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The NAFTA *Metalclad* Appeal - Subsequent Impact or Inconsequential Error? . . . Only Time Will Tell

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COMMENT

THE NAFTA *METALCLAD* APPEAL – SUBSEQUENT IMPACT OR INCONSEQUENTIAL ERROR? . . . ONLY TIME WILL TELL

I. Facts: A Short History of Constant Turmoil Between Metalclad Corporation and the Municipality of Guadalcazar

Metalclad, an American Corporation, did not begin to consider entry into the hazardous industrial waste industry in Mexico until the late 1980s.[1] By the mid 1990s, research revealed that Mexico generated over ten million tons of industrial waste annually, while only an estimated ten percent of this waste may have been treated in accordance with international environmental standards.[2] The remaining waste was either stored on site or illegally dumped elsewhere.[3] Moreover, there were only two facilities in the entire country equipped to dispose of this hazardous waste

1. *See* Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. GLOBAL TRADE 209, 229 (2001).
2. *See id.*
3. *See id.*

in conformance with international standards.[4] One of these sites is located nine hours away from Mexico's primary industrial areas, where seventy percent of the country's hazardous waste is generated; and the other site, partially due to its limited disposal capabilities, only accepts hazardous waste generated within its State boundaries.[5] Due to this predicament, "representatives of the Mexican government, Mexican industry, and both national and international organizations were in agreement that 'waste treatment and disposal [was] one of the most urgent national development problems.'"[6] In light of this unfortunate quagmire, one can easily see why Metalclad viewed entry into the Mexican hazardous waste disposal industry as brimming with potential for increased economic growth, capital and revenue.[7]

Initially owned by Mexican nationals, a company by the name of Coterin built and operated a hazardous waste transfer station within the municipality of Guadalcazar (the Municipality), in the State of San Luis Potosi (the State), Mexico.[8] Notably, the Municipality did not require Coterin to obtain a permit of any kind prior to the construction and operation of the transfer station.[9] In less than two years of operation, however, the Federal Government of Mexico shut down the site.[10] Soon thereafter, Coterin applied to the Municipality for a permit to construct a hazardous waste landfill at the site in 1991, but the application was denied.[11] Additionally, a newly elected municipal government came into office in 1992 and confirmed this 1991 permit refusal.[12] In spite of this refusal, in January of 1993, Coterin received two permits from federal agencies regarding the development of a hazardous waste landfill at the site, and one permit from the State with respect to land use for a landfill.[13] It is here that Metalclad made its first significant move into the Mexican hazardous waste disposal industry. In April of the same year, the permits were issued and

4. *See id.*

5. *See id.*

6. *See* Arturo Borja Tamayo, *The New Federalism, Internationalization and Political Change in Mexico: A Theoretical Analysis of the Metalclad Case*, Doc. No. 59, CENTRO DE INVESTIGACION Y DOCENCIA ECONOMICAS 8 (1998).

7. *See* Dhooge, *supra* note 1, at 229.

8. *See id.* at 38; *See* The United Mexican States v. Metalclad Corporation, 89 B.C.L.R.3d 359 (Can. 2001) [hereinafter Appeal].

9. *See* Dhooge, *supra* note 1, at 232.

10. Appeal, *supra* note 8, para. 5.

11. *Id.* para. 6.

12. *Id.*

13. *Id.* para. 7.

Metalclad signed an option agreement with Coterin to purchase the company, including the proposed hazardous waste landfill site.[14] Significantly, the option agreement was contingent upon either the issuance of a municipal permit to Coterin, or that Coterin receive a definitive judgment from the Mexican courts that a municipal permit was not required for the construction of a hazardous waste landfill.[15] Metalclad contends, and the Governor of the State denies, that it obtained the Governor's support for the project at a meeting between the two.[16] Further, other federal officials assured it that all of the necessary permits had been issued for the operation of the landfill except for one permit, which Metalclad would later acquire within the year.[17]

Shortly thereafter, Metalclad completed its purchase of Coterin without either of the conditions being satisfied according to the terms of the initial option agreement.[18] However, because Mexican federal officials promised that Coterin possessed all of the authority needed to undertake the landfill project, Metalclad believed that the underlying purpose for the conditions had been met.[19] Furthermore, due to these same federal assurances, Metalclad commenced construction at the site in the absence of a municipal construction permit.[20] Not only did federal and state officials inspect the site throughout the construction process, but Metalclad also provided officials with written status reports of its progress.[21] Yet, much to Metalclad's surprise, late in 1994, the Municipality issued a stop work order due to the lack of a municipal construction permit.[22] After further representations by the Federal Government that "the Municipality lacked any basis for denying the construction permit . . . [and] the Municipality would issue the permit as a matter of course," Metalclad immediately applied for the municipal permit in order "to facilitate an amicable relationship with the Municipality," and then the corporation recommenced construction of the facility.[23] In the interim, Metalclad received yet another construction permit from the Federal

14. *Id.* para. 8.
15. *Id.*
16. *See* Metalclad Corp v. The United Mexican States, Award of Aug, 30, 2000, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001) [hereinafter Award].
17. *See* Appeal, *supra* note 8, paras. 5-6.
18. *Id.*
19. *See id.*
20. *See id.* para. 6.
21. Award, *supra* note 16, para. 39.
22. *Id.* para. 40.
23. *Id.* para. 41.

Government authorizing construction of the final aspects of the facility.[24] Around the same time, two independent environmental studies were completed, confirming earlier findings that the site was suitable for a hazardous waste landfill with proper engineering.[25]

Construction of the landfill was completed in March of 1995. Metalclad attempted to host a grand opening party, but was thwarted by demonstrators who blockaded the site, preventing guests from entering the facility and causing considerable upheaval.[26] Consequently, the site never opened.[27] Still hopeful, Metalclad commenced months of further negotiations with federal authorities.[28] The State was invited to participate in the negotiations, but declined to do so.[29] Finally, believing to have reached the light at the end of the tunnel, an agreement called *The Convenio* was reached between Metalclad and federal authorities in November 1995.[30] *The Convenio* contained numerous provisions ensuring that environmental and human safety precautions would be given ample attention, and specific procedures were designed with this in mind.[31] Additionally, Metalclad also promised to commit significant resources to matters and organizations within the local community; such as waste disposal discounts, free medical care, employment preferences for local inhabitants, and sponsorship of educational courses for governmental employees, to name just a few.[32] Not persuaded by the numerous beneficial provisions contained within the agreement, however, and foreboding what would soon come, the Governor denounced *The Convenio* shortly after it was presented to the public.[33] Then, in December 1995, thirteen months after Metalclad first applied, and after numerous federal assurances and actions to the contrary, the Municipality officially denied Metalclad's request for a construction permit.[34]

The facts surrounding the denial of the municipal permit must be given special attention. First, there was not one instance where a federal authority required, or even considered, the need

24. *See* Appeal, *supra* note 8, para. 9.
25. Award, *supra* note 16, para. 44.
26. *Id.* para. 45-46.
27. *Id.* para. 46.
28. *See id.* para. 47.
29. *Id.* para. 49.
30. *Id.* para. 47.
31. *See id.* para. 48.
32. *Id.*
33. *Id.* para. 49.
34. *Id.* paras. 50-52.

for Metalclad to obtain a municipal permit throughout all of the numerous regulatory transactions, permitting processes, and negotiations in which the corporation engaged with the Federal Government.[35] In fact, the Federal Government assured Metalclad that it had obtained all of the authority and approval required on many occasions.[36] Second, "there was no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project in Guadalcazar['s history]."[37] Third, "there was no evidence [of] an established administrative process with respect to municipal construction permits in the Municipality . . . ."[38] Fourth, the extraordinary length of time (over a year) it took the Municipality to reject Metalclad's application for the permit.[39] Fifth, Metalclad never received notice or an invitation to attend the Town Council meeting where its application for the permit was discussed and ultimately refused.[40] Finally, even if it is assumed that a municipal permit was required, the Municipality's basis for denial of the permit was not within its constitutionally defined grant of authority.[41]

