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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

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I. Introduction

United Mexican States v. Metalclad Corp. (*Mexico v. Metalclad*) constitutes a landmark decision regarding both arbitration under NAFTA Chapter 11 and review proceedings of NAFTA Chapter 11 arbitral awards. For the first time since their creation in 1978, the Additional Facility Rules of the International Center for the Settlement of

Investment Disputes (ICSID) have governed an international arbitration.[1] In addition, the case exhibits the first time an arbitration award under NAFTA Chapter 11 has been challenged in a national court as provided for in article 1136.3(b)(i).

Due to the number of issues raised during the review proceedings held before the Supreme Court of British Columbia (the Supreme Court), this article does not purport to be a comprehensive commentary on its judgment. To the contrary, this article focuses exclusively on the inter-relationship between the nature of NAFTA Chapter 11 foreign investor/host state arbitration, and the scope of the Supreme Court's judicial review of Metalclad's arbitral award.

The Supreme Court extended *de facto*, the scope of its review far beyond the limits contained in the International Commercial Arbitration Act of British Columbia (ICAA), even though it formally proclaimed the narrow limits of the scope of its review, as provided for in ICAA section 34. Such an extension, is the natural consequence of having tried to assimilate NAFTA Chapter 11 arbitrations into pure commercial international arbitrations. It ought to be recognized, that important public interests are adjudicated in NAFTA Chapter 11 arbitrations, and therefore, it is necessary to profoundly reform the current system of arbitration that mirrors the one created to adjudicate pure private interests.

II. The Nature of the Interests Adjudicated Through NAFTA Chapter 11 Arbitrations and Their Influence in the Design of the Arbitral Proceedings

Section B of NAFTA Chapter 11, introduces an arbitral mechanism to settle the disputes arising between a NAFTA host state and private investors from another NAFTA state party, as a result of alleged violations by the former of its obligations under section A of NAFTA Chapter 11, and articles 1503(2) and 1502(3)(a).[2] As provided for

1. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad Corporation, Mar. 2, 2001, at 49 [hereinafter *Transcripts, Mar. 2*], *available at* http://www.dfait-magci.gc.ca/tna-nac/trans-2mar.pdf.
2. North American Free Trade Agreement, Aug. 12, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 [hereinafter NAFTA]. These obligations are:
   a) To provide national treatment to investors from other NAFTA State Parties (art. 1102).
   b) To provide most-favored nation treatment to investors from other NAFTA State Parties (art. 1103).
   c) To provide for a minimum international treatment to investors from other NAFTA State Parties (art. 1105).
   d) Not to impose performance requirements to investors from other NAFTA State Parties (art. 1106).
   e) To nationalize or expropriate investment of investor from other NAFTA State Parties, except for a public purpose, in a non-discriminatory basis, in accordance with due process of law and on payment of fair market value compensation.
   f) Other obligations relating to Monopolies and State Enterprises provided for art. 1503(2) and 1502(3)(a).

in article 1121, private investors from other NAFTA state parties may submit directly to international arbitration, any such disputes with a NAFTA host state by: a) unilaterally consenting to such international arbitration; and 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.[3] Therefore, NAFTA Chapter 11 arbitration allows private investors to remove their disputes from the national courts of NAFTA host states, and to submit such disputes to international arbitration, regardless of the previous exhaustion of domestic remedies. The factors leading up to NAFTA Chapter 11 foreign investor/host state arbitration included the fact that prior to its adoption, foreign investors could only either sue the host states in the latter's own courts, or convince their home states to pursue their claims against host states at an international level. However, neither of these mechanisms had proven to be effective. On one hand, host states' courts had traditionally been unreceptive to foreign investors' claims against their own country's administrative or legislative agencies. On the other hand, home states' political and economical interests often outweighed foreign investors' interests in pursuing claims against host states at an international level. As a consequence, there had been many instances in which host countries had gotten away with breaches of investment agreements that had caused significant economic damage to foreign investors.[4] On the basis of this general framework, two different interpretations of the nature of the relationship between private investors of a NAFTA state party and NAFTA state parties under NAFTA Chapter 11, can be found in Mexico's and Metalclad's submissions to the Supreme Court.

A. Mexico's Arguments

Mexico, supported by Canada, claimed that "generally speaking at international law only States have personality. They are the subjects of international law. And generally speaking, only States have the right to enforce international treaty obligations that exist between them."[5] Hence, in accordance with this interpretation, NAFTA would only create rights and obligations among the contracting parties that could be enforced through Chapter 20 party-to-party arbitration.

According to Mexico's submissions, private individuals or legal persons are, at the maximum, third party beneficiaries of the obligations imposed on NAFTA state parties, and therefore, have no right to enforce such obligations. Consequently, when they are damaged as a result of a NAFTA state party's breach of its duties, the third party beneficiary may only advocate before its home state, and forego the convenience of resorting to a Chapter 20 arbitration against the breaching NAFTA state party.

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3. *Id.* art. 1121. However, NAFTA art. 1121.1(b) does not require the waiver of any proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
4. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Mar. 1, 2001, 49-50 [hereinafter *Transcripts, Mar. 1*], *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-1mar.pdf.
5. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 19, 2001, at 61, *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-19fe.pdf.

However, Mexico conceded that "[s]tates can, by treaty or otherwise, provide access to private individuals or legal persons, to step into the shoes of a State, as it were, and assert their rights at international law."[6] This is precisely what, in Mexico's view, has happened in NAFTA Chapter 11. As a result, "a qualifying investor of a party may, in specified circumstances, commence an arbitral claim against a Contracting Party, but not its own, for an alleged breach of the obligations that are listed in Section A of Chapter 11."[7] In any case, Mexico added that, in its view, this latter mechanism is to be considered "an exception to the general rule of State-to-State dispute settlement."[8]

Mexico submitted, in conclusion, that "Chapter 11 . . . is aiming at the operation of the government as a government, not the operation of the government as a player, in any particular commercial marketplace."[9] Therefore, the underlying relationship between a NAFTA state party and a foreign investor is not commercial, but regulatory in nature.

