CARLOS CALVO, HONORARY NAFTA CITIZEN

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Key-note remarks made at the Conference on Regulatory Expropriations in International Law,

New York University School of Law, April 26, 2002.

It is common knowledge that international judges and arbitrators often have great pain in finding who is right and who is wrong in a given case. One can be persuaded at first by the views of one party only to find later that the arguments of the other party seem more convincing. This is not because such judge or arbitrator might lack clear legal convictions but it is rather the consequence of the nature of international law. In fact, international law is normally the outcome of a difficult process of reconciliation between differing views on fundamental issues.

One is somewhat baffled when hearing the present discussion about the meaning of international law in the context of foreign investments. Does it mean the minimum standard under customary international law, allowing for government measures to prevail except when there is some egregious form of conduct? Or is it a more elaborate standard of

treatment found in the sources of international law as a whole, including treaties, and based on the evolving experience of investments throughout the world?

The discussion is not at all different from that we knew about in Latin America a century ago. Was there to be a national standard of treatment that meant the governments would prevail over investors except in cases of egregious conduct? Or was there a minimum standard under international law that allowed for investors to have protection in terms of ensuring reasonable conditions for the development of their business? Whether the discussion is now labeled minimum standard versus fair and equitable treatment or some other variation, the issue is still the same, namely whether governments can adopt measures virtually unchecked or need to observe standards higher than those traditional imposed by customary law.

Carlos Calvo was a distinguished Argentine jurist that lent his name to the Clause that required submission of disputes involving investors to local courts as opposed to international means of protection, and above all argued in favor of national treatment as opposed to international standards. My question to you today is whether Calvo has become an honorary NAFTA citizen.

Seeking a balance of reasonableness.

The protection of property and acquired rights has been a fundamental issue in the evolving framework of international law. For a long time the right to protection could not be easily reconciled with the supremacy of national sovereignty. Only after difficult confrontations an understanding was reached about the limits of the respective contentions, and conditions were set to diplomatic protection and the right to expropriate, including the right to compensation. International adjudication was instrumental in reaching such reconciliation.

The situation is not different today in respect of the issue of indirect taking of property that brings us together. The State holds its right to adopt measures in pursuance of public policies. Investors hold their right to be compensated if such measures amount to a taking. Neither of these views can be questioned in and of themselves. The problem lies in how and where the respective limits and conditions should be established, that is in identifying the point of common interest and reconciliation. Yet, when we might have thought that the legal framework was rightly evolving in the direction of attaining such a balance, all of a sudden the confrontation flares up again. Is there a NAFTA/BIT treatment

or just a minimum customary law standard? Are such standards those of the twenty-first century or still those of the nineteenth century?

International legal thinking has had great difficulty in focusing on the right approach to the issue of indirect expropriations, as opposed to formal expropriation. This again is not because of a lack of clear legal convictions but rather because a process of action and reaction is still unfolding and the appropriate outcome has not yet been reached. Again here international adjudication has been making progress in seeking such a balance but the pertinent rule has not yet emerged with the necessary clarity.

May I propose to you that we begin together this process of reconciliation. The experience of my own country may well serve as a starting point to this effect. Thirty years ago Chile undertook radical nationalization policies in respect of the copper industry and other productive sectors. After a bitter economic and political experience it was found out that it was not a good idea to chase away foreign investors. As a result Chile opened its borders to trade and investment, a policy that remains the central tenet of both conservative and socialist governments.

More importantly, in addition to the traditional role of a capital importing country, Chile became at the same time a capital exporting

country. Significant private investments have been made in South America and elsewhere. The implication of this dual track investment policy is that Chile is today compelled to look at both sides of the equation. It may not wish to do to foreign investors what it would not like others to do to its own investors. Bilateral Investment Treaties have been made with developed and developing countries alike.

Let us then explore the main elements of the emerging equation relating to indirect expropriation under international law. The basic view that you will see underlying this presentation is that what is reasonable and fair on the part of States and investors alike ought to prevail, but what is abusive ought to be controlled.

Protecting private property, a need under human rights.

