ISSN:1692-8156

REGULATORY EXPROPRIATION DEVELOPMENTS: DID METALCLAD COMPLY WITH ALL THE DARK PREMONITIONS?*

DESARROLLOS EN EXPROPIACIÓN REGULATORIA: ¿CUMPLIÓ METALCLAD CON TODAS LAS OSCURAS PREMONICIONES?

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Reception date: 15 de agosto de 2009
Acceptance date: 1 de octubre de 2009

To cite this article / Para citar este artículo
Diego Bernal-Corredor, *Regulatory expropriation developments: Did Metalclad comply with all the dark premonitions?*, 15 *International Law, Revista Colombiana de Derecho Internacional*, 279-314 (2009).

* The nature of this article is an investigative exercise derived from the collaboration of Professor Christopher Thomas, who is probably, one of the most relevant lawyers regarding the NAFTA system.

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ABSTRACT

This is the final result of an investigation. Developing practices in international trade and investment law bring new challenges to investors who are always seeking better and more certain grounds to develop their businesses abroad. In that regard, free trade agreements and bilateral investment treaties set a legal frame under which a minimum standard of treatment is set for both the foreign investor and the Host State. The parties to NAFTA, especially the United States and Canada were concerned that Mexico could not be held accountable for measures that would be tantamount to expropriation. With that purpose Chapter Eleven was created with a very broad definition on its terms and a procedure that would allow a foreign investor from another Party, to submit a claim before an international tribunal without having to exhaust the local remedies. These two characteristics allowed Metalclad to submit a claim against Mexico for some domestic measures that allegedly amounted to a creeping expropriation. The Metalclad award introduced a very broad definition of indirect expropriation, which according to some academics it would undermine the regulatory powers of NAFTA Members and would drive states in a *race to the bottom* regarding safety, environmental and health regulations. My hypothesis is that based on the revision of the Tribunal's award and the recent developments in NAFTA jurisprudence, Metalclad did not have any relevant impact regarding the definition of expropriation.

Key words author: Metalclad, Indirect Expropriation, Regulatory Expropriation, Regulation, Chilling Effect, Sole Effect Doctrine, International Protection to Investment Law, NAFTA, Chapter Eleven.

Key words plus: Arbitration agreements, Commercial, Expropiation, Foreign Investments.

RESUMEN

Éste es el resultado final de una investigación. El desarrollo de las prácticas en comercio exterior y derecho internacional de la inversión ha traído nuevos retos a los inversionistas, que siempre están buscando bases más seguras para realizar sus negocios en el extranjero. En ese sentido, los acuerdos de libre comercio y los acuerdos bilaterales de protección a la inversión establecen un marco legal, bajo el cual tanto el país receptor de la inversión como el inversionista extranjero tienen un mínimo estándar de tratamiento. Los miembros del NAFTA, en especial Estados Unidos y Canadá, estaban preocupados por la posibilidad de que México no pudiera ser responsabilizado de manera efectiva por medidas que fueran equivalentes a la expropiación. En ese orden de ideas, el Capítulo Once fue creado con una definición amplia en relación con sus términos y procedimientos, los cuales le permitirían al inversionista extranjero de otro Estado miembro presentar una demanda frente a un tribunal internacional sin la necesidad de cumplir los requisitos relacionados con los remedios domésticos. Estas dos características permitieron que Metalclad interpusiera una demanda contra México por ciertas medidas domésticas que supuestamente fueron equivalentes a una expropiación fragmentada. El laudo de Metalclad presentó una definición muy amplia de la expropiación indirecta, que de acuerdo con algunos académicos podría hacer mella en los poderes regulatorios de los países Miembros del NAFTA y los llevaría a una carrera de fondo, en relación con los temas de salubridad, medio ambiente y seguridad. Mi hipótesis es que, con base en la revisión del laudo del Tribunal y otros desarrollos de la jurisprudencia de NAFTA, Metalclad no tuvo ningún impacto relevante en la definición de expropiación.

Palabras clave autor: *Metalclad, expropiación indirecta, expropiación regulatoria, efecto escalofrío, doctrina del único efecto, protección internacional a la inversión, TLCAN, capítulo once.*

Palabras clave descriptor: *Tratado de arbitramento comercial, expropiación, inversiones extranjeras.*

SUMMARY

INTRODUCTION

The North American Free Trade Agreement (hereinafter, NAFTA) that is a free trade area agreement signed by the United States, Mexico and Canada, has already been in force for over 14 years.[1] Said agreement has brought to the Member States economic benefits[2] including the increase in trade among the three countries and a considerable increment in job creation. According to some commentators, said agreement was only possible because of Chapter Eleven.[3] In other words, US and Canadian investors were concerned about Mexico's accountability on any measures that would amount to an expropriation of their investments, and Chapter Eleven represented the possibility to submit to an international arbitral tribunal a claim against any Member State, whose actions were a violation of NAFTA investment obligations.

Hence, with the purpose to protect foreign investors, Chapter Eleven[4] was broad in its definition on expropriation,[5] situation that led to some international disputes between investors and states, where investors alleged that they have been expropriated by regulations issued by the Host State. One of those disputes under the name of Metalclad[6] had been the center of many articles and concerns given the fact that it apparently broadened the *spectrum* of application of Chapter Eleven's definition of expropriation, making State regulations weak before foreign investor's interests, effect which has been called *The chilling effect*.[7]

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1 North American Free Trade Agreement entry into force on January 1st, 1994.
2 http://www.dfait-maeci.gc.ca/nafta-alena/NAFTA_Communique.asp.
3 Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 *Tulane Environmental Law Journal*, 387-410, 402 (2000).
4 This article will mostly deal with articles 1101 (scope of coverage), 1105 (minimum standard of treatment), 1110 (expropriation and compensation), 1116 (claim by an investor of a party on its own behalf).
5 Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 *Hastings West-Northwest Journal of Environmental Law and Policy*, 85, 87 (2002-2003).
6 *Metalclad Corporation v. the United Mexican States.* ICSID Additional Facility Case No. ARB(AF)/97/01, Award ICSID, August 30th, 2000.
7 Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 273 (2001).

This article questions the magnitude of Metalclad's impact on NAFTA's jurisprudence and shows how its interpretation of the definition of expropriation in Article 1110 of NAFTA has not been accepted by NAFTA international tribunals and in fact it has served as an alarm to international arbitrators and national regulation agencies regarding the sovereignty of regulation and public policies.[8] Further, I propose that as long as the definition of expropriation remains broad, more cases will end up in judicial review in local Courts,[9] until an interpretative note comes from the NAFTA Free Trade Commission[10] or (contrary to what Lucien Dhooge could see as "*unattractive*"[11]) until legal counsels realize that such definition is not part of NAFTA Chapter Eleven.

With the purpose to shed some light on the real impact of Metalclad, I will first make a brief presentation of Chapter Eleven in regards to the investor (state dispute resolution and some definitions that are basic in order to fully understand the matter under study). Then, I will march through specific NAFTA cases on indirect expropriation in order to see where Metalclad fits in. Afterwards I will discus Metalclad itself including the challenge of the award before the British Columbia Supreme Court. I will conclude by analyzing the cases that have taken place since Metalclad in order to evidence how most of the arguments of investors, which have relied on the definition of expropriation of Metalclad, have been rejected or not even taken into account.

Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 *New York University Environmental Law Journal*, 264, 274 (2002-2003).

8 Surya P. Subedi, *International Investment Law, Reconciling Policy and Principle*, 161 (1st ed., Hart Publishing, Oxford, 2008).

9 Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 *New York University Environmental Law Journal*, 198, 206-207 (2002-2003).
Héctor Olasolo, *Have Public Interests been Forgotten in NAFTA Chapter 11 Foreign Investor/Host State Arbitration? Some Conclusions from the Judgment of the Supreme Court of British Columbia on the case of Mexico v. Metalclad*, 8 *Law & Business Review of the Americas*, 189, 209 (2002).

10 Is important to take into account that on July 31st, 2001, the Free Trade Commission issued Statement which tried to clarify two basic aspects of Chapter Eleven (i) access to documents, and (ii) minimum standard of treatment in accordance with international law. Also available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en.

11 Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 283 (2001).

I. CHAPTER ELEVEN, THE INVESTOR – STATE DISPUTE RESOLUTION MECHANISM AND THE DEFINITION OF EXPROPRIATION

Chapter Eleven has the purpose to protect the legal interests of foreign investors of any NAFTA party that decided to invest in any other Party. From one side a rule such as Chapter Eleven provides investors with a legal framework that reduces significantly the legal risk, by the same token, such *security*[12] was meant to boost foreign direct investment. This part of the paper will make reference to specific provisions in Chapter Eleven, which I believe are fundamental in giving the frame to the issue at study.

Chapter Eleven of NAFTA is composed by three sections: Section A contains most investment obligations; Section B represents *the teeth* of the obligations within Section A, hence it contains the Regulations for Dispute Settlement between the Host State and an Investor of another Party; and, Section C which contains the specific definitions for Chapter Eleven.

As stressed above, Chapter Eleven aims at giving full protection to the other Party's investors and investments in order to promote trade and investment among NAFTA Parties,[13] whenever such investments fall within Article 1101. Thus, protection to foreign investors is not absolute as some authors have stressed.[14] The NAFTA Tribunal in the Azinian case was very clear in determining that not every disappointment of a Party's Investor with the Government could be brought before a NAFTA Tribunal,[15] however, even though the possibility to bring a claim is not unlimited is possible to state that is very broad.

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12 According to my opinion Chapter Eleven does not give security or certainty to any investor. It just lowers the legal instability risk.

13 Andrew Newcombe, *Regulatory Expropriation, Investment Protection and International Law: When is Government Regulation Expropriatory and when should Compensation be paid?,* 119-121, Thesis for LLM, Toronto University, 1999.

14 Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 *Tulane Environmental Law Journal*, 387-410, 402, 398 (2000).

15 *Robert Azinian, Kenneth Davitian and Ellen Baca (US) v. the United Mexican States.* ICSID ARB(AF)/97/2, Final Award, November 1st, 1999.

Section A of Chapter Eleven starts by defining the scope of application of Chapter Eleven which interpreted under the general[16] and specific[17] definitions of measures, expropriation, investor and investment *inter alia* are broad enough to allow NAFTA foreign Investors to at least have the expectation to be successful in the submission of a Claim before a NAFTA Tribunal whenever they have been negatively affected by measures enacted by the Host State.

For example: Chapter Eleven includes most of the forms by which a government could affect an International investor from another Party[18] byway of the definition of "*measure*". The definition of measures includes any "*law, regulation, procedure, requirement or practice*"[19] in any of the administrative levels (Federal, State or Municipal). In this light is possible to assert that any "*act*" any development of such initial "*act*" and any other "*conduct*" performed in order to implement the aforementioned "*acts*" will be taken into account, notwithstanding the administrative level or its fashion.

The definition of expropriation is another key definition in Chapter Eleven. Article 1011 stresses:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation *of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6*. (Emphasis added).

From the mere reading of the text is possible to understand the controversy between states and investors; there isn't a clear definition on what "*indirect expropriation*" and "*tantamount to expropriation*" are. Is true that there are available definitions

16 NAFTA, Part One, Chapter Two, Article 201.
17 NAFTA, Part Two, Chapter Eleven, Article 1139.
18 Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 *Tulane Environmental Law Journal*, 387-410 (2000).
19 NAFTA, Part One, Chapter Two, Article 201.

and guidelines on these concepts in the International Law jurisprudence,[20] however such jurisprudence does not result binding to the NAFTA Parties and even though it sheds some light over Chapter Eleven it's not the appropriate tool to interpret the agreement given the fact that Chapter Eleven definition *seems* to be broader and more comprehensive than most BITs or relevant International Law, given the characteristics of the dispute settlement mechanism of Section B of Chapter Eleven and the aforementioned definition of "*measure*".[21]

Section B of Chapter Eleven provides a very special procedural characteristic; it allows a NAFTA private investor of another Party to submit a claim before a NAFTA Tribunal against any Host State regarding any violation of any investment obligations[22] contained in Section A of Chapter Eleven and/or Articles 1503.2 and 1502.3.a.[23] According to Article 1121 the claim may be submitted directly to international arbitration "*(a) unilaterally consenting to such international arbitration, or (b) unilaterally waiving their rights to initiate or continue in any national or international forum, any proceedings with respect to the measures through which the Host State has allegedly violated its NAFTA obligations*"[24] without the requirement of exhaustion

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20 *Barcelona Traction, Light and Power Company, Limited. Belgium v. Spain.* Judgment of February 5th, 1970. International Court of Justice, ICJ. Reports 1970.
Saluka Investments BV (the Netherlands) v. the Czech Republic. Permanent Court of Arbitration, Partial Award, March 2nd, 2006.
Amoco International Finance Corp. v. Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company. Iran-US Claims Tribunal, July 14th, 1987. 15 *Iran-US Claims Tribunal Reports, Iran US CTR* (1987-II).
Chorzow Factory, Germany v. Poland. Jurisdiction. Judgment of July 26th, 1927, Permanent Court of International Justice, PCIJ Series A, No. 9.

21 Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 *Hastings West-Northwest Journal of Environmental Law and Policy*, 85, 86-88 (2002-2003).

22 (i) National Treatment; (ii) Most Favored Nation; (iii) Minimum International Standard of Treatment, and (iv) To nationalize or expropriate investment of investor from other NAFTA State Parties, except for a public purpose, in a non-discriminative basis, in accordance with due process and with the payment of fair market value compensation.

23 Article 1116, Section B, Chapter Eleven of NAFTA.

24 Héctor Olasolo, *Have Public Interests been Forgotten in NAFTA Chapter 11 Foreign Investor/ Host State Arbitration? Some Conclusions from the Judgment of the Supreme Court of British Columbia on the case of Mexico v. Metalclad*, 8 *Law & Business Review of the Americas*, 189, 192-193 (2002).

of local remedies and even with the possibility to remove a claim from the local Courts of the Host State.

Section B of Chapter Eleven State –private investor international dispute settlement mechanism prevents the investor from having to submit the claim to the local Courts of the Host State or having to convince their home state of submitting a claim at a International level on their behalf.