On the basis of this theoretical framework, Mexico pointed out that it is important to distinguish between a pure private commercial arbitration, whereby private parties intend to settle a private contractual dispute, whose value as precedent is very limited, and a foreign investor/host state arbitration under NAFTA Chapter 11.[10] As the Methanex Arbitral Tribunal affirmed, when explaining the reasons that led it to grant authorization to present written submissions to environmental groups and nongovernmental organizations, "[t]here is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not [just] because one of the . . . Parties is a State . . . [t]he public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions."[11]

Furthermore, although NAFTA article 1136.1 establishes that "[a]n award made by a Tribunal shall have no binding force, except between the disputing parties, and in respect of the particular case," Mexico submitted that "[t]he precedential significance of this award for future proceedings under the North American Free Trade Agreement cannot be underestimated. In addition, the award will be important guidance to future potential NAFTA claimants. It is for this purpose, that as complete an understanding as possible be expressed of the legal issues involved."[12] It is, precisely, the precedential value

6. *Id.*
7. *Id.*
8. *Id.* Mexico argued this very same point several times during its oral submissions to the Supreme Court. *See, inter alia*, *Transcripts of the Proceedings*, Sup.Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 20, 2001, 33; [hereinafter *Transcripts, Feb. 20*], *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-20fe.pdf; *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 22, 2001, 89; *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-22fe.pdf; and T*ranscripts*, *Mar. 2*, *supra* note 1, at 56.
9. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 23, 2001, 36, *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-23fe.pdf.
10. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 21, 2001, 13, *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-21fe.pdf.
11. Methanex Arbitral Tribunal's decision on authority to accept amicus submissions of Jan. 15, 2001, §49.
12. *Id.*

of the arbitral awards, that often brings other NAFTA state parties, not directly affected by the investment dispute, to the arbitration proceedings as intervenors.[13]

Based on the above-mentioned reasons, Mexico, supported by Canada, concluded that the fact that the "parties to the NAFTA have chosen arbitral rules that can also be used in commercial arbitration, does not make a Chapter 11 arbitration a commercial arbitration."[14] Consequently, "what this Court... is doing, or is engaged in, on an application to set aside a Chapter 11 award, is far more like judicial review of administrative action... as is typically the case where the decision about private commercial arbitrator is taken to the Court."[15]

B. Metalclad's Arguments

Metalclad's view is that NAFTA Chapter 11 "creates a relationship of investing between a qualified investor and a State party to NAFTA."[16] In accordance with this relationship, the state that receives the investment (the host state) "promises to provide certain treatment to investors, and provides them with a right to resolve disputes arising out their investment."[17] Therefore, if the host state fails to provide the treatment promised to foreign investors in NAFTA Chapter 11, the latter has the right to submit their disputes with the host state to international arbitration.

Metalclad gave special emphasis, both to the commercial nature of the investment relationship between NAFTA Chapter 11-regulated state parties and foreign investors, and in the discretion given to private investors to conclude arbitration agreements with NAFTA state parties as provided for in NAFTA article 1121.[18] Metalclad explained that NAFTA state parties wiped out the requirement of prior exhaustion of domestic remedies in NAFTA article 1121 in order to enhance the effective protection of foreign investors' interests through NAFTA Chapter 11 arbitration. Hence, as long as foreign investors consent to arbitration and waive their right to bring, or continue, any action for damages in the courts of the host state, they are entitled to remove, from the host state's courts, their investment disputes with the host state, and to bring them to international arbitration under the ICSID, the ICSID additional facility, or the UNCITRAL rules.

In Metalclad's view, foreign investors' right to invoke arbitration against the host state is not only contained in NAFTA Chapter 11, but the right to invoke arbitration "is [also] independent of any agreement by the home State of the investor."[19] It is exercisable directly against the host state and, in the event of success, it gives rise to damages against the latter. And, as Metalclad pointed out, "[i]t is neither diplomatic protection, nor is it activity in the courts of any State."[20]

13. *See*, e.g., Metalclad v. United Mexican States, United States Submissions, Nov. 9, 1999.
14. *Transcripts* Feb. 20, *supra* note 9, at 36.
15. *Transcripts of the Proceedings*, *supra* note 10, at 38.
16. *Transcripts of the Proceedings*, Sup. Ct. of British Columbia, United Mexican States v. Metalclad, Feb. 26, 2001, 31, *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-26fe.pdf.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

Finally, Mr. Cowper, counsel for Metalclad, eloquently expressed the relevance of Chapter 11 arbitration for foreign investors in his oral submissions to the Supreme Court:

> What we're seeing occur is precisely what happens when you give private parties rights, and you give them a process which allows them to call to account a government that was previously unaccountable to private parties.
>
> And the process of international law, which has undergone evolution for centuries, is one which had one significant and overwhelming filter for the adjudication of private rights, and that was no matter what was done to you by another State party, you had to persuade, what Harry Truman called, the men in pinstripes in the State Department, or our equivalent of pinstripes in our departments, that your problem deserved not only the attention of your country, but the determination by your country to take your claim to another State, and to prosecute it with all the diplomatic risks which are attendant on calling another State to account for a potential breach of its international obligations.
>
> And in my respectful submission, what's outrageous conduct when you own a business like this, and you invest in a country like this, for a businessman is outrageous having regard to what's occurred to that businessman, and that's always been the case. But what's happened in the past was the assessment at the very beginning of what was outrageous was made by the men in pinstripes; that is, the diplomats, the trade officials and otherwise, to decide whether what was conducted, whether it was outrageous or not, truly deserved the attention and, if you will, the championing by a sovereign State... And you can imagine the governmental process involved in assessing whether to allow private claims to go through that filter.
>
> And so what we've seen happen here, not only in this case, but in other awards we've reviewed, is that private parties have said 'hold it a second, we take those promises seriously.' And now that you're given us the right to bring them directly, we're going to. And of course, not surprisingly, Canada and Mexico, and the United States are saying, 'well, you know, actually there are a lot more people taking advantage of us, a lot more people calling us to account for the rights we've given them than we anticipated.'
>
> And I say with respect, that is absolutely precisely what the governments announced they were doing, what they intended to do, and the consequences flow naturally from investing people with rights that allow them to have access directly to tribunals to acquit their rights.
>
> In respect of this case, I have no doubt that in the previous era, in which a small company that tries to establish a facility in a rural part of Mexico would have had no luck whatsoever in getting something like the sovereign United States of America to bring a claim internationally to call Mexico to account, given the complexity of that international relationship.[21]

C. The Supreme Court Renders a Decision

The Supreme Court, in those sections of its judgment analyzing the applicable law and standard of review, embraced Metalclad's position regarding the nature of both the relationship between foreign investors and NAFTA state parties, and the investor/host state arbitration provided for in NAFTA Chapter 11. The Court first stated that although

> it is true that the dispute between Metalclad and the Municipality arose because the Municipality was purporting to exercise a regulatory function. However, the primary relationship between Metalclad and Mexico, was one of investing and the exercise of a regulatory function

21. *Transcripts, Mar. 1, supra* note 4, at 49–50.