First, I believe that we can all share the view that private property is entitled to protection. Outright arbitrary expropriation, whether direct or indirect, is not today a part of the international scenario. Moreover, protection of private property is today a vital element of the broader issue of protection of human rights.

May I note in this respect a recent decision of the Inter-American Court of Human Rights on the *Ivcher Bronstein Case*, in which it was held that the right to property includes all patrimonial rights of an individual. It

was further held that although the Claimant was not deprived of his property over company shares, he was in fact deprived by judicial decision of the fundamental rights associated to such property, namely the right to vote in the company and to receive dividends. Redress and compensation were ordered by the Court in accordance with the applicable standards under domestic law.

A comprehensive approach to overreaching regulations.

Second, I also believe that the formal approach followed on many occasions by international tribunals that tend to look basically to whether there has been a transfer of property rights from the individual to the State is no longer justified. The complexity and enormity that government regulations can reach requires a more comprehensive approach.

It is true, as held in the *S. D. Myers Case*, that expropriation involves the deprivation of property and regulatory acts of government amount to a lesser kind of interference. However, it is nonetheless true that, as held by another tribunal in the *Pope & Talbot Case*, the latter regulatory acts can be exercised in a manner that can be equated with expropriation. But even in this last case the ultimate test was whether the interference was sufficiently restrictive to support the conclusion that the property had been taken from the owner.

Who is to pay for the public interest?

Third, the right of the State to regulate and even to expropriate in the public interest is not questioned under international or domestic law. The issue really is if compensation should be paid. The rule is today explicit about the payment of compensation in the case of expropriation and transfer of property. It is not quite clear in the case of regulation not involving such transfer.

As Rosalyn Higgins wrote in her pioneering study on the taking of property by the State, the issue can be further refined to the determination of who is to pay for the economic cost of attending to the public interest involved in the measure in question. Is it to be society as a whole, represented by the State, or the owner of the affected property?

The answer to this difficult question will of course vary in the light of each case, particularly if there are contracts involved, but in the end it involves some form of decision about fairness and justice. It is interesting to note that in the past this was mostly an ideological question: you were either pro-State or pro-property and hence you would answer one way or the other.

Today fortunately this is no longer the case, at least for the international legal community, as the decision involves a determination on

the extent of the rights eventually affected, the incidence of the measure taken and the genuine need for a public purpose and non discrimination. However, one cannot overlook the fact that the old ideological dimensions are still around in some quarters.

On this point I cannot fail to mention how intrigued I am at the approach taken by the recent Charter of Fundamental Rights of the European Union. After recognizing the right to property and the safeguards against deprivation, including the payment of fair compensation, Article 17 of the Charter adds that the use of property may be regulated by law in so far as necessary for the general interest. No reference to compensation is made in this last sentence.

Does this mean that compensation for regulatory acts is ruled out in every instance? If so it is somehow difficult to reconcile this approach with that taken by both the European Commission on Human Rights and the European Court on the *Sporrong and Lonnroth v. Sweden Case* and other leading cases decided in the context of the protection of human rights. And it is certainly at odds with the view of the Inter-American Court referred to above.

A broad outlook of international law.

Fourth, international judicial and arbitral decisions have long recognized that the taking of property can adopt many different forms and these can be equated with expropriation in given circumstances. Surveys of decisions done by Rosalyn Higgins and later by Dolzer are quite eloquent in this respect. Similar conclusions on indirect taking may be found plentiful in the decisions of the Iran-United States Claims Tribunal.

It follows that international law has not ignored the issue of indirect expropriation and has defined a rather varied outlook in this respect by means of its case law. Neither has this outlook ignored the question of excessive regulatory measures and their incidence on the right to use property. This may not be written in an unequivocal manner, but certainly can be traced throughout a number of decisions. This state of flux in international law allows for a legitimate discussion about whether the rules keep with the traditional standards of expropriation or whether these have been enlarged as to cover new types of regulatory action.