An international investment always contains at least two kinds of risks: a commercial risk and a political risk. Usually[25] the investor, whose studies on the market, stability of the Host Country and the conditions of the investment must enclose all the exogenous and endogenous conditions of the investment, bares the mentioned risks. However, the aforementioned studies sometimes are not as accurate and complete as they should[26] and the investor sees himself before the decision of internalizing the loss or try to externalize it by recurring to legal claims or other means.

The lack of precision and ambiguity in the definition of key terms clears the path to claims from another Party's investors who are allowed to present claims directly against the Host State under Section B of Chapter Eleven. Hence, is possible to sustain that many types of claims based on different kind of arguments can fall under the analysis of a NAFTA Tribunal based on Chapter Eleven.

II. Regulatory Expropriation before Metalclad

Contrary to what other commentators have argued, I do not believe that there is a certain path to Metalclad,[27] in fact I believe

25 It is impossible to say always giving the fact that is possible that the foreign investor is considered *too big to fall* by the Host State.

26 A set of possibilities could be contained within this inaccuracy: excessive optimism undermining potential risks, change in the political and economical conditions, implementation of governmental policies, *inter alia*.

27 According to Godshall there are two specific cases under the NAFTA system which lead to Metalclad, I believe that to a point it was a global tendency, that even though never got as far in its interpretations, it certainly gave some tools to make a broad interpretation on regulatory expropriations. See Lauren Godshall, *In the Cold Shadow of Metalclad: The*

that to date it's a *standalone* award in regards to the definition of regulatory expropriation. In that order of ideas, I will briefly summarize and analyze a couple of *pre-Metalclad* cases regarding their interpretation of the definition of expropriation under NAFTA.[28] In this order of ideas I will review the following cases: Ethyl and S. D. Myers cases. I will extract the most important facts and rulings regarding the definition of regulatory expropriation out of those cases in order to understand and be able to assess the Metalclad case. My intuition is that the definition of expropriation has been subject to the permanent challenge of Corporations who sees in it a possibility to obtain compensation from the Host States for losses in their business. However, NAFTA Tribunals have not accepted such broad definitions and instead they have acted within the scope of the definition of indirect expropriation existent in International Law.[29]

A. The Ethyl case

In the Ethyl case[30] a claim was brought before a NAFTA Tribunal for the Canadian decision to forbid the import and internal trade of methylcyclopentadienyl manganese tricarbonyl[31] (hereinafter, MMT) alleging damages for US$250 million. Officially, the measure was issued with the interest to protect the environment and human health, to promote the harmonization of fuel standards in North America and to reduce economic burdens

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Potential for Change to NAFTA's Chapter Eleven, 11 *New York University Environmental Law Journal*, 264, 273-277 (2002-2003).
Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 86-88 (2002-2003).

28 Is important to remember that Article 1136 of NAFTA provides as follows: "*1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.*" However, Tribunals tend to make references to prior NAFTA Tribunal as they found them reliable auxiliary sources of interpretation of the NAFTA.

29 As an example, CAFTA (Central America-United States Free Trade Agreement) in Annex 10-C.4 defines indirect expropriation as follows: "*when an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*" This is a recent attempt to define indirect expropriation in an international agreement.

30 *Ethyl Corporation v. Government of Canada.* UNCITRAL, Notice of intent to submit a claim to arbitration, 3-4, September 10th, 1996. http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf.

31 Supplement to the gasoline additive tetraethyl lead to increase the fuel's octane rating. See more at: http://en.wikipedia.org/wiki/Methylcyclopentadienyl_manganese_tricarbonyl.

over the car companies. On September 10th, 1996 Ethyl Corp filed a notice of intent to arbitrate, in July 20th, 1998 Canada settled for US$13 million and withdraw the MMT legislation.

The notice of intent contained arguments concerning National Treatment (Article 1102), performance requirements (Article 1106) and expropriation (Article 1110).[32] Curious fact about the later is that the MMT regulation was not formally *in force* given the fact that as off the date in which Ethyl filed the notice of intent to arbitrate, the legislation did not have the Royal Assent, hence a case based on expropriation would have been very hard to sustain.

Moreover, Ethyl argued that declarations of officials of the Canadian Government were measures in the sense of Chapter Eleven and that those "*measures*" were tantamount to expropriation of their Good Will for their "defamatory and reckless" fashion.

Even-though *prima facie* it would be feasible to think that the Government of Canada settled for that amount of money based on a "*chilling effect*" doctrine, I believe is also possible that in the Ethyl Corp case, there were other reasons for the settlement, different from the concern on the direct expropriation claim and maybe at least there was some evidence that seemed to indicate that there was strong economic protectionism interest in the measure[33] or at least a clear violation of NAFTA in any other discipline.[34]

There is no doubt that the interpretation given by the Claimant to expropriation in the Notice of Intent is broad; it intended to include within the definition of measures, actions such as a

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32 Available at http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpNoticeOfIntent.pdf.

33 Andrew Newcombe, *Regulatory Expropriation, Investment Protection and International Law: When is Government Regulation Expropriatory and when should Compensation be paid?*, 138, Thesis for LLM, Toronto University, 1999.

34 According to some unofficial sources, the main reason Canada settled was that a Province challenged the same MMT law under a federal-provincial agreement called the Agreement on Internal Trade (AIT) and prevailed over the federal government, which seemingly was not according to the federal government's expectations because it suggested that the denial of market access for MMT would violate not only the AIT but also the NAFTA. Hence, the federal government's interest in settling (for a relatively small amount of money).

Ministry of Environment declarations, even broader when the Claimant is arguing that such "*measure*" was tantamount to the expropriation of the good will of the enterprise. Moreover, the Tribunal accepted the argument that even if the legislation did not have the Royal Assent, such *project of legislation* shall be considered as a measure.[35]

However, I do not agree with Lauren Godshall's argument that "*scientifically valid legislation that would have worked to protect the public health was voluntarily withdrawn by the government in the face of a $250 million expropriation claim*."[36] In other words, is important to remember that the Notice of Intent also contained an allegation on National Treatment that could have been the primary cause for Canada's settlement. I am not sure that Canada would "*set aside*" its sovereignty of protecting its nationals only based on a corporate *bluff*. In that order of ideas, I do not believe that this case in fact broadened the definition of "*regulatory expropriation*", primarily because there wasn't any award in the Ethyl case, further there were many other possible basis for Canada's decision to settle other than the firm believe in the existence of a regulatory expropriation, such as National Treatment which from the analysis of the facts seems to be a very strong point of the Claimant's arguments.

B. S. D. Myers

S. D. Myers, Inc. (hereinafter, S. D. Myers) is a United States corporation, whose business was the remediation of polychlorinated biphenyl (hereinafter, PCB) in the US. In October 1995, S. D. Myers established a company in Canada for the export to the US and remediation of PCB with the same name and with the same shareholders.

35 *Ethyl Corporation v. Government of Canada.* UNCITRAL, award on jurisdiction. http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf.

36 Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 *New York University Environmental Law Journal*, 264, 274 (2002-2003).