[A]s to hazardous waste evaluations and assessments, the federal authority's jurisdiction [is] controlling and the authority of the municipality only extend[s] to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations [regarding] . . . what was basically a hazardous waste disposal landfill was improper . . . as was [the denial of a] permit for any reason other than those related to the physical construction or defects in [a] site.[42]

Mexico's General Ecology Law of 1988 expressly grants the power to authorize construction and operation of hazardous waste landfills to the Federal Government.[43] Additionally, Mexican Law also limits the environmental powers of municipalities to issues regarding non-hazardous waste.[44] In spite of the Municipality's narrow scope of authority to grant or deny permits limited to physical construction considerations, the Municipality refused to

35. *Id.* para. 52.
36. *Id.* paras. 87-89.
37. *Id.* para. 52
38. *Id.*
39. *See id.* para. 50.
40. *Id.* para. 54.
41. *Id.* paras. 81-86.
42. *Id.* para. 86.
43. *See id.* para. 82.
44. *See id.* para. 83.

grant Metalclad a permit. The Municipality based its decision on "the opposition of the local population, the fact that construction had already begun when the application was submitted, the denial of the permit to Coterin in . . . 1991 and . . . 1992, and the ecological concerns regarding the environmental effect and impact on the site and surrounding communities."[45] In short, the denial of the construction permit was not grounded in a legitimate exercise of the Municipality's authority.

Attempting further measures, the Municipality then turned to the Mexican court system to obtain a court order preventing the operation of the landfill.[46] The judicial actions were successful in temporarily postponing Metalclad's operations, but the matters were eventually thrown out of the courts for lack of standing.[47] As if blind to all of the turmoil between the Municipality and Metalclad, the Federal Government, in February 1996, issued yet another permit increasing the annual permitted waste capacity of the facility from 36,000 tons per year to 360,000 tons per year.[48] As a final attempt, Metalclad requested once more that the Municipality reconsider its application for a permit, but it was again denied.[49]

The Municipality's second denial of a construction permit proved to be the straw that broke the camel's back. After an unsuccessful attempt at negotiations, Metalclad finally initiated arbitral proceedings against the Government of Mexico under Chapter 11 of the North American Free Trade Agreement (NAFTA) on January 1997 with the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID).[50] An arbitral tribunal was chosen, and soon thereafter the Tribunal determined the place of the arbitration to be Vancouver, British Columbia, Canada.[51]

Further sealing the fate of an already sufficiently battered and bruised investment, one last and final blow was thrown at Metalclad by the Governor three days before his term of office expired.[52] After the arbitral proceedings were underway, but before the hearing in the arbitration was held, the Governor

45. *Id.* para. 92.
46. *See id.* para. 95; *see* Appeal, *supra* note 8, para. 14.
47. *See* Appeal, *supra* note 8, para. 15; *see* Award, *supra* note 16, para. 95.
48. *See* Appeal, *supra* note 8, para. 12.
49. *See id.* para. 13.
50. *See id.* para. 16.
51. *See id.* para. 18.
52. *See id.* para. 17.

issued an Ecological Decree in September 1997 declaring an area within the Municipality, that included the landfill site, an ecological preserve for the purpose of protecting various species of cacti.[53] Needless to say, the Decree effectively and permanently prevented any operation of the landfill now, or in the future.[54]

II. NAFTA'S FIRST CHAPTER 11 ARBITRATION

Metalclad initially brought forth numerous claims against Mexico (on behalf of the Municipality and the State) for its treatment with respect to the landfill. The outcome of the NAFTA arbitration resulted in a damages award to be paid by Mexico to Metalclad Corporation in the amount of $16,685,000 (U.S.).[55] Mexico, unhappy with the Tribunal's decision, appealed to have the award set aside, arguing that the Tribunal decided issues beyond its scope.[56] As a result, for the first time since NAFTA's enactment, a Chapter 11 Arbitral Award was granted an appeal.

In accordance with NAFTA Chapter 11 arbitration procedure and the ICSID Additional Facility Rules governing this litigation, the appeal of the NAFTA Arbitral Award was brought in the same State as where the arbitration took place.[57] Canada was the host State of the arbitral decision in *Metalclad Corporation v. The United Mexican States,* and it is here that Mexico stated its case.[58] In this landmark appeal, the Supreme Court of British Columbia predominantly upheld the damages award ordering the Mexican government to compensate Metalclad Corporation for NAFTA violations. In doing so, however, it overturned two of the three Tribunal holdings.[59]

The Tribunal first held, and the Supreme Court of British Columbia (B.C.) overruled, that Metalclad was not given the minimum standard of treatment promised by the Parties in Article

53. *Id.*

54. Award, *supra* note 16, para. 59.

55. *See* Appeal, *supra* note 8, para. 1.

56. *See id.* paras. 1, 52.

57. *See id.* para. 1; *see generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, arts. 50-53, 17 U.S.T. 1270, T.I.A.S. No. 6090 (providing very limited protection against outside court review in accordance with national law relating to court review of international arbitral awards, since it is the law of the host state that governs actions to set awards aside). *See, e.g.*, New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 5, 21 U.S.T. 2517, T.I.A.S. 6997.

58. *See* Appeal, *supra* note 8, para. 1.

59. *See id.* para. 133.

1105 of Chapter 11.[60] Next, the Tribunal held that Mexico expropriated Metalclad's investment through contradictory, unpredictable, and unclear behavior.[61] This behavior, the Tribunal held, was violative of the minimum standards of treatment towards investors.[62] In other words, when the Mexican State and Municipal governmental actions were viewed in their entirety, the Tribunal found that the government took measures against Metalclad that were unfair and had an effect tantamount to expropriation prohibited under Articles 1105 and 1110.[63] Believing it relied too heavily on the first "erroneous" finding of a breach of Article 1105, the Court consequently overruled the second Tribunal holding that found a breach of Article 1110.[64] Finally, the Tribunal held, and the B.C. Supreme Court affirmed, that Metalclad was prevented from opening and operating its hazardous waste landfill site due to an Ecological Decree that, once enacted, indirectly expropriated the hazardous waste facility by the Mexican government.[65] Consequently, Metalclad lost all of its investment pertaining to the site, and the Decree was found by both the Tribunal and the B.C. Supreme Court to be a breach of Article 1110 of Chapter 11 of NAFTA.[66]

Metalclad, as with all Chapter 11 Arbitrations, needs perspective: even though the damages award was not significantly altered by the Supreme Court's decision,[67] its significance lies more in what it overrules, than in what it sustains. As this note will argue, familiarity with the legislative background, objectives, and context of NAFTA adds dimension to, and exposes the Court's superficial, shortsighted, and categorical analysis of the issues involved within the Tribunal's award. Its most opprobrious flaw is that the B.C. Supreme Court lacked jurisdiction and should not have granted itself authority to hear the appeal in the first place. Thus, this historic decision takes its form against a backdrop of subsequent Chapter 11 Arbitral interpretations, a wealth of treaties, agreements, and international and local law that all require consideration.

Part III of this note examines the B.C. Supreme Court's claim

60. *See id.* para. 65, 133.
61. *See* Award, *supra* note 16, paras. 107-108.
62. *See id.* paras. 104-108.
63. *Id.* para. 104.
64. *See* Appeal, *supra* note 8, para. 133.
65. *See id.* para. 35.
66. *See id.*; *See* Award, *supra* note 16, paras. 109-110.
67. *See* Appeal, *supra* note 8, para. 133.

of jurisdiction to hear the *Metalclad* appeal. Part IV provides some background and a brief history of NAFTA arbitral procedure. Part V reviews the legislative intent, history, language, and meaning of Article 1105, also known as the Minimum Standard of Treatment provision. Part VI analyzes the B.C. Supreme Court's basis for overruling the Tribunal. Part VII briefly discusses the recent clarification of NAFTA's Investor-State provision enacted soon after this appeal was decided. Finally, this case note concludes with a brief critique and summation of the potential effects the B.C. Supreme Court's decision will have on future NAFTA Investor-State arbitrations.