To this extent, whether the concept of "fair and equitable treatment" is subsumed under the rules of international law or it eventually adds new standards to those required by international law sounds a bit immaterial. The issue is whether international law safeguards

property and investments from arbitrary indirect taking or it does not. The answer on this point is unequivocal: it does. The specific standard may change from case to case, be broader or narrower in the light of BIT's, the NAFTA, the Energy Charter Treaty or simply customary law, but it cannot fail to protect an investment from arbitrariness and excess on the part of regulatory bodies.

In this light, the discussion developed in recent decisions about whether the provisions on expropriation of NAFTA Chapter 11 exceed the framework established under international law has inevitably found different answers depending on the view that each tribunal will have about the meaning of international law. It is of interest to note, however, that international tribunals have been generally inclined to support a broader interpretation, while one domestic court called to intervene in connection with the *Metalclad* case has held a narrower view. Is this again international adjudication versus domestic resolution? Is this a new expression of the Calvo Clause?

In this context one cannot be but intrigued by the interpretation adopted by the NAFTA Free Trade Commission on certain provision of Chapter 11 of that Agreement. The Commission finds that the concepts of "fair and equitable treatment" and "full protection and security" do not

involve standards higher than those required by customary international law in respect of the treatment of aliens. In the present and historical situation of flux of international law on this matter one can understand the concern of the Commission not to go beyond the applicable standard under customary international law, but this does not clarify which that standard is. Neither it takes notice of the fact that international law, customary and otherwise, has dramatically evolved in this context.

The discussion of these issues under international law is further complicated by those cases in which the investment has been made or the property rights acquired under a contract with the State. The observance of contracts is a central tenet of the international legal system. Stabilization clauses have been many times specifically included by the State in order to attract an investment. Although the sanctity of contracts does not always prevent subsequent changes in applicable legislation and other matters, the fact remains that in such circumstances the regulatory powers of the State may be further restricted. The same holds true, however, in respect of the investor's expectations. The issue may well turn into one of breach of contract and related damages.

Where to draw the line.

Fifth, may I turn now to the crucial question of when does a regulatory act interfere with property in such a way as to require compensation. I also believe that we all share the view that this is a question of degree. There are many regulatory acts that entail a perfectly reasonable degree of interference with the rights protected. Say, for example, a regulation that shall require all refineries in the country to use a certain kind of filter to minimize the emissions of noxious fumes and where the cost of implementing this measure is reasonable. But there are also other kinds of regulations that might seriously interfere with the viability of an investment. Say, for example, a regulation that might assign a zero quota to a fisheries industry that has been established pursuant to a foreign investment contract.

Where to draw the threshold line is the real difficult point. On this matter I should perhaps suggest that the concept of "police powers" of the State might be related only to those acts below the threshold line. Historically it has never been meant to cover regulations amounting to expropriation, except perhaps in situations of state of emergency or state of necessity. It is thus a concept associated to an element of reasonableness.

We should first rule out the mere diminution of value standard. Again Rosalyn Higgins has rightly commented that there is a trend in judicial decisions to disregard diminution of value as this concept by itself appears to be insufficient to occasion a duty to compensate. In the case *Mafezzini v. the Kingdom of Spain* an ICSID tribunal has further held that a bilateral investment treaty is not an insurance against bad business decisions.

However, this still leaves open the question of how much the value of an investment can diminish as a consequence of regulatory acts and still not be compensable. Dolzer has also explored the concept of "wealth deprivation", only to reach the conclusion that in spite of some advantages it is excessively broad. The United States Supreme Court has dealt with the attractive thought of the line being drawn at the point where the affected property is still "capable of earning a reasonable return" (*Penn Central Transportation Co. v. City of New York*, 1978).

Much has been written on the drawing of this line and dozens of decisions have attempted to strike the fair and just balance. The fact remains that probably an abstract definition is unworkable. It all depends on the specific facts and circumstances of the case, particularly the gravity and length of the interference, the rights of the parties under a

contract or general legislation, and even cultural elements that define shared expectations. However, just to keep in mind the thought of a necessary balance might be helpful to achieve a reasonable result. This is the challenge for judges, arbitrators and international lawyers.

A new reading of *Metalclad*.