In November 1995, the Canadian Minister of Environment closed the border for PCB waste with the purpose of making sure that Canadian PCB waste was handled in proper manner according to environmental friendly practices and the protection of human health. The border was re-opened in February 1997 for a short period of time until it was closed again by a US Court. S. D. Myers submitted a claim on the basis of: (i) National Treatment (Article 1102); (ii) Minimum Standard of Treatment (Article 1105), and (iii) Expropriation (Article 1110).

At the time of the claim, Canada was a Party to the Basel Convention.[37] Parties to this international Convention have the obligations to: (i) reduce the production of hazardous waste (Article 4. 2.a); (ii) ensure the availability of adequate disposal facilities, to the extent possible, within its own boundaries (Article 4.2.b), and (iii) *ensure that the transboundary movement of hazardous wastes and other waste is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement* (Article 4.2.d)[38] (emphasis added).

In this case the Tribunal discussed largely about the limits of the definition of expropriation in the face of the Police Powers of the State to regulate and also the balance between State's international obligations under several international instruments. Regarding the later, the Tribunal stressed that the Basel Convention does not specify that cross-border movement of PCB waste necessarily contradicted a Party's obligation in the Convention. Further, the Tribunal established that even-though Annex 104 of NAFTA establishes that the Basel Convention is considered an international instrument which has priority over NAFTA, it does not mean that a NAFTA Party could use said Convention to directly breach an obligation under NAFTA. Alternatively,

37 Available at http://www.basel.int/text/documents.html.

38 *S. D. Myers, Inc. v. Government of Canada.* UNCITRAL, Partial Award, 48, November 13rd, 2000.

the Party shall look for a measure that is least inconsistent with NAFTA,[39] and Canada did not.

In this light, the Tribunal by any means established that a State should breach their international environmental obligations in order to comply with their obligations under NAFTA. Far from that, the correct reading of this ruling would take us to understand that a Party to NAFTA cannot use an environmental international obligation as an excuse to take *any* measure in violation of NAFTA, rather, the State shall take necessary steps to comply with its international environmental obligations at the same time that it enacts the least inconsistent measures with NAFTA whenever necessary.

In regards to the expropriation issue, the Tribunal followed the Police Powers doctrine. It introduces the subject stressing that:

> *Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.*[40]

It continues by analyzing to which extent the expression "*tantamount to expropriation*" in article 1110 of NAFTA broadens or makes more extensive the definition of expropriation and following the analysis in *Pope & Talbot*, it determines that the normal meaning of tantamount is equivalent, and something that is equivalent cannot be "*more*".[41] In other words, the Tribunal understands that the word "*tantamount*" within the text of Article 1110 does not mean a broader definition of the concept of expropriation, but it reflects another adjective for what is usually called creeping expropriation.[42]

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39 *S. D. Myers, Inc. v. Government of Canada.* UNCITRAL, Partial Award, 50, November 13rd, 2000.

40 *S. D. Myers, Inc. v. Government of Canada.* UNCITRAL, Partial Award, 69, November 13rd, 2000.

41 *S. D. Myers, Inc. v. Government of Canada.* UNCITRAL, Partial Award, 70, November 13rd, 2000.

42 However the mentioned idea was stressed by the Tribunal, the Author does not found feasible this interpretation. Is unlikely that the Drafters of NAFTA were redundant when establishing the rules in Article 1110 or that they used one word in order to express another.

Finally, the case was decided on basis of National Treatment,[43] given the fact that the Tribunal found that Canada's motivation to issue the measure was not based on an environmental concern, but with the purpose of protecting its local market. Even though *prima facie* the measure was nationality neutral, for the Tribunal was clear that this measure had a specific effect over the non-Canadian company.[44]

However the interpretation of the Tribunal did not have the most solid basis, I believe that the lack of will of the Tribunal to broaden the definition of expropriation is clear. Moreover, the Tribunal decided this case under the doctrine of *Pope & Talbot*, giving importance to the power that States have over its regulations, nonetheless, making clear that international environmental obligations are not meant to create excuses for the violation of NAFTA. A *contrario sensu* interpretation would lead to a ruling under which any NAFTA Party could take any measure, no matter how disproportionate or inaccurate in order to *comply* with an international environmental obligation.

As a conclusion it becomes evident that the definition on expropriation is not a "*rubber*" becoming looser with time. My intuition is that in fact from the mere reading of the text of Article 1110 would be possible to interpret it in a fashion that could clash with the Police Powers of the State to regulate, however, Tribunals have remained very careful to set a precedent under which the sovereignty of a NAFTA Party to regulate is undermined.

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43 *S. D. Myers, Inc. v. Government of Canada.* UNCITRAL, Partial Award, 35, November 13rd, 2000.

44 Most of the Tribunal's argument is based on the intention and purpose of the government of Canada to issue the PCB waste destruction measure, nonetheless, is important to mention that in Paragraph 193 of the Partial award on The Merits in the *S. D. Myers case* the Tribunal applied the effects doctrine to some extent. Under said analysis the Canadian measure had the effect to prevent the American company from developing its business.

III. The Metalclad Award, a Regulatory Expropriation Argument before the Tribunal and the Supreme Court of British Columbia, Canada

A lot have been said and written about this case, most of the documents state that the Metalclad interpretation of expropriation had terrible consequences at its own time and will have terrible consequences in the future, that it will take away the power of States to regulate adequately on the environment among many other dark predictions.[45] Under this title I will briefly expose the Metalclad case and its rulings, including the sentence from the British Columbia Supreme Court. The purpose of this Chapter will be to center the legal issue of this article, express the problems with the interpretation of the Tribunal and the potential problems that such a ruling could bring to International Investment Law and domestic regulatory agencies.

Coterín, a company incorporated under the laws of Mexico, received the necessary Federal licenses to construct and operate a transfer station for hazardous waste landfill (hereinafter "landfill") in La Pedrera, State of San Luis de Potosí. After three months that Coterín obtained the Federal permit, Metalclad a company incorporated under the laws of The United States entered into negotiations to buy Coterín together with its licenses, which finally ended in a purchase.

The construction of the landfill developed through 1994 until October 27th, 1994 when the Municipality ordered the cessation of all building activities due to the absence of municipal construction permit, hence the construction was abruptly terminated. On

45 Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 *New York University Environmental Law Journal*, 264, 274 (2002-2003).
Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 *Hastings West-Northwest Journal of Environmental Law and Policy*, 85, 88 (2002-2003).
Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 273 (2001).
Jesse Williams, *Regulating Multinational Polluters in a post-NAFTA Trade Regime: The Lessons of Metalclad v. Mexico and the case for a 'Takings' Standard*, 8 *UCLA Journal International Law & Foreign Affairs*, 480 (2003).

November 15th, 1994 Metalclad resumed its construction activities, while it submitted an application for the Municipality's construction permit. During the first months of 1995 several demonstrators impeded the normal operation on the landfill.

After months of negotiation on November 15th, 1995, Metalclad came to an agreement *El Convenio* with the Government of Mexico in which Metalclad committed to correct certain deficiencies in the project. *El Convenio* provided for a 5 years operation for the landfill, renewable by decision of Mexican agencies. The Local Government of Guadalcázar was not a part of the negotiations nor the final settlement. In late 1995 Metalclad was notified that the Town Council of Guadalcázar rejected the construction permit.