III. THE CLAIM OF JURISDICTION BY THE SUPREME COURT OF BRITISH COLUMBIA

Before commencement of any discussion regarding the conflicting holdings between the B.C. Supreme Court and the Tribunal, it is of paramount importance to first evaluate the relevant Canadian law that governs grants to hear appeals, such as the *Metalclad* award. This is essential because Canadian public policy requires its courts to defer to the judgments made by international arbitrators in their decisions, except in very limited circumstances.[68] The relevant Canadian standard of review pertaining to this matter is found within Section 5 of the *International Commercial Arbitration Act* (the *Act*), and reads as follows:

> In matters governed by this Act,
>
> (a) a court must not intervene [in an arbitral award] unless so provided in this Act, and
> (b) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal *must not be questioned, reviewed or restrained* by a proceeding under the *Judicial Procedure Act* or otherwise except to the extent provided in this Act.[69]

Notably, Subsection 34(2) of the *Act* outlines the "only" conditions that must be present in order to enable a disputing party to seek

68. *See* The International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, § 5, s. 34; *see also* Quintette Coal Limited v. Nippon Steel Corporation, B.C.C.A. 1 W.W.R. 219, 229 (1991) (holding that, "as a matter of policy, [the court should] adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.").

69. *See* The International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, § 5, s. 34 (emphasis added).

recourse from a court in Canada against an arbitral award. The pertinent portion regarding the immediate case reads as follows:

> An arbitral award may be set aside by the Supreme Court *only if*:
> (a) the party making the application furnishes proof that
> . . .
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .[70]

To add further depth and understanding to the B.C. Court's standard of review when granting itself jurisdiction to set aside international tribunal awards, and to highlight the essential components required in the Court's analysis that are necessary to overrule, Justice Tysoe cites in his opinion the leading British Columbia authority on Subsection 34(1) (quoted above), *Quintette Coal Limited v. Nippon Steel Corporation*, 1 W.W.R. 219 (B.C.C.A. 1991).[71] In doing so, he appears to acknowledge that it is not the role of a court to second-guess an arbitral interpretation of provisions within a contract. Further, Justice Tysoe admits that in *Quintette Coal*, the B.C. Court of Appeal refused to interfere with an arbitral award, and in doing so, it also stated that unless an award "contains decisions beyond the scope of the submission to arbitration," the court will not have jurisdiction to set the award aside, "even if it can be shown that the arbitration tribunal has erred in interpreting the contract."[72] But the Appeals Court did not stop there. Notably, they explicitly continue by stating that as long as "[a tribunal's] interpretation is one which the words of the contract can reasonably bear," the interpretation must not be set aside.[73]

In light of this legislative history and leading judicial interpretation, the B.C. Supreme Court's decision to overturn the first two Tribunal holdings stands on rather dubious footing. Curiously, the B.C. Supreme Court explicitly cites within its opinion, as support, the very same authority it should have used to refuse to hear Mexico's appeal.[74] In order to fit within the Canadian jurisdictional requirements to overturn the Tribunal's holding,

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70. *Id.*
71. *Id.*
72. Appeal, *supra* note 8, para. 51.
73. Quintette Coal Limited v. Nippon Steel Corporation, 1 W.W.R. 219, 229-30 (B.C.C.A. 1991).
74. *See* Appeal, *supra* note 8, paras. 18-20.

Justice Tysoe had to make two findings. First, that the *Metalclad* Tribunal went beyond the scope of the submission to arbitration by interpreting the provisions of Chapter 11 the way it did.[75] Second, and of equal importance, that in light of *Quintette*, the Tribunal's interpretation was so nonsensical that the language within the relevant portions of NAFTA could not "reasonably bear" the meaning the Tribunal gave them.[76] So, let us see where these outlandish interpretations reside.

IV. An Overview of NAFTA's Chapter 11 Arbitral Procedure

The *Metalclad* Arbitration is the first NAFTA award to grant compensation for damages to a private investor under the provisions of Chapter 11.[77] In order to fully realize the cursory analysis applied by the B.C. Supreme Court in both its grant of appeal, and its final opinion, a brief summary of the duties of a NAFTA Chapter 11 arbitral tribunal is necessary. Absent specific definitions and intent behind the language within NAFTA, it becomes the tribunal's job to interpret NAFTA's meaning.[78] Significantly, by signing NAFTA, each Party has explicitly consented to the arbitral procedures set forth within the Agreement.[79] This consent includes a grant of power to the arbitral body that enables the tribunal to define the relevant provisions of NAFTA. This is important because the disputing parties are subsequently bound by the tribunal's interpretations with respect to the issues in controversy and to the final award the tribunal will ultimately reach.[80] Although NAFTA awards are not binding as precedent, the analysis applied can have a major impact on how the Agreement is understood and operates in practice.[81] Accordingly, no single award becomes "law" in terms of its interpretation of the NAFTA provisions at issue. International tribunals often consider the reasoning advanced by other tribunals in making their decisions, however, and depending on the weight this reasoning is given by the deciding tribunal, the prior award may help in shaping the interpretation given to the same provisions at issue in a

75. *See id.* para. 52.
76. *See id.*
77. *See* Dhooge, *supra* note 1, at 77.
78. *See* North American Free Trade Agreement, Dec. 8, 1993, art. 102(2)-1131(1), 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].
79. *See id.* art. 1122.
80. *See id.* art. 1136.
81. *See id.*

present claim.[82] It is important to note that the individuals chosen to lead NAFTA arbitration panels are world-renowned and respected international legal scholars, and experts in the field of international law. In contrast, Justice Tysoe's expertise is most likely vested in judicial analysis of matters under Canadian law, particularly that of British Columbia.[83]

Chapter 11 of NAFTA focuses on the free and nondiscriminatory treatment of investors and investments.[84] Many concepts and terms within NAFTA are taken from the global trade law system that was previously called the GATT system. This system was revised and condensed during the Uruguay Rounds of negotiations in 1994, culminating with the creation of the World Trade Organization (WTO).[85] Because the Uruguay Round of the WTO negotiations did not include an extensive code on private investments, NAFTA distinguishes itself from the Uruguay Rounds because the Parties involved did include such a code.[86] It is within Chapter 11 that a broad ranging set of rights and remedies are specifically established for individuals and enterprises from any country party to NAFTA.[87] Thus, the Agreement provides protection for these private investors, and all of their investments located within any other country party to NAFTA.[88] Notably, private parties may only arbitrate claims of breaches found within the provisions of Chapter 11.[89] NAFTA restricts private parties from arbitrating claims with respect to alleged breaches of other provisions of the Agreement. Under those circumstances, the investor would not have an independent right to bring a claim. Therefore, it can only be brought on the investor's behalf by its host country to be decided under the provisions set forth in Chapter 20.[90] This distinction is important because Mexico claims in its appeal to the B.C. Supreme Court that "the tribunal made decisions on matters beyond the scope of the submission to arbitration

82. *See* David A. Gantz, *Reconciling Environmental Protection and Investor Rights under Chapter 11 of NAFTA*, 31 ENVTL. L. RPTR. 10646 (June 2001).

83. Todd Weiler, *Canadian Court's Review of Decision by NAFTA Panel Against Mexico Raises More Questions than Answers: An Interview with NAFTA Legal Expert Todd Weile*, 9:5 LATIN AM. LAW & BUS. RPT 18, 19 (May 2001).

84. *See* NAFTA, *supra* note 78, ch. 11, 1099-1127.

85. *See* S.D. Myers, Inc. v. The Government of Canada, 19-22 (Nov. 12, 2000) (Schwartz, J., concurring).

86. *See id.*

87. *See* NAFTA, *supra* note 78, ch. 11, 1099-1127.

88. *See id.*

89. *See id.* ch. 11 sec. B.

