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A Comment

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The Mexican Experience with Investment Arbitration

A Comment

Francisco GONZÁLEZ DE COSSIO*

I. INTRODUCTION

The purpose of this article is to elaborate a summary of the arbitration cases that Mexico has been a party to before the International Centre for Settlement of Investment Disputes (ICSID) and share some comments on some of the issues that have thus far emerged from the Mexican experience.

II. CASES INVOLVING MEXICO

At the time of preparation of this review, Mexico had been part of seven ICSID arbitration proceedings¹ (through the Additional Facility), of which only three have concluded. A brief summary of the cases resolved thus far shall be made below in order to comment on some of the issues that have emerged.

A. *Robert Azinian and Others v. United Mexican States*²

The Claimants, Robert Azinian, Kenneth Davitian and Ellen Baca, initiated a procedure pursuant to Chapter Eleven of the North American Free Trade Agreement (NAFTA) as shareholders of Desechos Sólidos de Naucalpan, S.A. de C.V., which was a concessionaire of an agreement for waste collection in Naucalpan de Juarez (a county outside Mexico City), challenging the City Council's decision to revoke the concession on the grounds that a series of "irregularities" had been detected with regard to the conclusion and fulfilment of the concession.

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¹ *Robert Azinian and Others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2; *Metaklad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, registered on 27 September 2000; and *Adams et al. v. United Mexican States*, registered 16 February 2001.

² ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999.

After a court proceeding was followed, it was found that, of the twenty-seven apparent irregularities, only nine had been proved. After having lost in these proceedings, as well as in an "*amparo*" (constitutional suit) against the revocation of the concession, Claimants proceeded to bring a claim under the NAFTA on 17 March 1997.

The conclusion of the NAFTA/ICSID Tribunal was that Claimants did not carry the day in the relief sought and that the behaviour of the Mexican authorities, both the City Council and the courts, was considered appropriate, even when assessed against the requirements of the applicable international law.

B. *Metalclad Corporation v. United Mexican States*³

1. THE INVESTMENT AND THE FACTS

This case involved a dispute resulting from the investment that the Claimant—Metalclad Corporation, a corporation organized under the laws of the U.S. state of Delaware—performed in the Mexican state of San Luis Potosí.

Metalclad was the majority shareholder of Ecosistemas Nacionales, S.A. de C.V. (Econsa), which acquired Confinamiento Técnico de Residuos Industriales, S.A. de C.V. (Coterin), a Mexican corporation, with the purpose of developing and operating a hazardous waste facility in Valle de La Pedrera, located at Guadalucazar, San Luis Potosí.

Coterin obtained permits to build and operate a hazardous waste facility in La Pedrera, Guadalucazar. The county (*municipio*) ordered the suspension of activities due to the lack of a construction permit which it alleged was within its jurisdiction and was hence additional to the federal permits already obtained. In response, Metalclad claimed surprise, alleging that it had been assured by authorities that all the required permits had been secured. In addition to this, environmental authorities stated that all that need be done was to apply for such permit and the same would be granted. Following such advice, Metalclad reinitiated construction works while requesting the respective permit from the county. Shortly thereafter, it obtained an additional (federal) permit for such purpose issued by the National Ecology Institute.

On 5 December 1995, more than a year after the application had been made to the county, and with the construction almost finished, the permit was formally denied. The foregoing was grounded on Metalclad's commencement of the works prior to securing the county construction permit.

2. THE ARBITRATION PROCEEDINGS

The Arbitration Tribunal⁴ held that the described conduct of the Mexican

³ ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000.

⁴ Formed under the rules of NAFTA Chapter Eleven, Section B, Article 1120(1)(b).

authorities *vis-à-vis* Metalclad breached the NAFTA in two aspects. Firstly, the Tribunal held that the acts and omissions of Mexican authorities constituted a breach of Mexico's duty to accord investments of investors treatment in accordance with international law, including fair and equitable treatment further to NAFTA Article 1105(1).

The Tribunal's analysis factored in the concept of transparency found in NAFTA Article 102(1). The Tribunal believed that such concept includes the obligation of making clear and of easy reference all the requirements an investor must fulfil in order to successfully initiate, complete and operate an investment. No doubts should exist and, where existing, they should be clarified by the host State in order to guarantee security to the foreign investor so that it may continue with the investment.

