one of the representatives from a foreign country was saying and bragging that they were very pleased with the new software that they had installed, because now they were going to be able to know who the winner in the presidential election would be three or four hours after the polls were closed. And the Mexican representative said, "Well, that's no good to me, since we know well in advance—prior to the election—who the [next] president . . . will be!" So, again, even though it's going to be a highly theoretical point, I think that if for some reason the political climate in Mexico changes dramatically, this could be a [theory] that could be used by someone. Thank you very much.

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Professor Dodge: Thank you very much, Mr. Enriquez. That

raised a lot of thought-provoking questions in terms of the relationship between treaty norms and legislative norms in the Mexican legal system, and also questions of how these might come up procedurally in the NAFTA dispute settlement context.