90. *See id.*

by deciding upon matters outside [of] Chapter 11."[91]
To be sure, Chapter 11 has three primary objectives:

> (1) to establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; (2) to remove barriers to investment by eliminating or liberalizing existing restrictions; and (3) to provide an effective means for the resolution of disputes between an investor and the host government.[92]

These objectives are met through the establishment of six basic protections for NAFTA private investors:[93]

(1) Article 1110 – Expropriation
(2) Article 1102 – National Treatment
(3) Article 1103 - Most Favored Nation Treatment
(4) Article 1105 - Minimum Standard of Treatment
(5) Article 1106 – Performance Requirements
(6) Article 1114 – Environmental Measures

As noted above, the *Metalclad* award is limited to issues encompassed by Articles 1110 and 1105. For the purposes of this note, however, discussion will be limited to the B.C. Supreme Court decision that overturned the Tribunal's finding of a breach of Article 1105.

V. ARTICLE 1105 – MINIMUM STANDARD OF TREATMENT UNDER NAFTA

Let us now turn to the Tribunal's first holding. The Tribunal found that Mexico violated Article 1105 by not affording Metalclad treatment in accordance with the minimum standards agreed upon by all of the NAFTA Parties.[94] Article 1105(1) provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[95] The significance of Article 1105 of the NAFTA lies in the "extra" protection it provides private investors from what would otherwise be a major gap in the Agreement if they were left only to rely on the protections offered in other portions of NAFTA. In other words, a government might treat a foreign investor in an unjust

91. Appeal, *supra* note 8, para. 67.
92. *See* NAFTA, *supra* note 78, ch. 11, 1099-1127; *See* Dhooge, *supra* note 1, at 216.
93. *See* NAFTA, *supra* note 78, ch. 11, sec. A.
94. *See* Award, *supra* note 16, paras. 100-01.
95. NAFTA, *supra* note 78, art. 1105.

and injurious fashion, yet at the same time be treating that investor in the same manner that it treats its own nationals and/or every other foreign investor. Therefore, the Party would not be breaching Article 1102 (National Treatment) or 1103 (Most Favored Nation Treatment) of NAFTA, but it would be breaching Article 1105. "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice."[96] Thus, Article 1105 provides a floor of protection for private investments under which a Party to NAFTA may not fall below. Due to this gap filler, it is easy to see how circumstances occasionally are such where "[t]he existence of a minimum international standard means that in the eyes of international law, non-nationals might have rights and remedies that to some extent exceed those of nationals."[97] A clear example of this has been cited above. Under those circumstances, a State to a NAFTA Party would be compelled to treat a private investor from another NAFTA Party to a minimum standard of treatment above that given to its own nationals, other foreign investors, and both of their investments.

As stated briefly above, the Tribunal found that Mexico's behavior with respect to the landfill violated the requirements of "fair and equitable treatment." In order for the B.C. Supreme Court to interfere with this finding on appeal however, Justice Tysoe must establish that the Tribunal's holding was "beyond the scope of the submission to arbitration" *and* was based upon a textual interpretation so unreasonable that the meaning given to the Article's explicit terms is beyond "that which the words of the contract could reasonably bear." In the Tribunal's holding, it first addressed Mexico's responsibility for the acts of its States and Municipalities.[98] By citing to various authority, including customary international law, the Tribunal noted that "Mexico . . . proceed[ed] on the assumption that the normal rule of State responsibility applies; that is, that the Respondent can be internationally responsible for the acts of State organs at all three levels of government."[99] Justice Tysoe appears to have no problem with

96. S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000), *available at* http://www.appletonlaw.com/4b2myers.htm, at 29 (last visited Nov. 12, 2002) [hereinafter S.D. Myers Partial Award].

97. *See* S.D. Myers, Inc. v. The Government of Canada, para. 75 (Nov. 12, 2000) (Schwartz, J., concurring).

98. *See* Award, *supra* note 16, para. 73.

99. *Id.*

this first finding.[100] After establishing the Federal Government's responsibility for the actions at issue, however, the Tribunal then addressed whether Metalclad's investment was denied "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[101] To begin with, the Tribunal briefly mentions the prominence of the principle of transparency found throughout NAFTA.[102] It first cited to explicit references of transparency found in Article 102 – NAFTA Objectives.[103]

Article 102(2) of NAFTA obliges the Parties to "interpret and apply the provisions of [the] Agreement in the light of its objectives set out in Paragraph 1 and in accordance with the applicable rules of international law."[104] The relevant objectives set out in Paragraph 1 (Article102(1)) are as follows:

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: . . .
> (b) promote conditions of fair competition in the free trade area;
> (c) *increase substantially investment opportunities in the territories of the Parties*; . . .
> (e) *create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes*; and
> (f) establish a framework for further trilateral, regional and multilateral co-operation to expand and enhance the benefits of this Agreement.[105]

Furthermore, Chapter 11 arbitrators are required by Article 1131(1) to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[106] Although not specifically referred to by the Tribunal, but certainly relevant in this regard, are the objectives found in the NAFTA preamble, where yet another reference to the concept of transparency can be

100. *See* Appeal, *supra* note 8, para. 29 (". . . the acts of the State of SLP and the Municipality (which were attributable to Mexico), failed to comply with or adhere to the requirements of Article 1105."). *Id.*

101. *See* Award, *supra* note 16, para. 74.

102. *Id.* para. 76.

103. *Id.*

104. NAFTA, *supra* note 78, art. 102(2).

105. *Id.* art. 102(1) (emphasis added).

106. *Id.* art. 1131(1).

found. "The preamble is [the] part of . . . NAFTA that is of assistance in understanding the objects and meaning of specific detailed provisions."[107] Portions of the NAFTA Preamble state that the Parties involved have agreed to:

> STRENGTHEN the special bonds of friendship and cooperation among their nations;
> CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
> REDUCE distortions to trade;
> ENSURE a predictable commercial framework for business planning and investment;
> BUILD on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation;
> UNDERTAKE each of the preceding in a manner consistent with environmental protection;
> PROMOTE sustainable development;
> STRENGTHEN the development and enforcement of environmental laws and regulations.[108]

By considering the Agreement in its entirety, a tribunal must first start by identifying the meaning of the words in the context that they appear within NAFTA.[109] In doing so, a tribunal must also place particular importance on the object and purpose of the contract, including its preamble, the general objectives stated in the text, and any annexes.[110] For this purpose, the Vienna Convention on the Law of Treaties[111] is an influential tool used by international arbitrators in deciding issues that are before them. Article 31(1)[112] provides that:

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107. *See* S.D. Myers, Inc. v. The Government of Canada, (Nov. 12, 2000) (Schwartz, J., concurring).

108. *See* NAFTA, *supra* note 78, pmbl.

109. *See* Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers, Inc. v. Canada: It is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173 (2001) at 182 ("Successive NAFTA tribunals have declared that the NAFTA's terms must be interpreted in good faith, in accordance with their ordinary meaning, in the context within which they appear, and in light of the objects and purposes of the treaty."). *Id.*

110. *See generally id.*

111. NAFTA, *supra* note 78, art. 102(2); *see also* The Vienna Convention on the Law of Treaties, May 23, 1969, art. 31 & 32, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] (requiring under Article 32 that preparatory work and circumstances of its conclusion are to be referred to as a supplementary means of interpretation when interpretation under Article 31 "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.").

112. Vienna Convention, *supra* note 111, art. 31.

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in light of its object and purpose.* The context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text, including its preamble and annexes:*
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[113]

In the same vein, Article 27[114] provides that a State party to a treaty may not invoke the provisions of the internal law as justification for its failure to perform the treaty.