The Tribunal considered that the facts resulted in Mexico's failure to comply with the duty of securing a transparent and predictable framework of Metalclad's investment. In the Tribunal's opinion, the circumstances of the case displayed, on the one hand, the lack of a clear rule with regard to the requirements (or the absence thereof) for obtaining a municipal construction permit and, on the other hand, the lack of an organized process *vis-à-vis* an investor who may expect to be treated in a fair and equitable manner pursuant to the NAFTA. The county's conduct after the denial of the construction permit, coupled with certain substantive and procedural deficiencies,⁵ forced the conclusion that the county's denial of the construction permit was not appropriate, particularly because the competence of the county did not include hazardous residues, such authority being limited to federal authorities.

Secondly, the Tribunal found that Mexico, in this case, had breached NAFTA provisions on expropriation.⁶ The NAFTA sets forth that none of the State Parties may, directly or indirectly, expropriate an investment or take similar measures⁷ except:

- for public purpose;
- on a non-discriminatory basis;
- in accordance with due process of law and Article 1105(1); and
- upon payment of a fair compensation.

Although not strictly necessary for its conclusion, the Tribunal found that Mexico indirectly expropriated Metalclad's investment without paying any compensation as a

⁵ The Tribunal found that certain circumstances aggravated the case. One being that Metalclad was never notified of the municipal meeting whereby the decision to deny the construction permit was taken, nor did it have the opportunity to present its case. Also, the manner and term in which the permit was denied—thirteen months after having been requested and when the construction was almost finished—was also deemed inappropriate. Finally, none of the grounds for denying the construction permit were within the authority of the county. Therefore, the Tribunal found that the permit had been unjustly denied and the grounds for doing so were unrelated to the construction or material aspects of the same, including defects.

⁶ NAFTA Article 1110.

⁷ The term "measure" is defined in Article 201(1) and includes any law, regulation, process, requirement or practice.

result of the manner in which an Ecological Decree was implemented which permanently proscribed Metalclad's use of its investment and constituted a measure tantamount to expropriation, hence breaching the provisions of NAFTA Article 1110.

In holding Mexico liable for breach of its NAFTA commitments, the Arbitration Tribunal awarded Metalclad US\$ 16,685,000.00, which was the assessment of Metalclad's damages.⁸

3. THE SETTING-ASIDE DECISION

Mexico brought a suit before the Supreme Court of British Columbia (the B.C. Court)⁹ requesting that the Award be set aside. Mexico claimed that the Arbitration Tribunal committed two acts in excess of jurisdiction:

- it used the NAFTA's transparency provisions as a basis for finding a breach of Article 1105; and
- it went beyond the transparency provisions in the NAFTA and created new transparency obligations.¹⁰

Hence, the question before the B.C. Court was whether the Award contained decisions which were beyond the scope of the arbitral submission, i.e. what is commonly known in arbitration argot as an *ultra petita* award. The B.C. Court found the Award's scope did exceed the submission to arbitration (which was limited to the bounds of Chapter Eleven of the NAFTA) and hence partially set aside the same,¹¹ basically to the extent that it included interest due prior to the date when the Ecological Decree was issued (20 September 1997).

The above finding of excess of authority was premised on the following rationale. In solving the controversy, the Tribunal is constrained to the submission agreement. The submission agreement in the dispute is circumscribed to violations of obligations found in NAFTA Chapter Eleven. To the extent that no "transparency" obligations exist in NAFTA Chapter Eleven, the Award decision, to the extent that it relies on an alleged "transparency" duty, should be set aside for excess of jurisdiction.¹²

⁸ The foregoing notwithstanding Metalclad's claim that it invested approximately US\$ 20.5 million, exclusive of interest. The Arbitration Tribunal rejected three aspects of the claimed expenses: (1) the costs incurred prior to the acquisition of Coterin; (2) costs related to the development of other Metalclad projects in Mexico which had been "bundled" into the project, and (3) certain costs related to remediation of the site.

⁹ Since the place of arbitration was Vancouver, B.C.

¹⁰ *The United Mexican States v. Metalclad Corporation*, 2001 B.C.S.C. 664 (hereinafter cited as B.C. Court Decision), para. 66.

¹¹ *Ibid.*, para. 134.