by the Municipality was incidental to that primary relationship. The arbitration did not arise under an agreement between Metalclad and the Municipality in connection with regulatory matters. Rather, the arbitration was between Metalclad and Mexico pursuant to an agreement dealing with the treatment of investors.[22]

Second, the Supreme Court affirmed that, because the underlying relationship between Metalclad and Mexico was primarily one of an investing nature, it was covered by the broad meaning of the term "commercial" in both the United Nations Commission on International Trade Law Model Law of International Commercial Arbitration (UNCITRAL Model Law), and in the ICAA, which mirrors the former. Such a finding was based on the fact that "[c]lause (p) of s. 1(6) of the International CAA requires that the phrase 'a relationship of a commercial nature' be interpreted to include a relationship of investing."[23] As the Supreme Court stated, this interpretation is based on both the plain meaning of the words, and the incorporation in ICAA section 1(6) of the explanatory footnote about the scope of application of the UNCITRAL Model Law contained in its article 1.[24]

Finally, the Supreme Court found that, because the underlying relationship between Metalclad and Mexico was both international and commercial in nature, NAFTA Chapter 11 arbitration between Metalclad and Mexico had to be considered an international commercial arbitration, and, therefore, the ICAA was the applicable law to determine the scope of judicial review of Metalclad's arbitral award.[25]

D. A Sound Decision

From a legal perspective, the Supreme Court decision is sound. NAFTA article 1136(7), expressly declares that "[a] claim that is submitted to arbitration under this Section shall be considered to arise of a commercial relationship or transaction, for purposes of Article I of the New York Convention, and Article I of the Inter-American Convention."

In addition, many other features of section B of NAFTA Chapter 11, such as the possibility given to foreign investors to conduct the arbitration under the UNCITRAL Rules of Arbitration, the non-public character of the proceedings, and the attempt to limit the effects of the arbitral awards to the disputing parties in the particular case, confirm that, overall, NAFTA Chapter 11 foreign investor/host state arbitration has been conceived as an international commercial arbitration. Therefore, the application of ICAA to determine the scope of the judicial review to be conducted by the Supreme Court is consistent with NAFTA Chapter 11.

However, as NAFTA article 1136(7) implicitly points out, it is not clear, at all, that the underlying relationship between foreign private investors and a NAFTA state party

22. United Mexican States v. Metalclad, 2001 BCSC 644 §46 (Sup. Ct. of British Columbia, 2001) [hereinafter Supreme Court's judgment]. The municipality referred to in the Supreme Court's judgment is the Municipality of Guadalcazar in the State of San Luis de Potosí (Mexico), which denied Metalclad the required construction permit to build a hazardous waste landfill.
23. *Id.* §44.
24. *Id.* §41–43.
25. *Id.* §39, 49.

is commercial in nature. In fact, as Mexico and Canada asserted, the dispute between Metalclad and Mexico did not arise out of a breach of contract or assimilated relationship, but rather out of the fact that Mexico, in exercising its regulatory powers, allegedly did not respect the limitations that it voluntarily assumed when it ratified NAFTA. In other words, Mexico's regulation of the construction and operation of Metalclad's hazardous waste disposal landfill, did not provide Metaclad with the minimum standard of treatment that Canada, Mexico, and the United States had agreed to provide to foreign investors of the other NAFTA state parties, and as such, it amounted to an expropriation of Metalclad's investment.

The public nature of the relationship between Metalclad and Mexico is reinforced by the public interests that are involved in it. In fact, what is at stake in this case is not only Metalclad's pure commercial interest in running a landfill in La Pedrera (Municipality of Guadalcazar), but also Mexico's legitimate public interest in making sure that Metaclad's landfill is not going to impair either the environment, or the health of the local community' inhabitants. Such a legitimate public interest goes far beyond the commercial private interests for which adjudication under the UNCITRAL Rules of Arbitration were designed.[26]

For these reasons, and knowing that not only private, but also public, interests were going to be adjudicated under NAFTA Chapter 11 foreign investor/host state arbitration, Canada, Mexico, and the United States had to make expressly clear in NAFTA article 1136(1), that for the purposes of article I of the New York Convention, and article I of the Inter-American Convention, the relationships underlying a NAFTA Chapter 11 arbitration are to be considered commercial. This very same rationale compelled Canada to modify its International Commercial Arbitration Act to declare expressly that the relationships underlying a NAFTA Chapter 11 foreign investor/host state arbitration are to be considered "commercial."[27]

Therefore, NAFTA Chapter 11, disregarding the legitimate public interests involved in the relationships between private investors and NAFTA state parties, qualified such relationships as strictly "commercial" and provided for their adjudication through a mechanism of international arbitration originally designed to adjudicate mere private interests, where the principle of finality of arbitral awards takes precedence over the principle of correctness.[28] As a result, NAFTA Chapter 11 establishes a mechanism of international arbitration specially tailored to suit the private interests of foreign investors from NAFTA state parties.

However, as the Methanex Arbitral Tribunal pointed out in its decision on authority to accept *amicus curia* submissions, there is "an undoubtedly public interest" in many NAFTA Chapter 11 arbitrations, because the issues raised in them "extend far beyond those raised by the usual transnational arbitration between commercial parties."[29] The

26. G.A. Res. 31/98, UNCITRAL, 31st Sess. (1976). UNCITRAL Rules of Arbitration Art. 1, §1, establish its scope of application as follows: "Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification, as the parties may agree in writing." *Id.*
27. *Transcripts, Feb. 20, supra* note 9, at 30–31.
28. Supreme Court's judgment, *supra* note 24, at §124.
29. *See supra* note 8.

Supreme Court implicitly reached the very same conclusion when, after stating that the ICCA, in application of the principle of finality of arbitral awards, provided for a very narrow scope of judicial review of Metalclad's arbitral award. It recognized, that not only private, but also public, interests were being adjudicated, and it *de facto* extended the scope of judicial review of Metalclad's arbitral award to guarantee its correctness.

These decisions show the necessity of profound reform in NAFTA Chapter 11 foreign investor/host state arbitration. This reform should be based on an express recognition of the public interests involved in the relationships between foreign investors and NAFTA state parties that underlie NAFTA Chapter 11 arbitrations, and the arbitral procedure through which those public interests are disposed of.