The storm that *Metalclad* has triggered should not prevent us from seeing in this decision an attempt to draw the line at a reasonable point. Because it dealt with an environmental issue the world is now divided between pro *Metalclad* and against *Metalclad.* But we cannot fail to notice that a double threshold was used in this case. First, the regulatory interference must have the effect of depriving the owner in whole or in a significant part of the use of the property. Next, this is measured in the light of a "reasonably-to-be-expected economic benefit". These standards do not appear to be unreasonable in the light of the discussion we have pursued and the circumstances of the case. Nor do they appear to be unprecedented in international law or domestic decisions.

Whether this is within the meaning of NAFTA's Chapter 11 is a different issue. It is this other issue on interpretation of NAFTA that was pursued through Mexico's challenge of the award and the views of a Canadian court thereon. The meaning of "measures tantamount to

nationalization or expropriation" in the NAFTA Agreement, like the meaning of measures with "similar effect" or "effect equivalent" to expropriation normally used in bilateral investment treaties is certainly intriguing. This question, that has so much perplexed the NAFTA tribunals, is one that can only be resolved in the context of the interpretation of the respective treaties and the application by those tribunals of the standards established under international law.

One should note in this connection that the various NAFTA tribunals that have had to decide on the meaning of international law have shared largely similar views. And even the much-criticized reliance of the *Metalclad* tribunal on transparency under international law does not appear to be out of place. A conclusion contrary to transparency would fall into the absurd of affirming that international law allows for all sorts of obscure dealings on the part of governments.

Quite obviously, in spite of the NAFTA Free Trade Commission's interpretation noted above, there is no single view on the matter. But this very reason requires a very thorough examination of the facts and the law by the tribunals called to decide a dispute on this matter.

MAI and NAFTA at the shooting range.

Allow me to turn now to some recent issues raised by concerned organizations. It is believed by some that the current trends relating to the protection of investments, allowing investors to challenge government decisions before international tribunals, will dramatically affect the role of governments in regulating economic activity, particularly as it concerns environmental and health questions.

On this assumption the guns were pointed first to the failed Multilateral Agreement on Investments. With this I can agree as the MAI made the worst mistake of all: to try to define the rules without the participation of developing countries, major recipients of investments and influential actors of the international legal process.

The guns have been pointed next to NAFTA. With this I do not entirely agree. Independently from the discussion of the NAFTA provisions on foreign investments, one must not forget that the main object of the treaty is related to trade. If dispute settlement procedures are opened in one respect they will be most probably opened in other respects too.

One can fairly assume that the United States would be more than happy to get rid of the provisions subjecting its decisions on subsidies and antidumping to the control of international panels. This has already

become evident in the position taken in the negotiations of a free trade agreement with Chile. A few countries would perhaps be also happy to introduce additional obligations so as to better protect investments. These are some of the reasons why Mexico, for example, does not appear to favor the reopening of the NAFTA, or why Chile insists in having international controls over the regulatory measures and decisions of the United States in trade matters.

International law for dummies.

The guns are pointing now also to the vast network of bilateral investment treaties. With this I do not agree at all. The argument is based on the false assumption that developing countries have been ignorant of what they were actually signing and that this was not to their advantage. Thank you for that paternalistic thought but with respect I must say that lawyers from developing countries are not dummies. Bilateral investment treaties are signed because they offer guarantees and safeguards needed for the investments to come. On occasions the same guarantees are embodied in national legislation.

Trade and Investments hand in hand.

The guns will point next to the Free Trade Agreement of the Americas, probably on the same assumptions. I suggest that it would be a

mistake to do away with Chapter 11 type clauses. First, because such mechanisms do not interfere generally with normal governmental regulatory powers, but only with the occasional abuse of such power. To the extent that an abuse is controlled it is not a bad thing for foreign and domestic investors alike, and ultimately it is even good for the government itself. But most importantly, such clauses are also necessary because we would also like to have international legal controls and adjudication over domestic regulations and decisions affecting free trade.

The environment and investments as partners.