¹² Under §34 of the International Commercial Arbitration Act (R.S.B.C. 1996, c.233), which is the Canadian version of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law for International Commercial Arbitration, and which provides that "an arbitral award may be set aside by the Supreme Court only if ... the party making the application furnishes proof that ... the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ..."

The outcome of testing the three main legal findings in the *Metalclad* decision against such rationale was as follows.¹³ The first, the Article 1105—fair and equitable treatment—obligation, failed the test to the extent that it relied on the "transparency" obligation. The second (pre-Ecological Decree) finding that Mexico had taken measures tantamount to expropriation in violation of NAFTA Article 1110, also failed the test, since the Tribunal partially relied on the concept of transparency to conclude that there had been an expropriation within the meaning of Article 1110. Finally, the finding that the Ecological Decree amounted to an expropriation passed muster in so far as it stood on its own and was not infected by the "transparency malaise" nor was premised on the finding of breach of Article 1105.¹⁴

As a final note, on 26 October 2001, a settlement was reached whereby Mexico agreed to discontinue challenging the Award in Canada.

C. *Waste Management, Inc. v. United Mexican States*¹⁵

1. THE FIRST CLAIM

This case involved a dispute between Waste Management, Inc., acting on its own behalf and on behalf of Acaverde, S.A. de C.V., and Mexico as a result of an alleged breach of Articles 1105 and 1110 of the NAFTA by Banco Nacional de Obras y Servicios Públicos, S.N.C. (Banobras), the State of Guerrero and the City Council of Acapulco de Juárez.

The facts of this case will not be discussed here since the Tribunal's ruling concerned only a jurisdictional decision. Therefore, the substance of the case that gave rise to this dispute was not dealt with in the Award.

The Tribunal decided that, to the extent Claimants had not withdrawn their domestically initiated claims, the requirement of a waiver of the right to initiate or

¹³ The first finding was the governing finding. However, to the extent that the first had been set aside, the secondary findings became the governing findings. Despite the fact that Mexico was successful in establishing that two of the findings of the Tribunal involved decisions on matters beyond the scope of the submission, Metalclad "carried the day" in resisting Mexico's application to have the award set aside in its entirety; see para. 137 of the B.C. Court Decision, *supra*, footnote 10.

¹⁴ *Ibid.*, paras. 94 and 105. Other arguments put forward by Mexico regarded Metalclad's improper acts (which included a corruption claim and an excess damage claim) and its failure to address all questions. The first was not established before the Court and the second was found not to merit an annulment to the extent that the Tribunal adequately dealt with all issues before it and the failure to deal with all arguments is not a sufficiently good reason to merit annulment since the Tribunal is not required to answer all but only the dispositive arguments made in connection with the questions which the Tribunal must decide. See *ibid.*, paras. 122, 130 and 131.

¹⁵ ICSID Case No. ARB(AF)/98/2, Award on Jurisdiction, dated 2 June 2000.

continue domestic remedies provided by Article 1121(2)(b) of the NAFTA had not been complied with and, therefore, the Tribunal lacked jurisdiction.¹⁶

2. THE SECOND CLAIM

A subsequent claim has been brought before an ICSID Additional Facility Tribunal and is currently being heard.¹⁷ No final award has been issued.

III. COMMENTARY

The Mexican experience before the ICSID is fertile soil for comments. This article concentrates on the following issues:

- Mexico's status before the ICSID mechanism;
- the trail left by the cases resolved thus far; and
- the growing body of law in this traditionally controversial field.

A. Mexico's Failure to Adhere to the ICSID Convention

It is unfortunate that Mexico has failed to become a Contracting State of the ICSID Convention. As a result of such failure, all the procedures referred to in this article have been conducted under the auspices of the ICSID Additional Facility. The legal consequence of this situation is that the procedures carried out are not isolated from the law of the place of arbitration. This result, although it has thus far not created any problems, is regrettable, since one of the virtues (and purposes) of these types of procedures is to prevent the use (and abuse) of domestic remedies that delay or obstruct the arbitration procedure.

When questioning authorities as to the reasons explaining Mexico's failure to adhere to the ICSID Convention, one is confronted with the following abstract answer: that doing so is being carefully analyzed.