III. The Supreme Court of British Columbia's *de facto* Extension of the Scope of Judicial Review of NAFTA Chapter 11 Arbitral Awards in Order to Adequately Guarantee the Public Interests at Stake, Both in the Underlying Relationship Between Metalclad and Mexico, and in the Arbitral Proceedings

The central question in the proceedings held before the Supreme Court, consisted of the determination of the scope of judicial review of NAFTA arbitral awards by national courts. The only reference in NAFTA to this issue is contained in NAFTA article 1136.3 which establishes that:

> A disputing party may not seek enforcement of a final award until:
>
> a) In the case of a final award made under the ICSID Convention:
>
> i) 120 days have elapsed from the date the award was rendered, and no disputing party has requested revision or annulment of the award; or
>
> ii) revision or annulment proceedings have been completed; and
>
> b) In the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
>
> i) Three months have elapsed from the date the award was rendered, and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
>
> ii) A court has dismissed or allowed an application to revise, set aside or annul the award, and there is no further appeal.

Therefore, NAFTA does not provide for either the competent judicial organ to review arbitral awards, or for the scope of such judicial review. When a NAFTA arbitration is conducted in accordance with the ICSID Convention, article 52 provides for an *ad hoc* committee to carry out the review of arbitral awards, and Rule 50.3(b) establishes the following grounds of review:

a) The Tribunal was not properly constituted.
b) The Tribunal has manifestly exceeded its powers.
c) There has been a serious departure from a fundamental rule of procedure.
d) The award has failed to state the reasons on which it is based.
e) There has been corruption on the part of a member of the Tribunal.

However, as the ICSID Convention only provides facilities for conciliation and arbitration of disputes between member states and foreign investors who qualify as nationals of other member states, and neither Mexico nor Canada are parties to the Convention,[30] the possibility of conducting a NAFTA arbitration in accordance with the ICSID Convention is currently precluded.[31] Therefore, Chapter 11 NAFTA arbitrations are to be conducted in accordance with either the United Nations Commission on International Trade Law (UNCITRAL), or the ICSID Additional Facility Rules of Arbitration.

Neither the UNCITRAL Rules of Arbitration approved by General Assembly Resolution No. 31/98 of December 15, 1976,[32] nor the ICSID Additional Facility Rules of Arbitration,[33] which can only be used in NAFTA Chapter 11 arbitrations initiated by U.S. investors, or against the United States,[34] contain any reference to the judicial review of arbitral awards. In addition, NAFTA article 1136.3(b)(ii) only establishes that, in arbitrations conducted under UNCITRAL or ICSID Additional Facility Rules of Arbitration, the judicial review of arbitral awards shall be carried by national courts. It does not specify whether those national courts are to be the national courts of the NAFTA state party, in which territory the arbitration has been held, or if the national courts of any NAFTA state party would be competent to carry out such judicial review. Furthermore, it does not specify the scope of the judicial review to be carried out by such national courts. As a consequence, both questions have to be answered in accordance with the municipal law of Canada, Mexico, and the United States.

On the issue of the competent court to review NAFTA Chapter 11 arbitral awards, it is first important to distinguish between the judicial review, and the recognition and enforcement of arbitral awards. Since Canada, Mexico, and the United States are parties

30. *See* ICSID, *List of Contracting States and Other Signatories of the Convention, at* http://www.worldbank.org/icsid/constate/c-states-en.html.

31. International Center on the Settlement of Investment Disputes (ICSID) was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) of March 18, 1965. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State that has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings. Pursuant to the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. *See*, ICSID, *About ICSID, at* http://www.worldbank.org/icsid/about/about.html.

32. *See* UNCITRAL Rules of Arbitration, *at* http://www.uncitral.org/en-index.html.

33. *See* ICSID Additional Facility Rules of Arbitration, *at* http://www.worldbank.org/icsid/facility/33.html.

34. In September 27, 1978, the administrative council of the center authorized the secretariat to administer, at the request of the parties concerned, certain proceedings between states and nationals of other states, which fall outside the scope of the Convention on the Settlement of Investment Disputes between states and nationals of other states. They are: (i) conciliation or arbitration proceedings for the settlement of investment disputes arising between parties, one of which is not a contracting state or a national of a contracting state; (ii) conciliation or arbitration proceedings between parties, at least one of which is a contracting state or a national of a contracting state, for the settlement of disputes that do not directly arise out of an investment; and (iii) fact-finding proceedings. *See* ICSID, *About the Additional Facility, at* http://www.worldbank.org/icsid/facility/v.html

to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, all arbitral awards resulting from NAFTA Chapter 11 arbitrations, shall be enforceable by the national courts of all three states, unless one of the circumstances provided for in article V has taken place. However, the New York Convention, like NAFTA, does not include any provision dealing with the judicial review of arbitral awards. Therefore, the competent organ to review NAFTA Chapter 11 arbitral awards may only be determined in accordance with Canadian, Mexican, and U.S. law.

These national laws are directed by the principle of territoriality, which limits the discretion of their national courts to review arbitral awards granted in their jurisdiction. Therefore, as the Arbitral Tribunal in the case of *Metalclad v. Mexico* designated Vancouver (British Columbia) as the place of arbitration, the Supreme Court of British Columbia, in accordance with the relevant statutes of British Columbia (either the ICAA or the Commercial Arbitration Act (CAA)), was the competent organ to review Metalclad's arbitral award.

Likewise, because the New York Convention is not applicable, and absent any harmonization in NAFTA, the scope of the judicial review of NAFTA Chapter 11 arbitral awards is determined by Mexican, Canadian, and U.S. law. As a consequence, depending on the jurisdiction in which the arbitration is held, the scope of judicial review of arbitral awards by national courts will be broader or narrower. Hence, the selection of the place of the arbitration becomes a key element on the final outcome of the arbitral proceedings.

Article 16 of the UNCITRAL Rules of Arbitration binds the Arbitral Tribunal to accept the place of arbitration agreed by the parties,[35] while article 21 of the ICSID Additional Facility gives to the Arbitral Tribunal, after consultation with the parties, full discretion to select the place of the arbitration.[36] Therefore, in order to avoid unnecessary risks, especially after the experience of the judgment in the case of *Metalclad vs. Mexico.*

35. UNCITRAL Rules of Arbitration art. 16 provides that:
    (1) Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, with regard to the circumstances of the arbitration.
    (2) The arbitral Tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, with regard to the circumstances of the arbitration.
    (3) The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
    (4) The award shall be made at the place of arbitration.

36. ICSID Additional Facilities Rules of Arbitration art. 21 says as follows:
    (1) Subject to Article 20 of these rules (Arbitration proceedings shall be held only in States Parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards), the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.
    (2) The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. It may also visit any place connected with the

The UNCITRAL Rules of Arbitration, offer to foreign investors an important advantage over the ICSID Additional Facility Rules of Arbitration.