With this in mind, the Tribunal gave its interpretation of what it understood the reference of "transparency" to mean in light of its context within NAFTA, considering the Agreement's overall objectives. In doing so, a logical interpretation of 1105 included a transparency element as well. In the Tribunal's view, objectives of transparency are interwoven within the entire text, and to interpret 1105 without it would result in an interpretation contrary to NAFTA's purpose. Under this interpretation, the Tribunal defined transparency to include "the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made . . . should be capable of being readily known to all affected investors of another Party."[115] The Tribunal went further to hold that once a federal government becomes aware of any misunderstandings, it is their obligation "to ensure that the correct position is promptly determined and clearly stated" so that investors may proceed, confident that they are obeying all of the relevant laws.[116] Subsequently, the Tribunal held that Mexico failed to provide Metalclad with such a clear and predictable environment.[117]

In essence, the Municipality, through its illegitimate and unprecedented behavior (particularly with respect to its requirement for a construction permit), pulled the rug out from under-

113. *Id.* (emphasis added).
114. *Id.* art. 27.
115. Award, *supra* note 16, para. 76.
116. *Id.*
117. *See id.* paras. 99-101.

neath Metalclad's investment. This unexpected and sudden thwarting of its ability to open and operate the landfill was all the more damaging because Metalclad had relied upon federal assurances that it had obtained all that was required to ensure a solid footing to its investment.[118] Furthermore, even though the Federal Government was fully aware of its Municipal and State actions, it failed to interfere or exercise any governmental authority to alleviate the resulting damage.[119] These contrary governmental actions left Metalclad effectively whipsawed.[120] Therefore, after considering the NAFTA text in its entirety, and stating that it interpreted the language of Article 1105 to be conscious of a general principle of transparency, the Tribunal held that Mexico's actions against Metalclad failed to meet the level of fairness and equitable treatment expressly required within Chapter 11. As a result, the Tribunal found that Mexico breached the requirements of Article 1105.[121]

VI. The British Columbian Supreme Court's Analysis and Overrule of the Arbitration

Justice Tysoe disagrees with the Tribunal's finding that a government's failure to act in a clear, predictable, and transparent manner can constitute a breach of the "fair and equitable treatment" standard contained within Article 1105. He construes "fair and equitable treatment" to be limited to protections found only within "customary international law,"[122] and his overruling of the Tribunal's holding with respect to 1105 rests on three main components. First, Justice Tysoe is critical of the Tribunal's analysis because "no authority was cited or evidence introduced to establish that transparency has become part of customary international law,"[123] and he takes a categorical approach that the Tribunal should only have looked to "customary international law" in its interpretation.[124] Second, the Court states that the Tribunal inappropriately incorporated portions found in Chapter 18 of NAFTA

118. *See id.* paras. 87-89.
119. *See id.*
120. *Id.* The Federal Government was repeatedly giving assurances and granting permits to Metalclad simultaneously as the State and Municipal governments were denying permit requests and doing everything in their power (and then some) to try and thwart any progress towards completion and operation of the landfill. *Id.*
121. *Id.* at 101.
122. *See* Appeal, *supra* note 8, para. 62.
123. *Id.* para. 68.
124. *See id.* para. 62.

to support its reasoning and subsequent analysis of Chapter 11 provisions.[125] Finally, as a result of the two Tribunal actions stated above, Justice Tysoe concludes that "the Tribunal made its decision on the basis of transparency, [and] [t]his was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11."[126] However, in order to more fully appreciate the shortcomings of Justice Tysoe's analysis, it is important that we unpack each of these three components carefully, with all of the previously discussed international and Canadian law, and the various portions of the NAFTA text in mind.

The Court begins its discussion of 1105 by first agreeing with three rationales discussed in *Myers*, a partial NAFTA arbitration award issued shortly after the *Metalclad* award.[127] In *Myers*, the Tribunal asserts that the protections found within 1105 fill "a gap" that otherwise would exist between the protections offered to private investors in Articles 1102 and 1103.[128] Following this assertion, the *Myers* Tribunal articulates its view of both what the "proper approach" should be in interpreting Article 1105,[129] and what is required in order for a Party to be found guilty of "unfair treatment" towards a private investor.[130] Justice Tysoe, in agreement with the *Myers* award, quotes the Tribunal at length regarding these three interpretations.[131] According to the *Myers* Tribunal (and Justice Tysoe), "Article 1105(1) expresses an overall concept. The words of the Article must be read as a whole. The phrases . . . fair and equitable treatment . . . and . . . full protection and security . . . cannot be read in isolation. They must be read in conjunction with the introductory phrase . . . treatment in accordance with international law."[132] Further, the *Myers* Tribunal "considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[133] But the Court's citing of the *Myers* award in the present case fails to provide any

125. *See id.* para. 71.
126. *Id.* para. 72.
127. *See id.* paras. 61-63.
128. *See* S.D. Myers Partial Award, *supra* note 96, para. 259.
129. *See id.* para. 262.
130. *See id.* para. 263.
131. *See* Appeal, *supra* note 8, paras. 61-63.
132. *Id.* at 23; *see also* S.D. Myers Partial Award, *supra* note 96, para. 262.
133. S.D. Myers Partial Award, *supra* note 96, para. 263.

extra support for its argument that the *Metalclad* Tribunal went beyond the scope of 1105. It is possible that the *Metalclad* Tribunal simply found that Mexico met the *Myers* level of "unacceptable treatment." Hence, even though the *Metalclad* award preceded the *Myers* award cited by the Court, the Tribunal's decision still fits within the interpretation given to 1105 by the *Myers* Tribunal that followed.

However, taking one small step beyond the *Myers* interpretation, Justice Tysoe advances his interpretation of 1105, maintaining that "treatment may be perceived to be unfair and inequitable but it will not constitute a breach of Article 1105 unless it is treatment which is not in accordance with international law."[134] Yet, this interpretation fails to acknowledge another equally essential component required in NAFTA Arbitral analysis. NAFTA provisions must additionally be interpreted in light of the Agreement's overall content, objectives, and purpose.[135] Notably, the Court is conveniently silent regarding this consideration. Keeping in mind that this is a highly speculative, amorphous, and constantly evolving field of law, there are no bright line rules that may be utilized to weigh whether Mexico's actions are violative of customary international law levels of fairness, even if NAFTA's context and objectives are not taken into account.[136] Considering this, would not a tribunal consisting of practitioners, experts, and scholars of international law and agreements have a better understanding and breadth of knowledge regarding what concepts and principles are actually found within "customary international law," and what the terms of the NAFTA mean in that context?[137] Further-

134. Appeal, *supra* note 8, para. 62.

135. Vienna Convention, *supra* note 111, art. 31.

136. *See* Gantz, *supra* note 82, at 10650 ("Given the lack of clarity of customary international law in this area, the scope of the protection afforded by the fair and equitable treatment requirement is uncertain."); *see also* William T. Waren, *Paying to Regulate: A Guide to Methanex v. United States and NAFTA Investor Rights,* 31 ENVTL. L. REP. 10986, 8 (Vol. XXXI, August 2001) (espousing that the terms national treatment, minimum treatment, and expropriation are "undefined in NAFTA, and international law provides little precise guidance as to their meaning. The tribunal will have broad discretion to read the standards narrowly or broadly."); *see also* Weiler, *supra* note 83, at 19 (stating that international law is an "ever-expanding body").

137. *See* Gantz, *supra* note 82, at 10648 (asserting that "some of the best known and most highly respected lawyers in North America (or elsewhere) have served or are serving on NAFTA tribunals . . . ."); *see also* Weiler, *supra* note 83, at 20 (stating that the arbitrators are "experts" in international law, and referring to Sir Eli Lauterpacht (who Chaired the Metalclad tribunal) as a "renowned international legal scholar." He notes further, "the international arbitral community is not very large,

more, Justice Tysoe completely neglects looking to the Agreement itself as an interpretive vehicle to assist in attaching a more specific meaning to the terms found within its provisions (which the *Metalclad* Tribunal appropriately did).

The *Metalclad* Tribunal not only considered international law, but it also considered whether it was unfair and inequitable for Mexico to violate the objectives, preamble, and other provisions of NAFTA. Yet, Justice Tysoe speaks of a sole requirement of "treatment not in accordance with international law" as if that is the only area the Tribunal should have looked in interpreting the 1105 text. Further, it appears as though the Court also assumes that there are crystal-clear parameters and definitions regarding "fair and equitable treatment" found within "international law" that the Tribunal failed to follow.[138] It is here that Justice Tysoe slightly diverges from the *Myers* interpretation he cites as support, for according to the Court's reasoning, the Tribunal should have taken a categorical analysis of Article 1105 by interpreting the provisions in isolation from the rest of the NAFTA text.[139] Not even the *Myers* Tribunal interpreted Article 1105 so narrowly.[140]

After what amounts to a substitution of his interpretation of 1105 over the interpretation of the *Metalclad* Tribunal (an action he has no jurisdictional authority to take), Justice Tysoe proceeds to discuss the interpretation given to 1105 by the arbitrators of the *Pope* award,[141] another NAFTA decision that came shortly after *Metalclad*. Significantly, the *Pope* Tribunal diverges from the interpretation of 1105 that the *Myers* Tribunal espouses. The *Pope* arbitrators adopt an "additive" interpretation of 1105, holding that investors are entitled to treatment in accordance with international law, *in addition to* fair and equitable treatment and

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and [Sir Eli Lauterpacht] is a leading member of it. By contrast, very few people are likely to have heard of Justice Tysoe.").