As may be inferred, the answer provided is meaningless, and therefore one must speculate about the *real* reasons that have caused the reluctance to be part of such an international institution. There are three:

¹⁶ In this context, it is interesting to draw the reader's attention to the dissenting opinion presented by Mr Keith Highet, who, put simply, considered that domestic remedies were not incompatible with the NAFTA Chapter Eleven procedure, provided they did not refer to the same legal grounds/theory. This summarized description does not do justice to Mr Highet's sophisticated and interesting legal argument and, whether or not one shares his view, the fact remains that, insofar as it is congruent with the legal theories put forth in the *Azinian* case and *Ethyl Corporation v. The Government of Canada (Award on Jurisdiction)* (24 June 1998)—also a case involving NAFTA Chapter Eleven—it assists in the construction of a theoretical and practical basis for the cases that must be understood as comprised under the investment protection provisions of the Treaty. This topic is the object of the comment in Section III.C of this article.

¹⁷ ICSID Case No. ARB(AF)/00/3, registered on 27 September 2000.

1. Mexico's experience in international arbitration;
2. The desire to not pursue cases that involve Mexico's interests in international fora; and
3. Article 42 of the ICSID Convention.

The above reasons shall now be discussed.

1. MEXICO'S EXPERIENCE IN INTERNATIONAL ARBITRATION

Some argue that Mexico's not-too-positive experience with arbitration as a dispute resolution method explains the reluctance of relying on such method.¹⁸ The past, however, does not necessarily equal the future. As may be observed from certain recent cases, Mexico can prevail, but for such purpose it is imperative that Mexican authorities act impeccably. Moreover, it is contradictory to think that, in a globalized worldwide society where international investments have exponentially increased and countries (especially developing countries) compete to attract such international flows, a country with Mexico's status and importance can ignore or fear the world's most important dispute settlement mechanism.¹⁹

2. THE DESIRE TO NOT PURSUE CASES THAT INVOLVE MEXICO'S INTERESTS IN INTERNATIONAL FORA

This is not a sufficiently good motive for not acceding to the ICSID Convention. Rather, it seems more like the result of insufficient thought. By including the use of ICSID's Additional Facility in all of the investment treaties Mexico has thus far entered into²⁰ and then failing to formally adhere to the ICSID Convention, the following contradictory situation is provoked. On the one hand, there *is* arbitration for foreign investors but, on the other, it is arbitration whose potential has been diminished through the partial use (and waste) of an instrument that presents the benefits of ICSID.

¹⁸ Such experience can be consulted in Luis G. Zorrilla, *Los Casos de Mexico en el Arbitraje Internacional*, 2nd edition, Ed. Porrúa, S.A., Mexico, 1981.

¹⁹ By July 2001, 133 countries had become parties to the ICSID Convention. See Institute for Transnational Arbitration, *Scoreboard of Adherence to Transnational Arbitration Treaties*, published quarterly in the ITA newsletter, News and Notes.

²⁰ The investment provisions have been included by way of such free trade agreements and bilateral investment treaties as, for instance, NAFTA Chapter Eleven, the Agreement for the Reciprocal Promotion and Protection of Investments between the United Mexican States and the Kingdom of Spain (published in the Daily Official Gazette on 19 March 1997); the Agreement between the United Mexican States and the Confederation of Switzerland for the Reciprocal Promotion and Protection of Investments (published in the Daily Official Gazette on 20 August 1998); the Agreement between the Government of the United Mexican States and the Government of the Republic of Argentina for the Reciprocal Promotion and Protection of Investments (published in the Daily Official Gazette on 28 August 1998); and the Agreement for the Reciprocal Promotion and Protection of Investments between the United Mexican States and the Kingdom of the Netherlands (executed in Mexico City on 13 May 1998 and published in the Daily Official Gazette on 10 July 2000). To date, the free trade agreements to which Mexico has become a party total ten and the investment treaties total fifteen. For a review of the same, see José Luis Siqueiros, *An Overview of Arbitration Mechanisms between States and Investors—The Mexican Experience*, 2 J.W.I. 2, June 2001, pp. 249–257.

If the reason explaining non-adherence to the ICSID Convention is the desire to *not* pursue disputes that are sensitive to Mexico's interests in an international forum, then why accept arbitration in other international investment instruments? Indeed, if arbitration is accepted in other investment instruments, then why not also accept the ICSID Convention, since the outcome is legally identical.