The problems generated by the lack of harmonization regarding the grounds of judicial review of NAFTA Chapter 11, arbitral awards by national courts are multiplied by the federal political structure of all three NAFTA state parties. As a consequence, the parties to a Chapter 11 arbitration, when choosing the place of arbitration, not only have to take into account the federal law of Canada, Mexico, and the United States, but also the law of the states or provinces concerned. Hence, UNCITRAL Rule 16, paragraphs 1 and 2, should be interpreted as allowing the parties to choose not only the country, but also the state or province of arbitration. A different interpretation would defeat the provision's real purposes, which are to leave to the discretion of the parties, the selection of the jurisdiction where the arbitration is to be held, and to limit the intervention of the arbitral tribunal to: a) the selection of the place of arbitration when the parties cannot agree; and b) the determination of the actual physical "locale" where the arbitration is to be held within the jurisdiction chosen by the parties.

In addition to this lack of *vertical harmonization* among the municipal law of Canada, Mexico, and the United States, there might be what could be called a lack of *horizontal harmonization* inside each jurisdiction, which consists of the establishment of broader grounds for judicial review of NAFTA Chapter 11 arbitral awards, held in one's own territory than for the denial of recognition and enforcement of NAFTA Chapter 11 foreign arbitral awards. This lack of horizontal harmonization, is the result of the determination of the scope of judicial review of NAFTA Chapter 11 arbitral awards, by national laws which are influenced by the special characteristics of their national legal cultures, while leaving to international treaties, such as the New York or the Inter-American Convention,[37] the determination of the grounds for denial of recognition and enforcement of NAFTA Chapter 11 foreign arbitral awards. As a consequence, in some NAFTA state parties, NAFTA Chapter 11 arbitral awards may be set aside if the arbitration has been held in their own territory, but they must be recognized and enforced if the arbitration has been held abroad.

Due to this lack of vertical and horizontal harmonization, situations may exist in which a party to a NAFTA arbitration may ask for the recognition and enforcement of the same arbitral award in the national courts of one of the other two NAFTA state parties, after the courts of the place of arbitration have set aside a NAFTA Chapter 11 arbitral award on grounds other than those contained in the 1958 New York Convention. In other words, had the Supreme Court of British Columbia, applying the CAA, set aside Metalclad's arbitral award on the basis of an Arbitral Tribunal's error of law in the interpretation of the concept of expropriation in NAFTA article 1110, could Metalclad have requested the recognition and enforcement of its arbitral award in U.S. courts?

NAFTA article 1136.3(b)(ii) does not provide a clear answer to this question, in as much as it establishes that "[a] disputing party may not seek enforcement of a final

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dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.

(3) The award shall be made at the place of arbitration.

37. *See* NAFTA, *supra* note 2, at art. 1136(7).

award until: a) a court has dismissed... an application to revise, set aside, or annul the award, and there is no further appeal; or b) a court has... allowed an application to revise, set aside, or annul the award and there is no further appeal." The first part of NAFTA article 1136.3(b)(ii) would seem to provide for a negative answer to the above-posed question. However, its second part could be read as allowing a party to a NAFTA Chapter 11 arbitration to seek the enforcement of an arbitral award, even though it had previously been set aside by the courts of the place of the arbitration.

This apparent contradiction can be solved through two different interpretations. It could be argued that the last part of NAFTA article 1136.3(b)(i) is only referring to those cases in which arbitral awards have only been put aside partially, and, therefore, the requesting party is seeking to enforce the rest of the award. However, it could also be claimed that NAFTA article 1136.3(b)(ii) does not impose on the NAFTA state parties a duty to recognize the judgments rendered by national courts of other NAFTA state parties that set totally, or partially, aside NAFTA Chapter 11 arbitral awards, on grounds that exceed those contained in the 1958 New York Convention. This last interpretation would indirectly constitute a NAFTA harmonization of the scope of judicial review of NAFTA Chapter 11 arbitral awards by national courts, because not only would Mexico, Canada, and the United States not be bound by those judgments that set aside NAFTA arbitral awards on grounds other than those contained in the New York Convention, but they would also be bound by NAFTA article 1136.6 to recognize and enforce such arbitral awards.

The 1985 UNCITRAL Model Law of International Commercial Arbitration, addressed the problems of lack of vertical and horizontal harmonization among national laws regarding the scope of judicial review by national courts of arbitral awards issued in international commercial arbitrations. The solution put forward by the UNCITRAL Model Law, consisted of narrowing the scope of such judicial review so as to identify the grounds for setting aside arbitral awards, with the grounds for denial of recognition and enforcement of foreign arbitral awards contained in article 5 of the 1958 New York Convention. As a result, UNCITRAL Model Law article 4, under the heading "[a]pplication for setting aside as exclusive recourse against arbitral award," provides:

> An arbitral award may be set aside by [a national] court... only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in

conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

The 1985 UNCITRAL Model Law, unlike the 1958 New York Convention, is not binding on any NAFTA state parties. However, both Mexico and Canada at the federal level, and an important number of U.S. states and Canadian provinces, have passed International Commercial Arbitration Statutes that embrace the UNCITRAL Model Law.[38] Precisely, one of the Canadian Provinces that have passed an International Commercial Arbitration Act (ICAA) that mirrors the UNCITRAL Model Law is British Columbia, where the Chapter 11 NAFTA arbitration between Metalclad and Mexico was held.

Considering that the proceedings initiated by Mexico in the Supreme Court of British Columbia constitute the first judicial review of a NAFTA Chapter 11 arbitration award by a national court, the key question faced by the Supreme Court was the determination of the scope of its review by identifying both the grounds under which it could set aside Metalclad's arbitral award and the legal standards that gave meaning to such grounds. To answer this question, the Supreme Court had to decide first whether or not a NAFTA Chapter 11 arbitration was both international and commercial, so as to apply the limited grounds of judicial review contained in ICAA or the broader grounds of judicial review contained in the Commercial Arbitration Act of British Columbia (CAA).

On the basis that the "primary relationship between Metalclad and Mexico was one of investing,"[39] and that "the *International CAA* requires that the phrase 'a relationship of commercial nature' be interpreted to include a relationship of investing,"[40] the Supreme Court, in those sections of its judgment dealing with the applicable law and the standard of judicial review, stated that the grounds for setting aside Metalclad's arbitral award were only those provided for in ICAA section 34, which mirror the ones contained in UNCITRAL Model Law article 34. Therefore, it concluded that any question of law related to the Arbitral Tribunal's interpretation of the content of the expression "fair and equitable treatment" and "expropriation" in NAFTA articles 1105 and 1110 fell out the scope of judicial review of Metalclad's arbitral award.