138. *See* Appeal, *supra* note 8, para. 62.

139. *See id.* (Justice Tysoe never mentions interpreting the language of NAFTA by considering the Agreement's purpose and objectives, or the text as a whole. In fact, he even goes as far as to cut out the language that suggests a cumulative approach in all of the references he cites for support.).

140. *See* S.D. Myers Partial Award, *supra* note 96, para. 292 ("The chapters of NAFTA are part of a 'single undertaking.' There appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as cumulative and complementary.").

141. Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, (Apr. 10, 2001), *available at* http://www.naftaclaims.com (last visited Nov. 12, 2002) [hereinafter Pope & Talbot III].

full protection and security.[142] However, the Court disagrees with the *Pope* interpretation by faulting the additive characterization attached to the word "including" found within the text of Article 1105.[143] First, Justice Tysoe blatantly asserts that to interpret the word "including" additively results in a "virtually opposite meaning" than what the Parties intended.[144] Further, after taking it upon himself to deny the word an additive interpretation, Justice Tysoe then refers to the Vienna Convention for support, stating, "[the *Pope* Tribunal's] interpretation is contrary to Article 31(1) of the Vienna Convention, which requires that terms of treaties be given their ordinary meaning."[145]

According to *Webster's New Universal Unabridged Dictionary*,[146] "include" is defined as "to take into account; to consider as part of a whole; [and] to put in a total."[147] With these definitions in mind, it is not unreasonable to interpret "including" as having an additive translation. Specifically as applied by the *Pope* Tribunal, they, in essence, must have interpreted "including" in the following manner: that the fairness elements must also be "included," or "take[n] into account." An equally legitimate interpretation could also be: it is crucial that the fairness elements be "consider[ed] as part of [the] whole" body of international law, and finally, "including" may be interpreted as an assurance that the fairness elements be "put in [the] total" when considering breaches of Article 1105. At a minimum, the word "including" found within the text appears to at least emphasize the "fairness elements," and would seem to stress an extra level of sensitivity to them. The alternative would be to assume that the words following "including" have no significance. In short, if the fairness elements are already contained within principles of international law, why would the Parties bother to additionally refer to them? It is illogical to assume that the Parties to NAFTA agreed to a provision where half of the text consists of redundant language, entirely void of any ancillary meaning.[148]

Additionally, there are many substantial arguments for inter-

142. *Id.* paras. 110-118.

143. *See* Appeal, *supra* note 8, para. 65.

144. *Id.*

145. *Id.*

146. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 923 (2d ed. 1983).

147. *Id.*

148. *See* Pope & Talbot III, *supra* note 141, paras. 105-118 (citing to various authorities, the Pope tribunal provides a very convincing and solid argument for adopting an additive approach to Art. 1105).

preting 1105 in a fashion that pays special attention to the "fairness elements." Significantly, Chapter 11 incorporates norms that have long been established within many Bilateral Investment Treaties (BITs).[149] BITs are treaties entered into between two States. "BITs, like NAFTA, include assurances of nondiscriminatory treatment, treatment in accordance with a minimum international standard, a prohibition on trade-related investment restrictions, and guarantees of compensation when expropriations occur."[150] Norms regarding private investment protections that are similar, and often identical, to principles that are recognized in general international law are consistently found within most BITs.[151]

Compared to the excerpt cited below, it becomes obvious that "the language of Article 1105 grew out of the provisions of BITs negotiated by the United States and other industrialized countries. As Canada points out in the *Pope* arbitration, these treaties are a "principal source" of the general obligations of States with respect to their treatment of foreign investment.[152] The obligations embodied in various BITs are primarily taken from the *Model Bilateral Investment Treaty of 1987*.[153] It provides the following: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security *and* shall in no case be accorded treatment less than that required by international law."[154]

The opinion in the arbitral award of *Pope*, provides a very convincing argument for interpreting the language of Article 1105 consistently with the BITs.[155] As briefly mentioned above, the Tribunal in *Pope* interprets the meaning of Article 1105 as adopting the additive character found in BITs with respect to the "fairness elements" that are found in both contracts.[156] Moreover, the *Pope*

149. *See id.* para. 110 (stating "that the language of Article 1105 grew out of the provisions of bilateral commercial treaties negotiated by the United States and other industrialized countries . . . ."); *see* S.D. Myers Partial Award, *supra* note 96, para. 259; *see* S.D. Myers, Inc. v. The Government of Canada, 17 (Nov. 12, 2000) (Schwartz, J., concurring).

150. *See* S.D. Myers, Inc. v. The Government of Canada, 23 (Nov. 12, 2000) (Schwartz, J., concurring).

151. *See id.*

152. *See* Pope & Talbot III, *supra* note 141, para. 110.

153. Reprinted in K.J. VANDENVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (Deventer, Netherlands 1992) (emphasis added).

154. *Id.* art. II 2.

155. *See generally* Pope & Talbot III, *supra* note 141.

156. *Id.* para. 111.

Tribunal is not alone in this interpretation. Many established international scholars and other authorities have adopted the approach that the language found within BITs make the *additive* interpretation the proper one.[157] According to Mann,

> [T]he terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words . . . [A tribunal] will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable . . . . The terms are to be understood and applied independently and autonomously.[158]

This same interpretation of the "fairness elements" was also held by UNCTAD, stating,

> [T]his approach – fair and equitable treatment with full protection and security on the one hand and treatment no less favorable than that required by international law on the other – suggests that the two sets of standards are not necessarily the same . . . . Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors.[159]

Dolzer and Stevens come to a similar conclusion by submitting that,

> [T]he fact that parties to BITs have considered it necessary to stipulate this [fair and equitable treatment] standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing complementary to the provisions of the BITs.[160]

It should also be noted that prior to the B.C. Supreme Court's decision, this issue had come before various tribunals, and no

157. *Id.* para. 110.

158. F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 244.

159. *See* Pope & Talbot III, *supra* note 141, n.105.

160. R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 60 (1995)

Party to NAFTA ever offered evidence that the NAFTA Parties intended to reject the additive character of the BITs.[161] First, why would NAFTA Parties give more protection to other countries through BITs than to each other through NAFTA, when the United States, Mexico, and Canada share a closer relationship with each other than to many countries with which they have entered into BITs? "[I]t would be difficult to ascribe to the NAFTA Parties an intent to provide each other's investments more limited protections than those granted to other countries not involved jointly in a continent-wide endeavor aimed, among other things, at "increas[ing] substantially investment opportunities in the territories of the Parties."[162]

This is a highly relevant consideration when a tribunal is interpreting and applying various provisions of NAFTA in light of its "context, object and purpose." One of NAFTA's primary goals appears to be a guarantee to investors of a hospitable climate that would provide significant insulation from political risk and incidents of unfair treatment.[163]

Second, as already mentioned, Parties to NAFTA have signed numerous BITs with other countries that do ascribe to the additive interpretation of the fairness elements. A contrary view of the analogous provision found in Article 1105 would result in a more limited right of NAFTA private investors to object to laws, regulations, and administration than is accorded to host country investors as well as those investors and investments from other countries that have entered into BITs with a NAFTA Party. Under these circumstances, Articles 1102 and 1103, which give every NAFTA investor and investment the right to national treatment and most favored nation treatment, would be breached. However, it would be uncertain as to whether a breach could be found in Article 1105, the Article specifically designed to address claims by investors of unfair and inequitable treatment. Therefore, as outlined above, to deny 1105 an additive interpretation in some circumstances has the potential to lead to a judicially inefficient and ludicrous result that grates against the purpose of NAFTA. Specifically, this would mean that Metalclad would be required to look to Articles 1102 and 1103 rather than 1105 because Mexico may have entered into an agreement, such as a BIT with another State or investor that offers more protection

161. Pope & Talbot III, *supra* note 141, para. 114.
162. *Id.* para. 115.
163. *See generally* NAFTA, *supra* note 78.

than the "customary international law" standard of what is considered "fair and equitable treatment." This would be a highly likely result, since most BITs adopt an additive approach to those terms.[164] In this scenario, the party that has concluded such an agreement would be a "more favored nation" and the NAFTA Party (here, Mexico) would have violated either Article 1102, or 1103 in Chapter 11 anyway.