As a result of the above, the status quo is that foreign investors *do* have access to arbitration to settle any problems arising from their investment, but the chosen arbitration procedure has less than all the resources/potential it could otherwise have and which are offered by ICSID. This situation is inexplicably contradictory. What is sauce for the goose is also sauce for the gander. The differentiation is unwarranted and most probably the result of either incomplete consideration or leaving behind unsolved loose ends.

It could be argued that a little arbitration is better than no arbitration. However, either you do, or you don't. Either you choose a method with all its envisaged weaponry, or you stick with what you already have. Anything less is mediocre. Why take an arrow away from the chosen quiver? Why beat about the bush?

Moreover, the international financial and legal community is sophisticated enough to realize that the current situation is not as attractive as it could otherwise possibly be and that which other jurisdictions/markets *do* offer. Faced with such a scenario, potential investors will factor this situation into the financial analysis carried out when assessing the convenience of investing in Mexico *vis-à-vis* the opportunity cost or the rate of return offered by other investment opportunities.

3. ARTICLE 42 OF THE ICSID CONVENTION

Another reason that may explain the reluctance to adhere to the ICSID Convention is its Article 42.²¹ This provision establishes an impressive device: it makes international law *corrective* of domestic law in matters of foreign investment. One does not have to go too far to imagine the kind of arguments that can be made to defend the non-adherence to a convention grounded on such a proviso (consider the obvious and abused sovereignty argument).

Should this be the case, it would neglect the following: international law governing foreign investment has already filtered into Mexican law and in a way that has the same effect as Article 42 of the ICSID Convention. Article 1105 of the NAFTA provides that the host State (in this case Mexico, Canada or the United States of America) must grant investments of investors of another party "treatment in accordance with international

²¹ Article 42(1) provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." (emphasis added).

law, including fair and equitable treatment and full protection and security." This is also known as "minimum standard of treatment".

The result of such a precept is that a party in an arbitration procedure under NAFTA Chapter Eleven may legally and persuasively quote international precedents and rules as binding (or at least authoritative) in a case filed against one of the NAFTA Contracting States. Should the same establish a higher protection threshold than the treatment afforded by the State in question to the respective investor or investment, international law shall prevail.²²

B. *The Trail Left by the Cases Resolved thus Far*

Among those ICSID cases in which Mexico has been, it is the *Metalclad* saga which merits commenting upon since it is the only one which up until now has been challenged and subject to judicial scrutiny as to its merits.

As a whole, even though the challenge before the B.C. Court can be described as a pyrrhic victory for Mexico,²³ it is understandable, albeit not plausible, that a losing party challenge an Award. It is understandable because a losing State might need to show its constituents that it is taking all means available to protect its interests, but implausible since, by doing so, a State which seeks to promote investment flows could send a negative message to the international investment community.

The most thought-provoking matter was the B.C. Court's opinion in regard to the transparency issue. As summarized above, Justice Tysoe believed that the fact that some of the findings were premised on the duty of transparency merited the setting aside of the respective holding to the extent that no transparency obligation existed under NAFTA Chapter Eleven. However, the *Metalclad* decision did not hold that Mexico breached the transparency obligation found in NAFTA Article 102 but rather that Mexico breached, *inter alia*, the Article 1105 duty of granting fair and equitable treatment to investors and their investment. The transparency concept only comes into play when the Tribunal intended to give meaning to the ambiguous concept of "fair and equitable", to which end it construed the same by relying on the objectives, rules and principles of the NAFTA as found in its Chapter One.

Stated otherwise, "transparency", as a goal of the NAFTA, was only used to give meaning to an amorphous concept—"fair and equitable treatment". It was not by itself used to establish an obligation or an independent basis of liability under the NAFTA.

²² The escape valve to this overarching comment is that international law in matters of foreign investment is diffuse, ambiguous and controversial.

²³ The practical outcome of the partial setting aside of the Award was a loss of interest for a short period of time (from 5 December 1995 to 20 September 1997). On the other hand, *Metalclad* was granted 75 percent of its costs in the setting-aside proceedings.