Quoting Justice J. A. Gibbs in the Quintette case, the Supreme Court confirmed that "unless the arbitral award contained decisions beyond the scope of the submission to arbitration, the court has no jurisdiction to set the award aside under section 34(2)(a)(iv), even if it could be shown that the arbitration tribunal had erred in interpreting the contract."[41] The Supreme Court also pointed out that "[t]he concept of 'excess of jurisdiction' is the standard which was previously applied to decisions of administrative tribunals and arbitral bodies. The *International CAA* does not utilize the term 'excess of

38. *See*, e.g., CONN. GEN. STAT. ANN. 50A. UNCITRAL Model Law on International Commercial Arbitration §50a-100.

39. Supreme Court's judgment, *supra* note 24, §46.

40. *Id.* §44.

41. Supreme Court's judgment, *supra* note 24, §51.

jurisdiction' or the like but, instead, sets out with particularity the grounds on which the court may set aside an arbitral award."[42]

Finally, the Supreme Court expressly rejected the use of the "pragmatic and functional approach" to determine the appropriate standard of review under the ICAA. As the Supreme Court pointed out,

> [w]ith respect to the International CAA, it is my view that the standard of review is set out in ss. 5 and 34 of that Act and that it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute. It may be that some of the principles discussed by the Supreme Court of Canada in this line of authorities will be of assistance in applying ss. 5 and 34 but the "pragmatic and functional approach" cannot be used to create a standard of review not provided for in the *International CAA*.[43]

The adoption in the ICAA of this narrow scope of judicial review of NAFTA Chapter 11 arbitral awards, which seeks to preserve the autonomy of the forum selected by the parties, and to minimize judicial intervention, is justified by the Supreme Court's "concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[44]

Therefore, in those sections of the judgment dealing with the applicable law and the standard of review, the Supreme Court held that:

a) The only grounds for setting aside a NAFTA Chapter 11 arbitral award are those expressly contained in ICAA section 34.
b) No standards developed by national courts to review either administrative decision or arbitral awards issued in arbitrations of a non international commercial nature are applicable to the review of NAFTA Chapter 11 arbitral awards.

The Supreme Court acted within the strict limits of ICAA section 34.2(a)(iv), when it found that the Arbitral Tribunal decided a matter beyond the scope of the submissions to arbitration, by including the obligations of transparency contained in NAFTA Chapter 18 in the minimum standard of treatment that, in accordance with NAFTA article 1105, NAFTA state parties must provide to foreign investors. In this regard, it is important to highlight that NAFTA articles 1116 and 1117 clearly limit NAFTA Chapter 11 arbitrations to issues that arise from alleged violations by NAFTA state parties of their obligations under section A of NAFTA Chapter 11 and NAFTA articles 1503(2) and 1502(3)(a). Therefore, any dispute arising from alleged violations of other NAFTA provisions goes beyond the scope of a NAFTA Chapter 11 arbitration.

For these very same reasons, it can also be stated that the Supreme Court acted within the strict limits of ICAA section 34.2(a)(iv), when it found that the Arbitral Tribunal went beyond the scope of the submissions to arbitration, by reaching a finding of expropriation based on the lack of transparency of Mexico's actions before the adoption of the ecological decree.

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42. *Id.* §55.
43. *Id.* §54.
44. *Id.* §51.

However, the Supreme Court, despite its findings regarding applicable law and the standard of judicial review, *de facto* extended the scope of its review by importing some of the standards of review of decisions of domestic administrative tribunals when dealing with:

a) The Arbitral Tribunal's finding of expropriation as a result of the ecological decree.
b) Metalclad's alleged improper acts.
c) The alleged Arbitral Tribunal's failure to address all the questions posed by Mexico.

As noted previously, the Supreme Court expressly rejected Mexico's contention that Justice J. A. Gibbs, in *Quintette*, had left open the question of whether or not the domestic "patently unreasonable error" standard of review could be applied under ICAA §34(2)(a)(iv).[45] In the Supreme Court's understanding, "[w]hat Gibbs J. A. meant was that even if the domestic test applied (which it did not), it was still not shown that the award should be set aside because the arbitrators' interpretation of the contract was not unreasonable." However, when dealing with the ecological decree, the Supreme Court considered it necessary to answer the following question: "If a patently unreasonable error is a basis under the *International CAA* for setting aside an arbitral award, was it patently unreasonable for the Tribunal to conclude that the announcement of the Ecological Decree constituted an act tantamount to expropriation?"[46]

In other words, although the Supreme Court had expressly rejected the proposition that an alleged error of law derived from the unreasonableness of a finding of fact, on the basis of the available evidence, could constitute a ground under ICAA section 34 for setting aside a NAFTA Chapter 11 arbitral award. The Supreme Court later submitted that, not only the complete absence of evidence, but also the very same unreasonableness of a finding of fact on the basis of the available evidence, could justify a decision to set aside a NAFTA Chapter 11 arbitral award, because of a conflict with the public policy of the state.

After having declared the necessity of reviewing whether or not the Arbitral Tribunal had committed a patently unreasonable error in finding that the ecological decree constituted an act tantamount to an expropriation, the Supreme Court concluded that, on the basis of the available evidence, "[it did] not believe in this case that the Tribunal made a patently unreasonable error with respect to the Ecological Decree," and, therefore, "[it] need not decide whether a patently unreasonable decision is a ground for setting aside an arbitral award pursuant to the *International CAA*."[47]

In its submissions to the Supreme Court, Mexico claimed that "there were two categories of improper acts on the part of Metalclad, which were not explicitly addressed by the Tribunal,"[48] and that these acts "render the Award in conflict with the public policy in British Columbia."[49] In dealing with Mexico's submissions, the Supreme Court

45. *Id.* §52.
46. *Id.* §85.
47. *Id.* §97.
48. *Id.* §106.
49. *Id.*

first dismissed them on the following grounds:

> The Tribunal did not deal directly with the allegations involving Mr. Rodarte, but it effectively held that Metalclad had proceeded in good faith, when it relied upon representation of federal officials and constructed the landfill facility.[50] The Tribunal made reference to the assertion of Metalclad that it had invested $20.5 million in the landfill project. It rejected some of the claimed expenses, and made its award in the amount of US $16,685,000. Both of these matters were canvassed extensively during the arbitration.[51]

However, the Supreme Court later decided to review the evidence presented before the Arbitral Tribunal, in order to second-guess the Arbitral Tribunal's findings on both Metalclad's alleged corruption and its attempt to deceive the Arbitral Tribunal by overstating the damages suffered as a result of Mexico's actions. After carrying out such a review, the Supreme Court asserted that "[it had] reviewed the evidence from the arbitration relating to the alleged corruption of Mr. Rodarte, including the alleged bribes to his wife, and [it was] not persuaded that Mexico proved any corruption in which Metalclad participated."[52] Furthermore the Supreme Court was "not persuaded that Metalclad claimed expenses which it knew it had no legal justification to receive. While Metalclad was aggressive in its claim for damages, [the court was] not satisfied that it was fraudulent."[53]

Therefore, despite its initial assertions, the Supreme Court not only reviewed whether or not the findings of the Arbitral Tribunal could be considered reasonable on the basis of the available evidence, it also proceeded to assess the whole evidence contained in the record of the arbitral proceedings in order to newly decide Mexico's claim on Metalclad's improper acts, as if it were a continental European Court of Appeal. Unfortunately, the Supreme Court did not let us know what the standard of proof it used to reject Mexico's claim.