In spite of all of this legislative background and academic discourse supporting an additive interpretation of 1105, the Court nevertheless decides that the word "including" cannot possibly countenance an additive meaning.[165] In doing so, Justice Tysoe supports his interpretation by referring to Article 31(1) of the Vienna Convention,[166] as he cites it, which requires "that the terms of treaties be given their ordinary meaning."[167] Of huge significance (and with some irony), in arguing the importance of deciphering the pertinent language found within international contracts, Justice Tysoe fails to address the rest of the text found within the Article he employs for support. For in addition to giving the terms found within treaties their "ordinary meaning," Article 31(1) of the Vienna Convention also provides that the terms of the treaty be interpreted "in their context and in light of [the treaty's] object and purpose . . . in addition to the text, including its preamble and annexes."[168] Once the additional requirements found within Article 31(1) of the Vienna Convention are discovered, it becomes strikingly more apparent that not only should the Court have upheld the Tribunal's findings, but it also becomes clear that the Court should not have granted itself standing under Canadian law to hear the appeal. By including transparency obligations, the Tribunal still interpreted Article 1105 in a manner that the words could reasonably bear. As we proceed in our analysis it will become more and more evident that what Justice Tysoe is actually arguing, is *his* interpretation of Article 1105, *over* that of other tribunals' interpretation of 1105. As already noted above, please recall that Canadian courts are not to second-guess arbitral interpretations, especially if the words can "reasonably bear" the interpretation given.[169]

After supporting his interpretation of Article 1105 by dissect-

164. *Supra* notes 148-161 and accompanying text.
165. *See* Appeal, *supra* note 8, para. 65.
166. Vienna Convention, *supra* note 111, arts. 31 & 32.
167. *See* Appeal, *supra* note 8, para. 65.
168. Vienna Convention, *supra* note 111, art. 31(1).
169. *See* Appeal, *supra* note 8, para. 52.

ing and misapplying various pieces of relevant authority and analysis, Justice Tysoe then answers in the affirmative to Mexico's claim that the Tribunal "used NAFTA's transparency provisions as a basis for finding a breach of Article 1105."[170] Since Justice Tysoe interprets 1105 in isolation from the rest of NAFTA, and also refuses to allow any additional protection than that given under minimum international standards of customary international law, he subsequently concludes that principles of transparency are not consistently protected according to those minimum standards.[171] Therefore, the Court held that the *Metalclad* Tribunal gave meaning to the text of Article 1105 beyond the scope submitted to arbitration by basing their finding of a breach of Article 1105 primarily on the concept of transparency, a concept the Court interprets to only be found in other portions of NAFTA.[172]

The concept of transparency is also explicitly discussed in Chapter 18 of the NAFTA.[173] Justice Tysoe complains that the Tribunal quoted from Article 1802 in outlining its reasoning and consideration of the applicable law as applied to the facts in the *Metalclad* case, and that by citing Article 1802, "the Tribunal incorrectly stated that transparency was one of the objectives of NAFTA . . . . The principle of transparency is implemented through the provisions of Chapter 18, not Chapter 11."[174] Article 1802 of Chapter 18 explicitly states:

> 1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable *interested persons* and Parties to become acquainted with them.
> 2. To the extent possible, each Party shall
> (a) publish in advance any such measures that it proposes to adopt; and
> (b) provide *interested persons* and Parties a reasonable opportunity to comment on such proposed measures.[175]

Please note that Article 1802 explicitly refers to "interested per-

170. *Id.* para. 66.
171. *See id.*
172. *See id.* para. 67.
173. NAFTA, *supra* note 78, arts. 1802-1803.
174. Appeal, *supra* note 8, para. 71.
175. NAFTA, *supra* note 78, art.1802 (emphasis added).

sons" and Parties. Thus, a private party such as Metalclad, is entitled to the protections expressed in Chapter 18.

Next in its analysis, the Court mysteriously states that Article 102 (NAFTA Objectives) provides that NAFTA is to be interpreted and applied in light of the objectives it sets out. The Court also asserts, however, that "it does not require" that all of the provisions of the NAFTA are to be interpreted in light of those principles and rules.[176] But what are we to make of Justice Tysoe's comment here? Why would a court, tribunal, Party, or anyone for that matter, fail to interpret and apply the objectives of NAFTA in deciding an issue under it? Furthermore, Article 102 may not "require" consideration of NAFTA objectives when interpreting its provisions, but it certainly does not forbid it. It is a reasonable assumption that at a minimum, Article 102 encourages any relevant Party, arbitrator, or court to do so, and it would seem quite reasonable that the Tribunal chose to consider NAFTA's objectives while giving specificity to the meaning of "the fairness elements" in 1105. Consequently, there are many problems with the Court's statement. First, transparency is explicitly stated as an objective in 102. Second, the concept of transparency is also evident in the NAFTA preamble. Finally, transparency is once again reiterated in Articles 1802 and 1803 by explicitly applying to Metalclad as an "interested person."

As shown above, a certain degree of transparency is sprinkled both explicitly and implicitly throughout the entire NAFTA text. Therefore, in considering NAFTA's objectives, preamble, and other annexes, the Tribunal did not "reach beyond its scope" in order to include a minimum principle of procedural fairness and transparency within the protections provided to investors in Article 1105. Further, even if one assumes that it was incorrect to interpret a concept of transparency in Article 1105, it certainly is an interpretation that the words can "reasonably bear." As a result, the Court lacked the authority to overturn the Tribunal's holding, especially considering that one of the explicit purposes of NAFTA is to provide and encourage a more transparent and predictable framework for investors and investments.[177]

The primary mistake in Justice Tysoe's analysis is that the Tribunal did not hold that because Mexico breached the transparency provisions of NAFTA Chapter 18 (claims of a Chapter 18 breach may only be brought by a Party, not a private investor such

176. *See* Appeal, *supra* note 8, para. 71.
177. *See* NAFTA, *supra* note 78, at pmbl.

as Metalclad),[178] that it owed compensation under Chapter 11. Rather, the Tribunal was merely employing an international approach that emphasizes contextual interpretation in its analysis.[179] This assists tribunals in giving specificity to general terms found within various provisions of an international agreement. Here, the Tribunal interpreted the international "fairness elements" of 1105 to include principles of transparency. It did so by taking into account the underlying international values found within NAFTA's text. "Different chapters of NAFTA are . . . part of a single undertaking and there appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as cumulative and complementary."[180] This same view, that different chapters of NAFTA can overlap, and that the rights provided within it may be cumulative, has also been accepted by the NAFTA Tribunal in *S.D. Meyers*, which stated, "International law obliges tribunals to look at the object and purpose of a provision."[181] International law also requires a tribunal to look at the context of a provision.[182]

For this purpose, the most immediate context for deciphering the meaning behind the language within Chapter 11 would be to look to the language chosen, and its purpose within the entire NAFTA text itself. It becomes evident that the Agreement explicitly discusses the objective to promote principles of transparency in various places. Therefore, Justice Tysoe's holding, that "there are no transparency obligations contained in Chapter 11,"[183] could only have been reached by interpreting the text of Article 1105 in isolation. Once again, this is a matter of interpretation. The Court assumes the categorical and irrationally narrow position that because transparency is referred to in Article 1802 and other provisions of the NAFTA, it is impossible for it to be addressed anywhere else.[184] This interpretation is inaccurate and illogical. Moreover, a principle of procedural fairness and transparency is

178. *See id.* arts. 1116-1117 (limits claims brought by investors to only those within Chapter 11. The Party, on the investor's behalf, must bring all others).