Metalclad entered into negotiations with the Governor of San Luis de Potosí, which took most of 1996. On January 2nd, 1997, Metalclad filed a Claim under Chapter Eleven of NAFTA. On September 23rd, 1997, the Governor of San Luis de Potosi issued an ecological Decree declaring a Natural Area for the protection of the rare cactus *Turbinicarpus*. The natural area incorporated the area where the landfill was located. Metalclad included this ecological decree in its claim alleging that such measure will prevent "*effectively and permanently*" the operation of the landfill.

In the claim, Metalclad alleged Fair and Equitable Treatment (Article 1105); National Treatment (Article 1102); Most Favored Nation (Article 1103), and Expropriation (Article 1110).

The analysis of the Tribunal regarding Fair and Equitable Treatment was based fundamentally in transparency arguments. In this light, Metalclad convinced the Tribunal that it was led to believe by Mexico's Federal Government that it did not need the Municipality's construction and operation permit, and that in the case the Municipality should request such permit, it would be "*a matter of course*."[46] Allegedly such reliance on the Federal

46 *Metalclad Corporation v. United Mexican States.* ICSID Case No. ARB(AF)/97/1, Award ICSID, 25, August 30th, 2000.

Government was a *sine qua non* reason for the investment of Metalclad.

Regarding Fair and Equitable Treatment the Tribunal sustained that the lack of transparency in a Domestic license process could cloud the judgment of a foreign investor regarding to the predictability of the States behavior. Thereby, when the Foreign Investor from another Party believes that there isn't a legal justification for the rejection of a legal permit, the lack of transparency in the permit process could amount to the *full expectation* of the investor in the grant of such permit.[47] In that order of ideas, according to the Tribunal another big component (the first one is transparency) of Fair and Equitable Treatment is predictability. Following the analysis of the Tribunal, whenever a Party to NAFTA is unable to provide foreign investors with transparency and predictability it could be in breach of its investment obligations under NAFTA.[48]

In regards to expropriation, the Tribunal ruled:

> *(…) expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*

The arguments for such a definition were given basically on basis of Fair and Equitable Treatment,[49] in other words, the lack of transparency and the justifiable reliance of the foreign investor on the measures, affected in whole or in significant part the property of Metalclad, leading to a violation of Article 1110 of NAFTA.

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47 *Metalclad Corporation v. United Mexican States.* ICSID Case No. ARB(AF)/97/1, Award ICSID, Paras. 88-89, August 30th, 2000.

48 *Metalclad Corporation v. United Mexican States.* ICSID Case No. ARB(AF)/97/1, Award ICSID, 27 Paras. 99 and 101, August 30th, 2000.

49 *Metalclad Corporation v. United Mexican States.* ICSID Case No. ARB(AF)/97/01, Award ICSID, 29, August 30th, 2000.

The Supreme Court of British Columbia (hereinafter, The Court) revised the case following a challenge against the Tribunal's award on Metalclad's case submitted by the State of Mexico.[50] In this award The Court established that the inclusion of transparency (Article 102.1) as one of the objectives of NAFTA in the reasoning of Fair and equitable treatment and expropriation was incorrect, and it went beyond the scope of the submission to arbitration.[51]

Further, The Court stated that "*the Tribunal's analysis of Article 1105 infected its analysis of Article 1110.*"[52] With that sentence The Court followed a two step analysis: (i) it established that the analysis of a violation of Article 1105 could not be influence by Article 102(1) given the fact that the enforceability of that Article should be analyzed under Article 1802 of NAFTA and not under Chapter Eleven; (ii) secondly, The Court recognizes that the Tribunal's analysis of Article 1110 was based on Article 1105 and thereby it was biased with the analysis of other Articles of NAFTA beyond the scope of the submission to arbitration. In that order of ideas The Court set aside the award related to the existence of an indirect expropriation based on lack of transparency and reliance.[53]

However, The Court only set aside the Tribunal's award partially. According to The Court, the Tribunal's definition of expropriation was a matter of law, thus, The Court could not set it aside.[54] Moreover, it stated that said definition of expropriation was broad enough to include the Ecological Decree issued by the municipality of Guadalcázar and that there wasn't any reason to set aside the Tribunal's conclusion that "*the issuance*

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50 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, May 2nd, 2001.

51 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, Para. 72, May 2nd, 2001.

52 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, Para. 78, May 2nd, 2001.

53 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, Para. 79, May 2nd, 2001.

54 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, Para. 99, May 2nd, 2001.

of the Ecological Decree amounted to an expropriation of the Site without compensation."[55]

According to Marissa Yee, there is a big concern about Metalclad's award because it is downgrading environmental concerns, and also that the Tribunal in Metalclad forgot that another important goal of NAFTA is regional environmental protection.[56]

On his part, Lucien Dhooge argues that Metalclad had the effect of defining expropriation in broad terms, making almost impossible for environmental regulators to enact measures whenever they affect an international investor of a Party to NAFTA. Further it states that "*by granting an award of damages as a result totality of Metalclad's experience in La Pedrera, the Tribunal Transferred the risk for non-market related aspects of the investment from the Company itself to the Mexican Government*."[57]

For the most, the basic criticism and fear coming from Metalclad is that such award would be used as precedent in order to obtain lower environmental standards in Host Countries, by means of threats coming from Investors to submit claims under Chapter Eleven of NAFTA.[58]

I believe that environmental commentators are giving more importance to Metalclad than it really has. Even though there might be a global tendency in International Tribunals awards to adopt the "*sole effect*" doctrine,[59] said tendency is not a consequence of Metalclad. Said tendency is prior to Metalclad and also because Metalclad was awarded based on NAFTA which is a regional set of rules, that will not bind any other Country outside NAFTA.

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55 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904, Para. 105, May 2nd, 2001.

56 Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 *Hastings West-Northwest Journal of Environmental Law and Policy*, 105 (2002-2003).

57 Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 269-270 (2001).

58 Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 *New York University Environmental Law Journal*, 264, 267 (2002-2003).

59 Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 86 (2002-2003).

Moreover, the definition of expropriation in the Metalclad case after the revision of The Court seems to be inconsistent when thinking that it could become precedent for other Tribunals. In other words, I believe that the greatest potential impact of the mentioned award would be the definition of expropriation, however, said definition followed an analysis based on Fair and Equitable Treatment standards. Since the Canadian Supreme Court stressed that this sort of analysis was flawed, it becomes evident that the only reason why The Court did not set aside this definition was because it was a matter of law and thereby it was outside the scope of analysis of The Court, and not because such definition would overcome a detailed analysis under Chapter Eleven of NAFTA.[60]

I believe that is possible to state that using the logic of the Court regarding Fair and equitable treatment, its elements and its relation with expropriation, the Tribunal's award becomes null. In that regard, making reasonable expectations and transparency a crucial part of the test to establish the existence of an indirect expropriation becomes void.