The B.C. Court's decision seems to confuse a "legal argument" with a "legal issue". Arbitration doctrine has distinguished between legal issues and arguments. If an award deals with an *issue* outside the submission to arbitration, it will clearly run afoul of the *ultra petita* limitation. However, where *legal arguments*—whether included or not in a submission to arbitration—are used to challenge, support or otherwise address an issue within the arbitration submission, no such situation is present. They will simply constitute additional ammunition targeted at the same bull's-eye—the issues object of the dispute.

Stated otherwise, had the *Metalclad* Award held that Mexico failed to comply with the duty of transparency under Article 102(1), it would clearly be out of bounds. However, paragraph 101 of the Award is clear when it states that "[t]he Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105." The holding could not be clearer, and it is not grounded on transparency.

Furthermore, notwithstanding the B.C. Court's opinion, the Arbitration Tribunal's use of the notion of transparency seems congruent with applicable NAFTA provisions, applicable international law, and international jurisprudence.

The NAFTA requires that the objectives of the Agreement be used to interpret its other provisions. Article 102 of the NAFTA, when setting forth the objectives of the Agreement, states:

"1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and *transparency*, are the following ..." (emphasis added)

The Article continues by stating that:

"2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

Moreover, Article 1131, in providing for the governing law of the arbitration proceedings, states:

"1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

International law also supports the interpretation methods used by the *Metalclad* Tribunal. Article 31(1) of the Vienna Convention on the Law of Treaties²⁴ states:

"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 the light of its object and purpose." (emphasis added)

²⁴ Adopted on 22 May 1969; entered into force on 27 January 1980; and to which both Mexico and Canada have adhered.

Also, Article 31(2) states that "[t]he context for the purpose of the interpretation of a treaty shall comprise ... the text, including its preamble and annexes ..."

There are many examples in international jurisprudence of reference to the preamble of a treaty in order to elucidate the meaning of a particular provision. To name a few, the following should suffice. In the *United States Nationals in Morocco* case, the International Court of Justice referred to the Preamble of the Madrid Convention of 1880 to ascertain its object and purpose;²⁵ in the *Golder* case, the European Court of Human Rights made reference to the Preamble of the European Convention of Human Rights to resolve whether right of access to the courts was permitted;²⁶ and in the *Beagle Channel Award*, reference was made to the Preamble of the Chile/Argentina Boundary Treaty of 23 July 1881.²⁷

As may be observed, international law (through the Vienna Convention on the Law of Treaties and international jurisprudence) takes the position that piecemeal interpretation of an international instrument is not the best method of interpretation. Arriving at the correct legal interpretation is more likely if the text of a treaty is read as a whole. One cannot simply concentrate on a single objective, purpose, rule, principle, paragraph, section, article or chapter when construing international instruments.²⁸

The B.C. Court attached pivotal importance to the distinction between the objectives of the NAFTA and the rules and principles of the NAFTA. It stated that "the [*Metalclad*] Tribunal *incorrectly* stated that transparency was one of the objectives of NAFTA". (emphasis added)²⁹ True, when Article 102(1) speaks of "transparency", it does so, technically, not as an "objective" but as a "rule and principle". However, the point the B.C. Court misses is that the referred Article does not nakedly refer to such "rules and principles", but it refers to them as rules and principles by which NAFTA objectives are spelled out and elaborated. In other words, the NAFTA objectives are embodied in the rules and principles therein contemplated.

Furthermore, and aside from the foregoing discussion, the question whether or not the "NAFTA rules and principles" are different from the "NAFTA objectives" is irrelevant. The fact remains that *both* may be used to interpret NAFTA provisions and, hence, the Tribunal's doing so cannot be dismissed as improper.

To summarize, if one considers the following:

- that the concept of fair and equitable treatment is ambiguous;

²⁵ I.C.J. Rep. (1952), at 196.

²⁶ 57 I.L.R., at 217.

²⁷ See para. 19 of the Award, reprinted in 52 I.L.R. 93 and 17 I.L.M., 1978, 634.

²⁸ In this regard, see Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press, Manchester, U.K., 1984, at 127.

²⁹ Para. 71, B.C. Court Decision, *supra*, footnote 10.