179. *See* Weiler, *supra* note 83, at 19 ("[the Tribunal was] employing an international lawyer's approach to explaining how the "principle of transparency" can be found throughout the ever-expanding body of international law, including other provisions of the NAFTA text.").

180. *See* S.D. Myers, Inc. v. The Government of Canada, 63 (Nov. 12, 2000) (Schwartz, J., concurring).

181. *Id.* at 71.

182. *Id.* at 72.

183. Appeal, *supra* note 8, para. 72.

184. *Id.* at 71-72.

not a "state of the art" concept, and is found, at least implicitly, within minimal standards of customary international law.[185] Furthermore, in light of all of the relevant legislative history discussed in this note, the terms found in 1105 can "reasonably bear" an interpretation of some minimum principle of transparency. Therefore, the Court should not have upset the NAFTA Tribunal's finding because it had no standing under Canadian law to do so.

VII. Clarification of NAFTA's Investor-State Provision

This note cannot adequately be concluded without mentioning briefly the clarification[186] announced by the NAFTA Parties regarding the interpretations to be given Chapter 11 investor protections. The clarification is partially an attempt by the Parties to narrow arbitral interpretations of what "fair and equitable treatment" entails. The relevant portions are as follows:

> B. Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> 2. The concepts of "fair and equitable treatment" and "full protection and security" *do not require* treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[187]

Even with the new clarification, the Tribunal's finding of an Article 1105 breach still holds its muster, albeit with less force. "The addition of the word 'customary,' which is not included in the orig-

185. *See* WTO, Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 55 WT/DS58/AB/R, para. 183 (holding that "It is clear to us that Article X:3 of GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of regulations . . . .").

186. *See* Notes of Interpretation of Certain Chapter 11 Provisions (Dept. of Foreign Affairs and Int'l Trade July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp (last visited November 9, 2002) [hereinafter Interpretation of Chapter 11].

187. *Id.* § 2 (emphasis added).

inal Article 1105(1), should limit the standard of treatment to well-established norms of treatment . . . ."[188] As previously mentioned, principles of procedural fairness and transparency are found implicitly and explicitly throughout customary international law. Yet, this is an amorphous and oftentimes loosely defined field.[189] Under these circumstances, a tribunal is obliged to turn to NAFTA to further define its text where customary international law is somewhat unclear. Further, where one holding will result in a finding perfectly in line with NAFTA's objectives and intent, and a contrary holding will result in a finding opposed to them, an interpretation considering the text of NAFTA in addition to customary international law to come to the former result does not violate the clarification.

Significantly, the Parties chose the phrase, "do[es] not require" when clarifying the concepts of "fair and equitable treatment" found in Article 1105 with respect to treatment "in addition or beyond that" required under customary international law.[190] "This language represents an attempt to ensure that Chapter 11 panels are only allowed to consider what constitutes fair and equitable treatment within the context of NAFTA's Chapter 11 and a limited series of norms that have been established in customary international law."[191] The Parties did not choose phrases such as "do[es] not consider" or "do[es] not entail" treatment in addition to customary international law. Therefore, this gives a NAFTA tribunal some discretion in interpreting "gray areas" of customary international law, but it also places more emphasis on interpreting those provisions of Chapter 11 with a focused scope and set of parameters in mind. Consequently, the *Metalclad* Tribunal still came to a justifiable holding with respect to its finding that Mexico had not treated Metalclad fairly from a customary international perspective.

The clarification also addresses when a Chapter 11 tribunal has made a determination that there has been a breach of another provision of NAFTA.[192] In this circumstance, the clarification explicitly states this "does not establish that there has been a

188. *U.S., Canada, Mexico Agree to Clarify NAFTA's Investor-State Provision*, 19:31 INSIDE U.S. TRADE, Aug. 3, 2001, at 21 [hereinafter *Clarify NAFTA*].

189. WTO, Import Prohibition of Certain Shrimp and Shrimp Products, *supra* note 185.

190. Interpretation of Chapter 11, *supra* note 186, § B(2).

191. *Clarify NAFTA*, *supra* note 188, at 22.

192. Interpretation of Chapter 11, *supra* note 186, § B(3).

breach of Article 1105(1)."[193] Importantly, the holding made by the *Metalclad* Tribunal additionally survives this limitation, for although the Tribunal found a breach in another provision of NAFTA (Chapter 18), it also found a breach under Article 1105. The Tribunal found a breach of Article 1105 because it interpreted principles of transparency and procedural fairness found scattered throughout the entire NAFTA text to be within Article 1105 as well. Needless to say, "[a] determination that there has been a breach of another provision of the NAFTA . . . does not establish that there has been a breach of Article 1105."[194] However, it also does not necessarily establish that there has *not* been a breach of Article 1105.

Although it is apparent in the clarification that the Parties finally got their wish to narrow private investment protections under the provisions of Chapter 11, "it will be difficult to assess the impact of the clarification until it is actually applied by panelists in disputes."[195] Thus, as of the time of this note's completion, there has been no further published commentary or tribunal interpretation of the clarification regarding Chapter 11 to engender any further discussion as it relates to the Metalclad dispute.

VIII. CONCLUSION

It is evident that Justice Tysoe substituted his opinion for that of the Tribunal's because he felt that the Tribunal's "error" was so fundamental and beyond the scope submitted for arbitration that the Tribunal overstepped its boundaries to make the finding it did under Article 1105 of Chapter 11. As a result, the message sent by the B.C. Supreme Court's overruling is that NAFTA Parties, by arguing that they are not required under Chapter 11 to provide compensation when they fail to act in a fair or transparent manner, will certainly instill concern for private investors with foreign investment interests in any of the Parties within NAFTA. This attitude, displayed by NAFTA Parties and expressed in the clarification, if left unchecked, is not likely to "increase substantially investment opportunities"[196] or "ensure a predictable commercial framework for business planning and investment."[197] On the other hand, the B.C. Supreme Court's deci-

193. *Id.*
194. *Id.*
195. *Clarify NAFTA*, *supra* note 188, at 21.
196. NAFTA, *supra* note 78, art. 102(1).
197. *Id.* at pmbl.

sion may not be a great concern for investors arguing their case before international tribunals because its holdings are limited in their precidential authority only to Canadian courts, and may have virtually no value in the international context. As mentioned in the beginning of this note, international law is argued before international arbitrators, and an opinion by the B.C. Supreme Court regarding what it thinks "customary international law" should mean may not be very significant to most international scholars and arbitrators when deciding future NAFTA Chapter 11 controversies.

To conclude, when viewed in isolation, the *Metalclad* Appeal to the B.C. Supreme Court appears to be a victory for the private investor against interference from NAFTA Parties because Justice Tysoe predominantly upheld the Tribunal's monetary damages figure. However, when viewed in its historical context, the opinion's relevance is not so clear. Undoubtedly, time will tell whether Justice Tysoe's opinion will influence other Chapter 11 tribunals to interpret NAFTA categorically and in isolation or whether the opinion will take a back seat to the analysis of arbitral tribunal decisions that precede and succeed it. Either way, "the biggest losers of all [are] the people of Mexico who continue to have to live in a country that produces ten million tons of hazardous waste a year and has only one facility in the whole country to handle it."[198]

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198. Anthony DePalma, *Mexico is Ordered to Pay a U.S. Company $16.7 Million*, N.Y. TIMES, Aug. 31, 2000, at C4 (quoting Grant S. Kesler, President and Chief Executive Officer of Metalclad); *see also* Danielle Knight, *Mexico Ordered to Pay U.S. Company $17 Million*, INT'L PRESS SERV. (Aug. 31, 2000), *available at* http://www.globalpolicy.org/socecon/environment/nafta/html (last visited Nov. 12, 2001).

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