But strategic reasons aside, I also believe there is a fundamental misconception in the criticism to the protection of foreign investments. There is no reason to believe that foreign investments are detrimental to the environment. On the contrary, the evidence points to the fact that many times environmental standards in a given country are improved as a result of the investments made in some industries like mining, agriculture and forestry. I could point out to you a host of examples from my own country, including cases where international and domestic investors have strictly applied the polluter-pays-principle on their own initiative, and in the absence of any regulation, in order to better compete in international markets.

Moreover, studies by World Bank officials have concluded that the cost of complying with environmental regulations is relatively low. In the United States, for example, it amounts to 1% of the investment, and at the most 3% in the more regulated sectors. No such effect of a regulation could be considered as tantamount to expropriation.

It follows that the argument suggesting that developing countries need to regulate environmental matters free from claims procedures and international standards is a *non sequitur*. No reasonable regulation with a 1-3% incidence would be subject to an international claim. But another matter altogether is that eventually the incidence might reach high percentages of the investment, or seriously diminish its returns or wipe it out entirely. Unless justified by the facts, this would not be within normal reasonable parameters and would be quite understandably the matter of an international claim.

Facilitating access to international claims settlement.

I also tend to see a contradiction in some of the arguments seeking to restrict the access of individuals and corporations to international claims procedures. The whole evolution of international law points towards an enhanced access to international adjudication, including trade and financial matters. Even the obstacles that prevented the protection

of shareholders in the *Barcelona Traction Case* have fallen apart in the case law of the Iran-United Sates Claims Tribunal, the United Nations Compensation Commission and a host of other mechanisms in current international practice. In this context it appears not to be quite right to suggest that foreign investments, which have been at the forefront of this evolution, would be in need of retrogression. Carlos Calvo would be delighted to hear from such restrictive view that highlights domestic adjudication and clamps on international procedures.

Let us all benefit from globalization.

One final thought and conclusion. Bilateral investment treaties have been many times written in the belief that the developing country party to it ought to be restrained, as there is a prejudiced assumption of misbehavior on its part. That is of course disregarding what some developed countries have done in the recent past in terms of indirect expropriation, particularly in the oil and gas sectors. Developing countries and their businessmen, however, are also benefiting from economic globalization and learning how to invest abroad. Those treaties can also be, and in fact have been, invoked against perceived abuses arising in OECD countries, much to their surprise. Again here Carlos Calvo would be delighted to learn from major OECD countries called into legal

accountability before international tribunals that domestic court decisions are better than international arbitration.

Recent ICSID decisions are also reflecting this changed perception. The new reality of financial markets was addressed in the *Fedax Case*. A claim against an OECD country was partially successful in the *Maffezini Case*. It does not seem fair or reasonable to prevent this process from moving ahead precisely at a point when its effects are reaching the global market without distinction and hence might be put to work to the advantage of developing countries too.

In any event, two other old safeguards must be kept in mind in respect of all these restrictive views on the role of international law. One is the most-favored-nation clause, a mechanism capable of improving the treatment accorded to its beneficiary by comparing rights under different treaties. The other is national treatment, also allowing a foreign investor to claim benefits at least as good as those available to nationals. This includes also the standards developed by national courts, which in some cases are quite significant in respect of the curtailment of unjustified regulatory expropriation. Both safeguards are ultimately an antidote against discrimination.

No need for Carlos Calvo to be an honorary NAFTA citizen.

Government officials love to regulate, investors and businessmen hate to be regulated. Reasonable regulations are not an obstacle. They are needed and many times welcome. It is the abusive regulation that ought to be controlled. International mechanisms are one way of doing this. Strict domestic administrative controls and procedures in respect of claims are another way provided they offer the guarantee of impartiality and independence. But seldom can you be a good judge in your own cause.

It follows that international law and international lawyers might still hope to be in business in the years ahead for developing the standards that will help to achieve a balanced outcome in the equation of the right to regulate and the right to have your property protected from abuse. International law appears in this context to have moved beyond traditional customary international law.

After all, there seems to be no need to offer Carlos Calvo an honorary NAFTA citizenship.

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