Further, the fact that NAFTA does not have a permanent appellate body leads to a situation in which any kind of award is possible,[61] because as aforementioned there isn't a precedent rule. In fact, the Metalclad definition did not make any reference to any prior case within or outside NAFTA.[62] In this order of ideas, just the way in which Metalclad's Tribunal ruled with its own definition on expropriation, said definition will disappear when the environmentalist articles and the investor's claims stop mentioning it, just as is possible to see in recent awards of Chapter Eleven Tribunals.

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60 Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 267 (2001).

61 Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64 (2002-2003).

62 Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 72 (2002-2003).

IV. DECISION ON REGULATORY EXPROPRIATIONS AFTER THE METALCLAD AWARD

In this chapter, I will demonstrate how the Metalclad award has not been as relevant as some commentators have predicted, given the fact that subsequent tribunal awards have isolated Metalclad's broad definition on regulatory expropriation. In order to show such isolation I will comment on the following cases: (i) Waste Management case; (ii) Marvin Feldman case; (iii) Fireman's Fund case, and (iv) Methanex. Using cases such as Metalclad commentators[63] have developed a line of thought from the *race to the bottom* hypothesis[64] to the *Chilling effect*[65] doctrine. But, is my position that cases such as Metalclad are relevant only if its holdings are adopted by future Tribunals. From the reading of the awards below becomes evident that this is not the case.

Metalclad has been understood as the great *change* in the expropriation doctrine or at least the confirmation of a growing fear,[66] because apparently it has permanently broaden the definition of expropriation by focusing on the effects that regulatory measures have on investors rather than focusing on the

63 Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 *Hastings West-Northwest Journal of Environmental Law and Policy*, 105 (2002-2003).

64 Under this theory, States will drop their environmental, labor and health standards in order to be more attractive to foreign investors. For more information, see: Meg Kinnear, Andrea Björklund & John Hannaford, *Investment Disputes under NAFTA. An annotated guide to NAFTA Chapter 11*, 10-1114 (Kluwer Law International, Alphen, 2006).

65 The *Chilling effect* doctrine considers that the open possibility of Foreign Investors to submit millionaire claims before an international tribunal against a Host State for issuing a regulation which affects property and revenues of a Foreign Investors, will prevent regulatory agencies to enact environmental, labor and health friendly measures. Lucien Dhooge, *Foreign Investors versus Environmentalists: Whose Green Counts in the North American Free Trade Agreement?*, 10 *Minnesota Journal Global Trade*, 209-289, 273 (2001).
Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 *New York University Environmental Law Journal*, 264, 274 (2002-2003).

66 However Dolzer does not talk about a growing fear, he stresses that Metalclad is the confirmation of the tendency on the "*sole effect*" doctrine, where Tribunals are fundamentally concerned about the effects of the measure and not so much on its purpose or motivation. Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 93 (2002-2003).

motivations of the State for enacting the measure. But, did the Tribunals follow the precedent in Metalclad?

A. Marvin Feldman case[67]

Marvin Feldman was the owner of CEMSA that was a company in the business of buying cigarettes from volume retailers in Mexico and exporting them. Under the *Impuesto Especial sobre Producción y Servicios* Law (Hereinafter, ISPS) CEMSA was eligible for a rebate on the exporting tax during 1990 and some part of 1991. Legislation passed in 1991 to rebate only taxes paid by certain traders of cigarettes and CEMSA became ineligible for the rebates.

CEMSA alleged that the 1991 legislation was enacted because Carlos Slim, a Mexican cigarettes producer, protested against the rebates for traders and the government took administrative steps intending to leave all traders of cigarettes without tax rebates and conferring such benefit only to cigarettes producers. The respondent contested said allegation.

During April of 1991, CEMSA took several judicial steps (criminal and civil) in order to stop the enforcement of the 1991 legislation. In 1992 CEMSA was again suitable to obtain the rebates from cigarettes exports for most of the year. During the following year, CEMSA again became ineligible to obtain tax rebates, because they were not able to comply with one of the requirements, which was the presentation of certain type of invoices to which CEMSA as a trader did not have access.

The claimant received tax rebates from June 1996 to September 1997 that according to him was the result of some negotiations with the Mexican government. According to the Respondent, the recognition of the Tax rebates in 1996 and 1997 was the result of an *Amparo* recourse presented by CEMSA. However, Mexico stopped paying Rebates to CEMSA on November 1997

67 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, December 16th, 2002.

and amended the Law on December 1997 resulting in CEMSA's disqualification for tax rebates. Then CEMSA was audited and asked to pay back the rebates of 1996 and 1997. The claimant submitted a domestic claim that was pending when the Chapter Eleven Tribunal was established.

In the Chapter Eleven claim, CEMSA alleges that the tax rebate legislation drove him out of business and thereby it was tantamount to expropriation or creeping expropriation. Also that the legislation was "*arbitrary, confiscatory and discriminatory, a violation of the Claimant's right to due process*."[68]

The Tribunal in this case held *inter alia* that the definition of expropriation under Article 1110 of NAFTA was broad,[69] and that it was not well defined. Further it expressed the difficulty in assessing a clear line between a *bona fide* regulation and an expropriatory measure.

As expected, the claimant tried as much as possible to sustain its position on Metalclad award by supporting its allegation of indirect expropriation on the arguments discussed *supra*: (i) NAFTA law on indirect expropriation is influenced by the objectives of transparency and reasonable expectations (certainty);[70] (ii) the definition of indirect expropriation is broad and includes measures which have the effect of harming the foreign investor,[71] and (iii) estoppel.[72]

However, as would be expected after the British Columbia Supreme Court revision, the Feldman Tribunal did not found basis to consider that in the case *sub judice* there was an expropriation. The Tribunal based its decision on the following arguments: (1)

68 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, para. 89, December 16th, 2002.

69 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, para. 97, December 16th, 2002.

70 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No.ARB(AF)/99/01, Claimant's additional observations submitted in reply to the counter-memorial on preliminary issues, Para. 12, 38 and 55.
Also *Marvin Roy Feldman-Karpa v. the United Mexican States*. ICSID case No. ARB(AF)/99/01, Claimant's Memorial, 169, 172-173.

71 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Claimant's Memorial, Para. 160.

72 *Marvin Roy Feldman-Karpa v. the United Mexican States*. ICSID case No. ARB(AF)/99/01, Claimant's Memorial, Para. 186.

Not every business problem experienced by a foreign investor is an expropriation under article 1110; (2) NAFTA an principles of customary international law do not require a state to permit "*gray market*" exports of cigarettes; (3) CEMSA did not have a "*right*" to export cigarettes from Mexico; (4) CEMSA is still under Feldman's property, and it could develop other exporting markets, where he could get rebates.[73]

Regarding transparency and in general to the inclusion of general principles of NAFTA in Chapter Eleven claims, the Tribunal in Feldman was conclusive in citing Metalclad's Court award in the sense that there isn't any Article in Chapter Eleven which enforces transparency standing alone as a potential violation of the aforementioned Chapter.[74]

Regarding estoppel, the Tribunal in Feldman held a higher standard for reliance. In that order of ideas, the Tribunal held that in order to find reliance on measures of the Government, such reliance must be according to unambiguous and formal information coming from the State and in accordance with the domestic law.[75]

The Tribunal also established a higher benchmark to determine that a measure is tantamount to expropriation by stating that:

> *(…) governments must be free to act in a broader public interest through protection of the environment, new or modified tax regimens, the granting or withdrawal of government subsidies, reductions or increases in tax levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.*[76]

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73 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, 111, December 16th, 2002.

