

CASES

Introductory Note

The award rendered on August 30, 2000 in the proceeding instituted by Metalclad Corporation, a Delaware company, against the United Mexican States, was the first to uphold, on the merits, a claim submitted to arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA). Metalclad filed its notice of arbitration on January 2, 1997, and requested access to ICSID's Additional Facility. The notice was registered, and access to the Additional Facility granted, on January 13, 1997.

The Arbitral Tribunal, the first established for a NAFTA Chapter Eleven proceeding, was constituted on May 19, 1997. NAFTA Article 1123 provides for a three-member tribunal. NAFTA Article 1125 allows the appointment in ICSID cases of arbitrators who have the nationality of the parties. Metalclad appointed Mr. Benjamin R. Civiletti, a former United States attorney-general, and Mexico appointed Mr. José Luis Siqueiros, a former chairman of the Inter-American Juridical Committee and Professor of Law at the National University of Mexico. By agreement between them, the parties appointed as President of the Tribunal Sir Elihu Lauterpacht, Emeritus Professor of International Law at the University of Cambridge and former President of the World Bank Administrative Tribunal.

The dispute arose from the construction, by an enterprise owned and controlled by Metalclad, of a landfill in Guadalucazar in the central Mexican state of San Luis Potosí, designed for the confinement of hazardous waste from the area. Approvals having been obtained at the federal and state level, construction of the landfill was completed in March 1995. Demonstrations took place at the inauguration of the landfill which kept it from opening. In November 1995, Metalclad concluded an agreement with federal environmental agencies setting forth the conditions under which the landfill would operate. In December 1995, however, the local municipality issued

a denial of a construction permit for the landfill which had been requested thirteen months earlier. The municipality then challenged the agreement Metalclad had concluded with federal agencies and obtained a judicial injunction which prevented the operation of the landfill through May 1999.

The Tribunal held in its award that the actions of the Mexican state and municipal authorities entailed a breach by Mexico of its obligation to afford Metalclad's investment treatment in accordance with international law, including fair and equitable treatment, under NAFTA Article 1105. The award gives an account of the facts on which the Tribunal found a breach of the obligation to grant fair and equitable treatment. The award thus contains one of the first rulings ever to apply the standard of fair and equitable treatment under a treaty governing investment matters.

The Tribunal further held that, by permitting the actions of the municipality, Mexico had taken measures tantamount to expropriation of Metalclad's investment under NAFTA Article 1110, since those actions "effectively and unlawfully prevented the Claimant's operation of the landfill." The Tribunal further held that, although not necessary for its finding of an expropriation, an Ecological Decree issued by the state Governor in September 1997 also had the effect of preventing the landfill's operation, and was thus also a measure tantamount to expropriation. In the award, the Tribunal set forth its understanding of the meaning of direct and indirect expropriation. The award also notes that the reference in NAFTA Article 1110 to measures "tantamount to" expropriation does not create a category different from direct or indirect expropriation.

In determining the compensation owed to Metalclad for the market value of its investment, the award relied on a number of international arbitral precedents to conclude that a discounted cash flow method taking into account expected future profits would be inappropriate in this case because the landfill was never operative. In addition, the award discounted from such compensation the sum that Metalclad would have spent in remediation of the existing landfill site under its November 1995 agreement with federal environmental authorities.

Much like the Tribunal in *Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), the Tribunal in the *Metalclad* case encountered and dealt with a number of novel procedural issues. For example, it was the first ICSID Tribunal in a NAFTA Chapter Eleven proceeding to have had the benefit of submissions made by the other two NAFTA State Parties (Canada and the United States, in this case) on questions of interpretation of NAFTA under its Article 1128.

The award in the *Metalclad* case held that the dispute-settlement provisions of NAFTA Chapter Eleven, Section B, did not modify the provisions of the Additional Facility Arbitration Rules concerning ancillary or additional claims. The Tribunal thus found that it was able to rule on the September 1997 Ecological Decree, as well as on events taking place before the notice of intent to submit the claim to arbitration. Early in the proceeding, the Tribunal issued an important decision concerning the extent of the parties' duty of confidentiality, which is cited in the award's account of the procedural history of the case.

In proceedings under the Additional Facility Rules, which fall outside the scope of the ICSID Convention, the Tribunal must determine the place of arbitration in a State that is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. NAFTA Article 1130 provides further that, unless the disputing parties otherwise agree, the place of arbitration must be in the territory of a NAFTA State Party. The Tribunal in the *Metalclad* case determined the place of arbitration to be Vancouver, British Columbia, Canada.

On October 27, 2000, Mexico filed an application, subsequently amended, with the Supreme Court of British Columbia in Vancouver to have the award set aside. In the alternative, Mexico seeks leave to appeal from the award to the Supreme Court of British Columbia. Mexico's application invokes the provisions of both the British Columbia Commercial Arbitration Act and of the British Columbia International Commercial Arbitration Act. In connection with Mexico's application, an incidental issue appears to have been raised as to which of the two mentioned statutes governs the application and which is the resulting standard of review. At the time of writing, a decision on Mexico's application was still pending.

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