# Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution

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## I. Introduction

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) is a treaty between Mexico, Canada, and the United States to open domestic markets of each signatory country to the goods and services provided by nationals of all three countries.[1] As is the case with other multilateral trade agreements, NAFTA raises issues that have significant impacts on international investors, traders, and other business people. However, NAFTA's impacts on the regulatory authority of state and local governments render this agreement unique. Under NAFTA, the domestic laws of the signatory nations may not disadvantage foreign persons or entities undertaking business there.[2] Paramount among those fairness

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1. Canada–Mexico–United States: North American Free Trade Agreement. (Dec. 17, 1992), 32 I.L.M. 289 (1993) (chs. 1–9), 32 I.L.M. 605 (chs. 10–22) [hereinafter NAFTA].

2. NAFTA ch. 11, Investment. Emerich de Vattel, the eighteenth century Swiss philosopher and, with Pufendorf and Grotius, a founder of international law, defined the law of nations as follows: "The *Law of Nations* is *the science that teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.*" *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758; tr. *Law of Nations*, 1760). In a note under this definition, the author uses the Hanseatic League as a example of a long-standing accepted international series of understandings and agreements: "Another system of international law was framed by the deputies of the *Hanseatic League* in 1597, and which was confirmed with additions in 1614, and has obtained much consideration in the maritime jurisprudence of nations. . . ."

interests is the assurance that investments will not be expropriated except under circumstances that provide for a fair hearing and some assurance that such seizures are not a penalty for doing business in a foreign country. A frequent provision of multinational trade agreements limits the powers of national or sub-national governments to expropriate or "take" the property of foreigners.

In the United States, the Fifth Amendment to the federal Constitution prohibits the "taking" of private property without payment of "just compensation."[3] Although not clearly or consistently interpreted, this clause generally prohibits physical invasions or seizure of title in lands and has been used to limit the scope of regulatory (or "police") powers to limit the use of land.[4] The purpose of this article is to compare the investor protection provisions of the Fifth Amendment to the treaty guarantees of NAFTA with a view toward understanding the relative protections accorded within the United States to its nationals and those of other countries participating in NAFTA. This analysis should also be helpful in evaluating future efforts to protect businesses and investors in the United States and those other countries future trade agreements are created. Finally, this article should provide an understanding of the impacts NAFTA may have on state and local government regulatory powers.

This article begins with an examination of both Fifth Amendment and NAFTA protection against efforts by national or sub-national governments to regulate private property severely or to expropriate the same. The ideas in both sets of guarantees are broadly expressed and subject to diverse interpretations by different adjudicators in different times and in different circumstances. The wildly varying interpretations given to the Fifth Amendment by the U.S. Supreme Court over the years are well known. Nevertheless, the Court has both an institutional memory and commitment to precedent. The NAFTA process has neither one set of adjudicators, nor any formal commitment to following precedent. Thus, the consistency in the application of the broad provisions of NAFTA is left to the discretion of individual arbitrators, and is, therefore, theoretically problematic at best.

Following this introduction, this article proceeds to a historical dis-

3. U.S. CONST. amend. V. That amendment provides:"[N]or shall private property be taken for public use without just compensation." The constitutions of all the states have similar language or have been construed to have the same guarantees against taking without just compensation.

4. An issue not completely resolved by the Supreme Court is whether the takings clause applies to property other than real property. That Court has been less than clear on the subject. *Compare* Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) (1996), *and* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

cussion of the origins and applications of the Fifth Amendment Takings Clause. A similar discussion of the history, structure, and operations of NAFTA's provisions relating to expropriation and a discussion of cases decided under NAFTA follows. After this groundwork has been laid, an analysis of the two sets of investor protection provisions and a determination of the nature and extent of those provisions ensues. Finally, we propose our own conclusions to the issues. We emphasize the difficulty in following (much less predicting) the course of federal takings law;[5] moreover, the few cases, the lack of binding authority or precedent, and mercurial nature of foreign trade law create similar difficulties in forecasting the future of NAFTA protections. Nevertheless, the importance of the task exceeds its difficulty. The comparison of NAFTA with the U.S. Constitution is similar to a comparison of NAFTA to the Mexican[6] and Canadian[7] constitutional documents, because both are

5. In the most recent Supreme Court takings case, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 321–22 (2002), Justice Stevens characterized this confusion as follows:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries" [citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 124], designed to allow "careful examination and weighing of all the relevant circumstances" [citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001).]

6. 1917 CONSTITUTION OF MEXICO tit. III, ch. IV, art. 107, § XIII.

> The law shall specify the terms and cases in which the precedents of the courts of the federal judicial branch are binding, as well as the requirements for their modification. If the full circuit courts sustain contradictory opinions in *amparo* cases within their jurisdiction, the ministers of the Supreme Court of Justice, the Attorney General of the Republic, or those courts, may denounce the contradiction before the appropriate section, to decide which opinion shall prevail. When the sections of the Supreme Court of Justice sustain contradictory opinions in cases of *amparo* within their jurisdiction, any one section or the Attorney General of the Republic may denounce the contradiction before the Supreme Court of Justice, which, sitting as a full court, shall decide which opinion shall prevail. Both in this instance and in the case provided for in the preceding paragraph, the decision rendered shall be solely for the effect of fixing the precedent and shall affect the concrete juridical situation deriving from contradictory judgments in the case in which they were rendered.

7. Not unlike the American judicial system, the Canadian court system is based on common law that developed based on precedent or *stare decisis*. As the Supreme Court of Canada has held, Canadian jurisprudence has been:

> built up as it has been by the long continued and arduous labors, grown venerable with years, and interwoven as it has become with the interests, the habits, and the

overseen by a court system that is guided by precedent. How NAFTA squares with the rights guaranteed by one of these national constitutions is the object of this article, with particular emphasis on the Fifth Amendment.

## II. A Brief History of the Takings Clause

As mentioned, the "Takings Clause" of the U.S. Constitution fairly simply provides "nor shall private property be taken for public use." In the last quarter century, the clause has taken on a prominent role in constitutional jurisprudence, particularly with respect to the limits of state and local regulatory power. Any discussion of the Takings Clause should begin with the history of the clause, the reasons for its enactment, and the way the law has developed in the courts.

The Takings Clause finds its genesis in section 39 of the Magna Carta, which declared that land would not be taken without some form of due process.[8] Almost immediately after signing the document, King John I denounced the undertaking to his barons. However, that promise eventually made its way into the coronation oaths taken by kings and, in England at least, became a protection against confiscation of lands without some form of a hearing.[9]

That is not to say there was no significant struggle among royal power on the one hand and the nobility and, following the Renaissance, a rising middle class, on the other. Those who opposed the royal powers to seize land found three formidable legal and political writers who provided theories to support their position based on common or natural law. Each of those writers influenced the development of American law in general and constitutional law in particular.

Sir Edward Coke (1552–1634), a Lord Chief Justice of England,

> opinions of the people. [Without the common law a court would] in each recurring case, have to enter upon its examination and decision as if all were new, without any aid from the experience of the past, or the benefit of any established principle or settled law. Each case with its decision being thus limited as law to itself alone, would in turn pass away and be forgotten, leaving behind it no record of principle established, or light to guide, or rule to govern the future.

Hanford v. Archer, 4 Hill, 321.

The Canadian Constitution and Constitution Act of 1982, Part I: Canadian Charter of Rights and Freedoms, § 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

8. This section specifically provides: "No freeman shall be seized or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

9. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 395–96 (1988).