The final ground on which Mexico sought to set aside Metalclad's arbitral award, was based on the fact that the Arbitral Tribunal had failed to answer all questions raised by Mexico which could have affected the final result.[54] In order to decide Mexico's claim, the Supreme Court first stated that while the awards granted under the ICSID Convention may be set aside because, either there is a "serious departure from a fundamental rule of procedure," or "the award has failed to state the reasons on which it is based,"[55] the ICSID Additional Facility Rules of Arbitration and ICAA section 34.1(d) provides that Metalclad's arbitral award may only be set aside when "the arbitral procedure was not in accordance with the agreement of the parties."[56]

In interpreting the scope of ICAA section 34.1(d), the Supreme Court first analyzed the ICSID *ad hoc* committees' annulment decisions in *Klockner v. Cameroon, Amco v. Indonesia* and *MINE v. Guinea*.[57] It concluded that "[t]o the extent that these decisions

50. *Id.* §109.
51. *Id.*
52. *Id.* §110.
53. *Id.* §117.
54. *Id.* §119.
55. *Id.* §125.
56. *Id.* §126.
57. *Id.* §120.

of the annulment committees have interpreted the phrase 'every question submitted to the Tribunal,' to mean 'every argument made to the Tribunal which could have changed the outcome of the award,' it is [the Supreme Court's] opinion that the interpretation is overly broad."[58] Furthermore, it added "the tribunal must deal fully with the dispute between the parties and give reasons for its decision. It is not reasonable to require the tribunal to answer each and every argument which is made in connection with the questions which the tribunal must decide."[59]

After having declared the unreasonableness of the ICSID *ad hoc* committees' interpretation of ICSID Convention article 52(1), the Supreme Court turned to ICAA section 34.1(d). It then implicitly affirmed that stating the reasons on which the arbitral award is based, is to be considered part of the arbitral procedure when the rules of procedure governing the arbitration stipulate that reasons are to be given.[60] The Supreme Court also stated that the language "the award may be set aside" used in ICAA section 34, gives to the Court full discretion to decide whether or not to set aside an arbitral award when one of the grounds contained in that provision exists.[61] Finally, the Supreme Court concluded that, in the absence of express grounds for annulment of the arbitral award because of the Arbitral Tribunal's failure to state the reasons on which it is based, the Supreme Court, when exercising its discretion to set aside an arbitral award, should take into consideration the seriousness of such defect, which does not bring into question the fairness of the hearing or the decision making process.[62]

On the basis of the above-mentioned interpretation of ICAA section 34.1(d), the Supreme Court seemed to dismiss Mexico's claim by stating that "the Tribunal adequately dealt with the principal issues before it," because the questions related to NAFTA article 1105 were merely academic after having overturned the finding of the Arbitral Tribunal, in relation with Mexico's alleged violation of its obligation under that article; the Tribunal effectively found that Metalclad had acted in good faith when it relied on the representations of the federal authorities; the alleged deceptions did not affect the award; and the Tribunal did give general reasons for its method of calculating the [award].[63] However, immediately afterward, the Supreme Court added that "the failure of the Tribunal to explicitly deal with all of Mexico's arguments is not sufficiently serious to justify the exercise of this Court's discretion to set aside the Award."[64] In other words, even though the Arbitral Tribunal had dealt with all principal issues, the fact that the Arbitral Tribunal had not dealt expressly with all of Mexico's arguments, constituted a violation of the arbitral procedure agreed upon by the parties. But, in the exercise of its discretion, the court decided not to set aside the arbitral award because such violation was not serious enough.

In the next paragraph, the Supreme Court surprisingly declared that it declined to set aside the arbitral award because, in accordance with article 58 of the ICSID Additional Facility, either party, within forty-five days after the date of the award, had the

58. *Id.* §121.
59. *Id.* §122.
60. *Id.* §129.
61. *Id.*
62. *Id.*
63. *Id.* §130.
64. *Id.*

opportunity to request the Arbitral Tribunal "to decide any question which it had omitted to decide in the award," and Mexico did not use it.[65] Therefore, the controlling rationale behind the Supreme Court's exercise of its discretion was not the lack of seriousness of the Arbitral Tribunal's failure to appropriately deal with all of Mexico's arguments, but rather was Mexico's failure not to further request the Arbitral Tribunal to decide on the questions that it had omitted in the award.

In reaching its final conclusion, the Supreme Court, which, despite its initial findings, had *de facto* interpreted ICAA section 34.1(d) in accordance with the above-mentioned ICSID *ad hoc* committees' annulment decisions, finally departed from them on the point of the mandatory request of a supplemental decision to the Arbitral Tribunal. In fact, for the ICSID *ad hoc* committees, the party seeking annulment of an award does not have to first request a supplemental decision to the Arbitral Tribunal.[66] Such departure, however, is not based on the different grounds for review contained in ICSID Convention article 52 and ICAA section 34, but in the different nature of the competent organ to carry out such review under the ICSID Convention and ICSID Additional Facility Rules.[67]

To complete an exposition of the scope of the review undertaken by the Supreme Court of Metalclad's arbitral award, it is necessary to refer to the initial section of its judgment where the so-called "underlying facts that are not in dispute" are contained. Among them we can find several facts that were not only disputed facts before the Arbitral Tribunal, but that were also extensively argued during the arbitration. In fact some of them directly affect several factual findings made by the Arbitral Tribunal.