74 Marvin Roy Feldman-Karpa v. the United Mexican States. ICSID case No. ARB(AF)/99/01, Final Award, 133, December 16th, 2002.

75 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, 149, December 16th, 2002.

76 *Marvin Roy Feldman-Karpa v. the United Mexican States.* ICSID case No. ARB(AF)/99/01, Final Award, 103, December 16th, 2002.

All in all, the Tribunal rejected all arguments presented by the Claimant coming from the Tribunal in the Metalclad case. In fact I believe that the Tribunal rejected not only what the British Columbia Supreme Court set aside, but it also rejected the philosophy behind the Metalclad Tribunal award. In other words, is my opinion that the Tribunal in this case intended to limit the definition of indirect expropriation and thereby the potential influence of foreign investors over domestic regulation.

B. Waste Management Inc. case

Acaverde was a Mexican company wholly owned subsidiary of Waste Management Inc. (hereinafter, Waste Management) an US corporation. Acaverde entered into a Concession Agreement with Acapulco to provide on exclusive basis[77] certain municipal waste disposal and street cleaning services in a specific touristic area of Acapulco.

On June 30th, 1995, the City passed a legislation that established that the service of waste recollection must be requested. In that order of ideas only those who signed a contract with Acaverde had the obligation to pay. In the Concession Agreement the City undertook to negotiate with Banobras (development bank established by the Federal Government of Mexico) "*an irrevocable, contingent and revolving line [of credit]*" to guarantee "*all payment obligations*" of the City for the term of the Concession Agreement,[78] obligation which Acaverde understood completed on June 1995.[79]

On August 15th, 1995 Acaverde started rendering services. Since that time Acaverde had several issues with the collection

77 Article 15 of the concession agreement provided that the City would not grant to any other company or person "*any right or concession inconsistent with he rights of the Concessionaire under this Concession Agreement*." *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 42, April 30th, 2004.

78 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 48, April 30th, 2004.

79 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 51, April 30th, 2004.

of payments from the citizens. On its side, the City had to step in several times, to deal with complaints about "*black spots*" in the touristic area. On November 12th, 1997, Acaverde suspended the provision of the services under the Concession Agreement. By the end of the contract, Acaverde only received payment for approximately the 20% of the invoices to the City.

It is true that the Tribunal in this case adopted the *sole effect* doctrine[80] which according to Rudolf Dolzer[81] is increasing its popularity among international tribunals including Metalclad, however, the Tribunal established a higher benchmark in the assessment of the existence of an expropriation as is possible to see from the analysis it gives to the Metalclad case.

The Tribunal does not face directly the issue of the validity of the definition of expropriation under the Metalclad case,[82] notwithstanding, it does not enforce Metalclad's definition or at least, as mentioned before the Tribunal sets a higher standard for its application. When examining the facts the Tribunal finds that Mexico deprived Acaverde of the reasonable to be expected economic benefit, nevertheless, this is not a sufficient *criteria* to declare the existence of an indirect expropriation.[83] Further, it rules that "*It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the state amounting to a virtual taking or sterilizing of the enterprise*."[84]

The Tribunal goes as far as determining that there are three groups of indirect expropriations: (i) cases where a whole enterprise is terminated because it's functioning is simply halted by a measure and it is usually accompanied by other conduct;[85]

80 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 143, April 30th, 2004.

81 Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 91 (2002-2003).

82 "*In answering this question it is not necessary for this Tribunal to resolve the differences in interpretation which arose in the Metalclad case as between the NAFTA tribunal and the British Columbia Supreme Court*." *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 159, April 30th, 2004.

83 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 159, April 30th, 2004.

84 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 160, April 30th, 2004.

85 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final

(ii) when there has been acknowledged taking of property, and associated contractual rights are affected in consequence,[86] and (iii) when the only right affected is incorporeal but however "*the mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) it is tantamount to expropriation (…) It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (*i.e.*, the effective taking of the chose in action) and the protection of Article 1110 be called into play*."[87]

In this light, if we compare the definitions and the treatment that the Tribunal in Metalclad gave to the definition of expropriation, and the elements that the Tribunal in Waste Management held, becomes evident that the latter not only limited the definition of expropriation by rejecting elements such as reliance and certainty as main elements of expropriation, but it also limited the definition of expropriation by taking prior landmark cases to group the kinds of indirect expropriations. Said classification could mean in the future that cases outside the classification would not be conceived as expropriations, whenever the rulings in this case are embraced.

As a conclusion for this part of the article, it would be enough to say that the Tribunal in Waste Management did not use Metalclad's definition of expropriation as the threshold. I also believe that the Tribunal in this case, ruled against Metalclad by narrowing down and limiting the definition to certain cases. Further, I believe that the Tribunal in Waste Management case did not even have clear whether the definition of the Tribunal in Metalclad was still "*alive*" after the award from the British Columbia Supreme Court, and in fact it sets aside this issue.[88]

Award, Para. 172, April 30th, 2004.

86 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 173, April 30th, 2004.

87 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 175, April 30th, 2004.

88 *Waste Management, Inc. v. United Mexican States.* ICSID Case No. ARB(AF)/00/3, Final Award, Para. 159, April 30th, 2004.

C. Fireman's Fund Insurance Company[89]

In 1994 a serious financial crisis broke out in Mexico, which led to the decline of the Mexican Peso value before the American Dollar in over 96%. In order to face the crisis and support banks and depositors and to re-establish their viability the Mexican Government enacted the *Programa de Capitalización y Compra de Cartera* (hereinafter, PCCC).

Fireman's Fund Insurance Company (hereinafter, Fireman's Fund) is a wholly owned subsidiary of Allianz of America, Inc., a Delaware corporation. Said company purchased US$50 million in dollar-denominated mandatorily convertibly five year subordinated debentures issue by GF BanCrecer, a Mexican financial holding company in 1995. In September 20th of the same year the same kind of convertible subordinated debentures denominated in Mexican Pesos, in the same amount were issued, and they were bought by Mexican nationals.

The claimant alleged that the re-purchase (which was mainly supported by the Mexican Government) of the Peso Debentures to Mexican nationals was preferential over the Dollar Debentures re-purchase.

In the present case the Tribunal goes further than the Waste Management Case and it dismisses the application of Metalclad's definition of expropriation when it states:

> *In retaining the above elements, the Tribunal notes the doubts expressed concerning the definition of expropriation given by the Metalclad tribunal as being too broad.*[90]

Moreover, the Tribunal group some common characteristics of expropriations brought by different tribunals in NAFTA cases and did not include Metalclad in those citations,[91] even though

89 *Fireman's Fund Insurance Company v. United Mexican States.* ICSID Case No. ARB(AF)/02/01, Award, July 17th, 2006.

90 *Fireman's Fund Insurance Company v. United Mexican States.* ICSID Case No. ARB(AF)/02/01, Award, Para. 177, July 17th, 2006.