- that ambiguous terms must be interpreted so as to arrive at their accurate legal definition;
- that the NAFTA *requires* its provisions be interpreted further to its objectives (which are elaborated through its rules and principles);³⁰
- that one of the rules and principles of the NAFTA is transparency;³¹
- that arbitration tribunals under Chapter Eleven are *required* to decide the issues in accordance with NAFTA provisions *and* international law;³² and
- that international law and jurisprudence accept as a valid method of interpretation that treaties be read as a whole, comprising to such end the text, preamble and even annexes in light of their object and purpose;

one is forced to conclude that the B.C. Court's position in regards to transparency is questionable, to say the least. To the extent that it is questionable, the pro-enforcement bias with which international awards are equipped (see NAFTA Article 1136.2) should have outweighed the B.C. Court's concerns and argued against the setting aside of the Award.

Certainly, arbitral awards are sensitive instruments and, to the extent that ordinary means of challenging the same will not be available to the parties to the arbitration, extra care must be displayed by the arbitration tribunal to ensure that their decisions have been arrived at by adequate methods. However, it is also true that the party challenging an award has a high burden of proof for challenging the same and proving that one of the "cardinal sins" has been committed. To the extent that it was less than clear that the *ultra petita* sin was present, "finality should have prevailed over correctness" in that portion of the *Metalclad* Award.³³

C. A Growing *Lege Ferenda*

A brief comment regarding the significance of investment treaties and the impact that ICSID cases and other decisions have had on the legal and political debate that has historically surrounded the subject of international foreign investments law (now at its climax) and the growing body of law in this field is warranted.

Within the cornucopia of subjects of international regulation it is hard to find any subject where the lack of consensus about what international law *is* and *should be* is so

³⁰ NAFTA Article 102(2).

³¹ NAFTA Article 102(1).

³² NAFTA Article 1131.

³³ Borrowing Schreuer's description of the conflicting principles at work in the review process. See Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, at 893; and Christoph H. Schreuer, *Commentary on the ICSID Convention: Article 52*, 13 ICSID Rev.-F.I.J. 2, Fall 1998, at 520.

acute.³⁴ An ideological and political confrontation has traditionally existed between, on the one hand, rich, capital-exporting countries and, on the other, developing, capital-importing countries.³⁵ Briefly stated, wealthy countries tend to support transnational³⁶ companies in their search for business in any part of the world, urging that the property and contract rights they acquire as a result of such activity be protected. On the other hand, developing countries, to a certain extent in response to the legacy of economic domination which prevailed during the colonial era, perceive the expansion of transnational companies as a neo-colonial incursion that risks their sovereignty and welfare in the long run.³⁷ The division and lack of understanding between these two trends has been so intense that to date no multilateral treaty regulating foreign investment has been achieved³⁸ and the creation of one has been qualified as a political impossibility.³⁹ Suffice it in this regard to recall the experience with the Multilateral

³⁴ This comment coincides with the view expressed by the U.S. Supreme Court in the case of *U.S. v. Sabbatino* (1964), where Justice Harlan noted, "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on the State's power to expropriate the alien's property." For a discussion of this subject, see M. Somarajah, *The International Law on Foreign Investment*, Grotius Publications, Cambridge University Press, Cambridge, U.K., 1994. When studying this author and others, it is advisable not to lose sight of the fact that, because of the noted lack of consensus in this field, the literature on this subject may frequently display one renowned author saying exactly the opposite to another. For instance, compare Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edition, Vol. 1, Longman, London, 1992, pp. 911-927; Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford University Press, Oxford, U.K., 1998, pp. 460-510; and Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, Routledge, London and New York, 1997, pp. 435-439. Having said the foregoing, it must be mentioned that the content of international law in matters of foreign investment has been clarified up to a certain point by the Iran-United States Claims Tribunal; for a thorough analysis, compare Charles N. Brower and Jason D. Brueschke, *The Iran-U.S. Claims Tribunal*, Clarendon Press, Oxford, U.K., 1996; and Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, Martinus Nijhoff, Dordrecht, 1994.

³⁵ The expressed division is frequently not obvious. A capital-exporting country may at the same time be a capital-importer. A clear example is the United States of America, which is one of the biggest private-capital-exporting economies and at the same time one of the most important receivers of international flows. See Edward M. Graham and Paul R. Krugman, *Foreign Direct Investment in the United States*, Institute for International Economics, Washington, D.C., 1989. Having said the foregoing, it is useful to mention that the United States of America, as of 1989, became a net/aggregate debtor with regard to the balance between its assets and its liabilities in international capital flows and has remained so since then. In 1999 it had a negative balance higher than US\$ 1.9 trillion, more than 20 percent of its gross national product; *The Economist*, 18 November 2000, at 123. Compare this with the total amount of global foreign capital flows that in 1999 ascended to US\$ 865 billion, which meant a 27 percent increase over 1998; *The Economist*, 11 November 2000, at 131.