The Supreme Court's judgment referred to an amended option agreement between Metalclad and COTERIN, where the "payment of the purchase price was subject to, among other things, the condition that: (a) a municipal permit was issued to COTERIN, or (b) COTERIN had received a definitive judgment from the Mexican courts that a municipal permit was not required for the construction of the landfill."[68] The Supreme Court added that "Metalclad completed its purchase of COTERIN without either of these conditions being satisfied."[69] Such an "undisputed" fact clearly shows that, at the time of making its investment, Metalclad knew that a municipal permit was needed to build its projected landfill in La Pedrera (Municipality of Guadalcazar), and that Metalclad was aware that it was undertaking an important risk by buying COTERIN without the municipal permit. Only from this perspective can it be understood that Metalclad, before effectively purchasing COTERIN, tried to minimize such a risk by conditioning the payment of three fourths of the final prize to the securing of the municipal permit.

This "undisputed" fact contradicts the core of Metalclad's submissions to the Arbitral Tribunal. In fact, Metalclad claimed that it did not know about the municipal permit until the Municipality of Guadalcazar issued its stop work order on October 26, 1994.[70] It also seriously undermines the Arbitral Tribunal's finding that "Metalclad was led to

65. *Id.* §131–132.
66. *Id.* §132.
67. *Id.*
68. *Id.* §8.
69. *Id.*
70. *See* Arbitral Award, *Metalclad Corporation v. United Mexican States* Sept. 2, 2000, §37–44, 85–89.

believe, and did believe, that the federal and State permits, allowed the construction and operation of the landfill."[71] Finally, considering that the Arbitral Tribunal found Mexico in violation of NAFTA article 1105 because it "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment," such an "undisputed" fact could have very well been a legitimate basis to challenge the Arbitral Tribunal findings in relation with NAFTA article 1105, even if transparency is considered part of the minimum treatment guaranteed to foreign investors by that provision.

The Supreme Court of British Columbia affirmed that after the Municipality rejected Metalclad's request to reconsider the denial of the municipal permit, the latter

> filed a writ of amparo in a Mexican federal court in respect of the Municipality's refusal to issue a permit. The proceeding was dismissed without a hearing of the merits on the basis that [Metalclad] had not exhausted its administrative remedies. [Metalclad] appealed to the Mexican Supreme Court, but subsequently abandoned its appeal as a sign of good faith to the Municipality for the purpose of negotiations.[72]

The Arbitral Tribunal did not even mention in its award that, Metalclad had looked for a remedy in Mexican courts, and that it later abandoned the proceedings it had previously initiated. This may even become a controlling factor in deciding both if a NAFTA Chapter 11 arbitral tribunal may exercise its jurisdiction over the underlying dispute, and if a NAFTA state party has violated its obligations under NAFTA article 1105. Surprisingly, the Arbitral Tribunal completely ignored it, and the Supreme Court referred to it as an "undisputed" fact.

Once again, the Supreme Court, by affirming the undisputed character of some facts that were not contained in the Arbitral Tribunal factual findings, has acted as a continental European Court of Appeal. However, these new "undisputed" facts are not based on a review of the evidence contained in the record of the proceedings held by the Arbitral Tribunal, but rather on the mere submissions filed by the parties with the Supreme Court.

In conclusion, the Supreme Court inappropriately extended *de facto*, the scope of its review far beyond the grounds and standards of judicial review affirmed in its findings on applicable law and standard of judicial review. The Supreme Court carried out such a *de facto* extension by admitting that:

a) The patent unreasonableness, on the basis of the available evidence, of an Arbitral Tribunal's factual findings may justify a decision to set aside a NAFTA Chapter 11 arbitral award because of a conflict with the public policy of British Columbia.
b) Certain claims of corruption or deception that could make an arbitral award conflict with the public policy of British Columbia, justify a complete review of the evidence introduced during the arbitral proceedings in order to second-guess the Arbitral Tribunal's findings on such claims.
c) The failure of an Arbitral Tribunal to expressly deal with arguments put forward by the parties to a NAFTA Chapter 11 arbitration constitute a violation of the arbitral procedure agreed upon by them, and it could justify the setting

71. *Id.* §85.
72. Supreme Court's judgment, *supra* note 24, §5.

aside of a NAFTA Chapter 11 arbitral award in accordance with ICAA section. 34.2(a)(v).

d) Certain facts, which were extensively argued during the arbitral proceedings, and were left out of the factual findings of the arbitral award, were "undisputed" between the parties.

Therefore, although legally bound by a narrow set of grounds for judicial review directed by the principle of finality of the arbitral awards, the Supreme Court *de facto* extended such grounds in order to make sure of the correctness of the arbitral award. This extension of the grounds of judicial review was developed in order to adequately guarantee the public interests at stake, both in the underlying relationship between Metalclad and Mexico, and in the arbitral proceedings.

IV. Some Final Tips for a Future Reform

NAFTA Chapter 11 qualifies the underlying relationships between foreign investors and NAFTA host states as exclusively "commercial," and the arbitrations under NAFTA Chapter 11 arbitrations as purely international commercial arbitrations. However, the case of *Metalclad v. Mexico*, as many other cases that are currently taking place under NAFTA Chapter 11,[73] shows that such qualifications do not take into account the important public interests, such as public health or the environment, that are at stake. As a consequence, when national courts become aware of the important public interests at stake, they will likely follow the example of the Supreme Court of British Columbia, and extend *de facto* the scope of their review of NAFTA Chapter 11 arbitral awards, in order to make sure of the correctness of such awards.

In order to avoid this phenomenon, I consider it necessary to profoundly reform NAFTA Chapter 11 foreign investor/host state arbitration, so as to expressly recognize the public interests at stake, in both the underlying relationship between private foreign investors, and NAFTA host states and in NAFTA Chapter 11 arbitrations. Such reform could include, among others, the following measures:

(a) The mandatory recourse by a foreign investor to, at least, some (but not necessarily exhaustion) of the domestic remedies available before triggering a NAFTA Chapter 11 arbitration.
(b) The public character of the arbitral proceedings with due regard to confidential information.
(c) The extension of NAFTA article 1126 to encompass the consolidation of the proceedings after the petition of the state concerned.
(d) Granting to arbitral tribunals the power to subpoena documents and summon witnesses.
(e) The participation of interested third parties as *amicus curiae.*
(f) The determination of the competent national court to review NAFTA Chapter 11 arbitral awards.

73. *See*, e.g., the cases of Ethyl Corporation v. Canada, Methanex Corporation v. The United States of America, or Waste Management Inc. v. United Mexican States. For detailed information in these and other cases under NAFTA Chapter 11, *see* http://www.NAFTACLAIMS.com

(g) The establishment of common grounds to set aside NAFTA Chapter 11 arbitral awards on the basis of the level of deference given to national administrative tribunals.
(h) The automatic recognition and enforcement of the arbitral awards confirmed by the competent court of the NAFTA party where the arbitration was held, or those not having been challenged before such a court in the period of time provided for NAFTA article 1136.3.