91 *Fireman's Fund Insurance Company v. United Mexican States.* ICSID Case No.

Metalclad is one of the NAFTA cases that directly deals with indirect expropriation as a central issue.

Also, the Tribunal states that there are some common factors that may be taken into account: "*…whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the* bona fide *nature of the measure*"[92] from those elements is possible to understand that the Tribunal is not even applying the *sole effect* doctrine, because when it expresses "*the public purpose and the effect of the measure*", is allocating the effect of the measure at the same level of importance that all the other factors, and secondly most probably is not referring to the effects on the Foreign Investor or its Investment but to the public effects of the measure.

D. Methanex Corporation

Methanex is a Canadian Corporation involved in the production and retail of methanol which is commonly used to produce methyl tertiary-butyl ether (hereinafter, MTBE).[93] Methanex indirectly owns a Texas Partnership, Methanex Methanol Co. The concentration of MTBE have increased in the US over the 1990's in order to comply with the standards in the Clean Air Act Amendments, however, this chemical has a very characteristic taste and odor, that makes water undrinkable, further it is highly soluble in water which indicates a great risk of contaminating groundwater reservoirs.

In mid 1990's people in the State of California started to complaint about the taste of water. A further investigation showed that there was a contamination coming from some MTBE tanks that were leaking, thus rendering the water undrinkable.

ARB(AF)/02/01, Award, Para. 176, July 17th, 2006.

92 *Fireman's Fund Insurance Company v. United Mexican States.* ICSID Case No. ARB(AF)/02/01, Award, Para. 176.j, July 17th, 2006.

93 MTBE is generally used in gasoline as a source of octane and as an oxygenate. Said product helps fuel resist uncontrollable combustion.

In 1997, the California Senate decided to fund an investigation regarding the risks of MTBE to human health and the environment. The UC report concluded that there are significant risks and costs associated with MTBE contamination, and also recommended that MTBE be phase out of use in gasoline.[94] Accordingly, Governor Gray Davis issued an executive order directed to the California Energy Commission (hereinafter, CEC) to develop a timetable to remove MTBE from gasoline no later than December 31st, 2002.

This case becomes the perfect conclusion for this chapter. The Tribunal in *Methanex Corporation v. United States of America*[95] acknowledges that in June 16th, 2004 oral hearing[96] Methanex relied its argument on the definition of expropriation in the *Metalclad case*. Methanex also made an argument in the oral hearing of June 7th, 2004, however the argument at that time was not regarding the definition of expropriation but rather the definition of investment. Without even studying the matter, the Tribunal dismisses that argument and goes strait to cite other cases such as *Pope & Talbot, Inc. v. Canada* and *Waste Management*. Notwithstanding the Tribunal was not clear regarding the arguments of Methanex under Article 1110, it was clear that it rejected the holding in Metalclad which ruled that the analysis of expropriation should include the analysis of transparency, argument also set aside by the Supreme Court of British Columbia.[97] In Methanex case the Tribunal found that there wasn't any indirect expropriation.[98]

94 Anonymous, *Introduction to Regulatory Expropriations in International Law and Case Summaries*, 11 *New York University Environmental Law Journal*, 1 (2002-2003).

95 *Methanex Corp. (Canada) v. United States.* UNCITRAL, Final Award, December 3rd, 1999.

96 Available at: http://naftaclaims.com/Disputes/USA/Methanex/MethanexTranscriptDay8.pdf.

97 *United Mexican States v. Metalclad Corporation.* Supreme Court of British Columbia, 2001 BCSC 664, L002904.

98 *Methanex Corp. (Canada) v. United States.* UNCITRAL, Final Award, Part IV-Chapter D-, 8, December 3rd, 1999.

CONCLUSION

After reading this article is clear that contrary to what many environmentalists have written, Metalclad's definition of expropriation is currently a *Damocles sword* that lives only in their academic articles. Whilst authors like Lucien Dhooge, Lauren Godshall and Marissa Yee announce that NAFTA Tribunals will allow a broader definition of indirect expropriation because of Metalclad, Tribunals are in fact narrowing the definition of expropriation. In that order of ideas, I do not believe that regulators will become *afraid* of enacting measures for a relevant public purpose, rather, they may be encouraged to take measures for the right reasons and under adequate procedures.

Further, I believe that the Metalclad award gave some expectations to international investors regarding the fact that Host States would become the last resort guarantors of their investments by reducing non-economic and some economic risks. The intuition might have been that Chapter Eleven would openly protect NAFTA Investors and Investments from state measures, actions and behaviors that could economically harm the investor. Recent developments indicate that notwithstanding Chapter Eleven (specially Article 1110) is broad, it does not encompass every and all state measures and conducts as probably Metalclad would indicate.[99]

I believe that Chapter Eleven has been developed through the awards of Tribunals that despite Article 1136.1, still have an impact on future awards.[100] However, there are certain awards that given their interpretation of Chapter Eleven and the impact of their interpretation in regional Trade Disputes have not been clearly adopted by future Tribunals, such as Metalclad's case.

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99 "*This case (Metalclad) also highlights how the responsibility for non-commercial risks associated with a foreign investment go from being a burden of responsibility of a foreign investor to that of the host government*." Debra Guajardo, *Redefining the Expropriation of a Foreign Direct Investment in Mexico*, 42 *South Texas Law Review*, 1328 (2001).

100 "*In the NAFTA context, the lack of an institutionalized permanent tribunal and the absence of a NAFTA-wide nullification procedure have contributed to considerable jurisprudential heterogeneity presumably unsustainable in the long run*." Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 *New York University Environmental Law Journal*, 64, 68 (2002-2003).

It's common that the definition of sovereignty among the Parties to NAFTA was affected by said international agreement because it makes States accountable for certain conducts that otherwise they wouldn't. However, in the case of Metalclad, the adoption of its interpretation on Article 1110 would probably have dramatic consequences not only on NAFTA disputes as such, but also in the ability of States to regulate according to their domestic public interests. In that light I believe that even if the purpose of Chapter Eleven was to promote and encourage foreign direct investment in Mexico, a definition to the extend of Metalclad is not necessary.[101]

Finally, is normal that Metalclad raised some concerns not only among environmentalist, but in many other sectors and this article should not be understood as a critique to such concerns. Rather, this article tries to support the position that States should be able to regulate in the true public interest of their people[102] with measures that respect their international commitments and yet are effective in promoting social welfare.

101 "*In assessing the adequacy of Metalclad and other decisions, we might ask whether it was necessary for such awards to take the approach they did in order to create and encouraging investments climate. (…) It strikes me, however, that the definition of 'expropriation' or 'tantamount to expropriation' would not need to be so broadly defined to encourage foreign investment in Mexico.*" Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 *New York University Environmental Law Journal*, 198, 206 (2002-2003).

102 Héctor Olasolo, *Have Public Interests been Forgotten in NAFTA Chapter 11 Foreign Investor/ Host State Arbitration? Some Conclusions from the Judgment of the Supreme Court of British Columbia on the case of Mexico v. Metalclad*, 8 *Law & Business Review of the Americas*, 189, 209 (2002).

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