³⁶ Or "multinational", depending on the definition preferred.

³⁷ See, for example, Stephen Zamora, *Economic Relations and Development*, in Oscar Schacter and Christopher C. Joyner (eds.), *United Nations Legal Order*, Vol. 1, American Society of International Law, Grotius Publications, Cambridge University Press, Cambridge, U.K. 1995, at 431.

³⁸ This statement merits a qualification. Even though no multilateral understanding on this subject exists, thousands of bilateral investment treaties (BITs) exist which regulate foreign investments. Although BITs do not encompass a complete framework concerning investor-host State relations, they do include obligations upon the State *vis-à-vis* the investor with regards to investment, such as the duty not to expropriate but for public purpose reasons and upon payment of compensation, treatment standards (minimum, national and most-favoured-nation), etc.; see, in general, Rudolf Dolzer and Margrethe Stevens, *Bilateral Investment Treaties*, International Centre for Settlement of Investment Disputes, Martinus Nijhoff Publishers, The Hague, 1995. Likewise, several codes of conduct have been elaborated which have certain legal effects; see, for example, *Guidelines on the Treatment of Foreign Direct Investment*, prepared by the World Bank; 7 ICSID Rev.-F.I.J. 2, 1992, at 295.

³⁹ "La conclusion des conventions multilatérales à vocation universelle ayant pour objet la protection des investissements internationaux est une impossibilité politique ..." (emphasis original); D. Carreau, P. Juillard, and T. Flory, *Droit International Economique*, 1978, pp. 78-79, cited by Zamora, *supra*, footnote 37, at 431.

Agreement on Investment promoted in the late 1990s by the Organisation for Economic Co-operation and Development.⁴⁰

It is against this background that the importance and impact of the ICSID cases discussed above must be assessed. Against this backdrop, these cases give concrete content to the (abstract) general rules of international foreign investment law and, therefore, are a highly significant step in the development and progress of this (prickly) subject.

In other words, the result of these cases is the—slow but progressive—crystallization and ripening of international law in matters of foreign investment that begins to “bind”⁴¹ investors and recipient States, the content of which has, from the inception of the phenomenon of international investment,⁴² been aggressively disputed.⁴³

⁴⁰ For an interesting discussion of this subject, see Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?* *The Int'l Lawyer*, Vol. 34, No. 3, Fall 2000, at 1033.

⁴¹ This observation must be understood within the premise that, even though such decisions lack legal force for future cases (NAFTA Article 1136(i)), they are useful as an authoritative/persuasive source that assists in the developing of an understanding of what the law should be; that is, as *opinio iuris communis*.

⁴² The foreign investments phenomenon dates from more than 400 years. During the European colonial expansion in America and then Africa and Asia, there was an expansion of foreign investments by groups or enterprises directed to develop economic activities outside their country of origin. See James Otis Rodner S., *La Inversion Internacional en Paises en Desarrollo*, Ed. Arte, Caracas, Venezuela, 1995, at 58.

⁴³ The “precedent value” of these cases may be observed in, for instance, the Opinion prepared by the dissenting arbitrator in *Waste Management*, wherein the *Ethyl* and *Azinian* cases were analyzed. Likewise, the *Metalclad* Award analyzed another international case whose facts were similar to the one at bar: *Biloune et al. v. Ghana Investment Centre et al.*, 95 I.L.R. 183, 207–210, 1993. Finally, and significantly to the extent that it was a court and not only an arbitration tribunal, the B.C. Court’s setting-aside decision made reference to the following ICSID cases: *S.D. Myers, Inc. v. Government of Canada*; *Pope & Talbot, Inc. v. Canada*; *Klöckner v. Cameroon* (2 ICSID Reports 95, 3 May 1985); *Amco v. Indonesia* (1 ICSID Reports 508, 16 May 1986); and *MINE v. Guinea* (4 ICSID Reports 79, 22 December 1989).