

With respect to the second question—that of the exceptions to the principle of nonretroactivity—the ECHR found no fault with the German courts' application of Radbruch's formula in the light of international human rights. This approach has been criticized as being "natural law jurisprudence disguised as enlightened positivism,"⁴¹ but the fact remains that the refusal to accept the GDR practice as a defense serves to uphold basic human rights, especially the right to life, under an applicable international treaty—a treaty that is itself positive law. That said, the judgments do not satisfactorily answer the question of which violations of international law warrant an exception to the principle of nonretroactivity. Some jurists have suggested that only crimes under international law should be capable of justifying such exceptions.⁴² The decisions of the Federal Court of Justice, the Federal Constitutional Court, and ECHR, however, could be understood as giving a different answer. They are all based on the position that no state has the right to use deadly force to imprison its own population within its borders. This position, broadly conceived, may reflect what some commentators see as the emerging human right to democracy: as applied to this situation, state interests cannot justify restrictions on fundamental human rights if the purpose of those restrictions is the preservation of an undemocratic order that does not respect the rule of law. By the same token, the principle of nonretroactivity cannot be invoked in such circumstances to avoid prosecution for unjustified killing.

Although the *Streletz* and *W.* judgments concerned the unique case of the FRG's having to judge the crimes committed by officials of another state—the GDR—under the laws of that very state, the fundamental tension between positive law and the demands of justice was the same as that for any state facing its own repressive past. Since the courts of such a state have the authority to reinterpret statutes, the question is whether defendants can plead that they could not foresee the change in interpretation and that their acts, therefore, were excused. The ECHR's reasoning in *Streletz* would preclude such a plea, however. All state officials would be required to assess whether their actions would infringe upon fundamental human rights and have the effect of maintaining a regime that disregards the people's rights to democracy and to live in a society governed by the rule of law.

BEATE RUDOLF

University of Düsseldorf/Tulane Law School

NAFTA—arbitration—scope of jurisdiction to arbitrate—requirement of transparency—expropriation resulting from withholding governmental permits and imposing new environmental restrictions—damages for expropriation—enforcement of arbitral award

METALCLAD CORPORATION V. MEXICO. ICSID Case No. ARB(AF)/97/1. 40 ILM 36 (2001), available at <<http://www.worldbank.org/icsid/cases/awards.htm>>.

NAFTA Chapter 11 Arbitral Tribunal, August 30, 2000.

MEXICO V. METALCLAD CORPORATION. 2001 B.C.S.C. 664, available at <<http://www.courts.gov.bc.ca>>.

Supreme Court of British Columbia, May 2, 2001.

In 1993, Metalclad Corporation purchased the Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (COTERIN) in order to build and operate a hazardous-

⁴¹ Matthias J. Herdegen, *Unjust Laws, Human Rights, and the German Constitution: Germany's Recent Confrontation with the Past*, 32 COLUM. J. TRANSNAT'L L. 591, 602 (1995).

⁴² See, e.g., Thilo Rensmann, *BVerfGE 95, 96-Mauerschützen*, in VERFASSUNGSRECHTSPRECHUNG 604, 610–11 (Jörg Menzel ed., 2000). Similarly, in concurring opinions in the instant cases, Judges Loucaides (in both the *Streletz* and *W.* ECHR judgments, *supra* notes 1 & 2, respectively) and Levits (*W.* ECHR judgment, *supra* note 2, paras. 13–18, following Loucaides, J.) proposed to find against the applicants because their conduct constituted a crime against humanity.

waste transfer station and landfill in Guadalucazar, San Luis Potosi. Although the federal government of Mexico and the state government of San Luis Potosi had granted COTERIN permits to construct and operate the landfill, the municipality of Guadalucazar denied a municipal construction permit, and the governor of San Luis Potosi subsequently declared an area encompassing the landfill to be an ecological reserve. An arbitral tribunal (Tribunal), convened under Chapter 11 of the North American Free Trade Agreement (NAFTA),¹ found that the lack of transparency in Mexico's regulatory requirements constituted a denial of fair and equitable treatment in violation of NAFTA Article 1105, and that Mexico's actions to prevent Metalclad from operating the landfill constituted an expropriation under Article 1110.² On Mexico's application to set aside the award, the Supreme Court of British Columbia—the provincial trial court—held that the Tribunal's findings concerning fair and equitable treatment and also concerning expropriation based on Mexico's conduct prior to the creation of the ecological reserve were beyond the scope of the submission to arbitration, but that the award could be sustained on the ground that the ecological decree itself was an expropriation.³

The complex history of the case began in April 1993, when Metalclad obtained a six-month option to purchase COTERIN, which had previously obtained federal permits to build a hazardous-waste transfer station and hazardous-waste landfill in the valley of La Pedrera, seventy kilometers from the city of Guadalucazar. In May, the state government of San Luis Potosi granted COTERIN a land-use permit for the landfill. In August, the federal government issued a permit to operate the landfill. In September, having been assured by federal officials that it had all the permits required, Metalclad exercised its option to purchase COTERIN.⁴

Metalclad began construction of the landfill in May 1994. In October, the municipality of Guadalucazar ordered that construction stop because no municipal construction permit had been issued. In November, on the advice of federal officials, Metalclad applied for a municipal permit and resumed construction. The landfill was completed in March 1995, but demonstrations prevented its opening. In November, Metalclad and the federal government entered an agreement (*Convenio*) that provided for operation of the landfill while requiring Metalclad to remediate deficiencies that had been detected by an environmental audit and to designate thirty-four hectares as a buffer zone for the conservation of endemic species. The governor of San Luis Potosi, however, opposed the *Convenio*, and in December, the municipality denied Metalclad's application for a construction permit. The municipality subsequently filed an administrative complaint with the federal government challenging the *Convenio*. When this complaint was denied, the municipality filed an *amparo* proceeding in Mexican courts challenging the denial, and an injunction was issued barring Metalclad from operating the landfill.⁵

After further negotiations with the state of San Luis Potosi failed, Metalclad brought its arbitral claim under Chapter 11 of NAFTA on January 2, 1997. In September, three days before the end of his term, the governor of San Luis Potosi issued an Ecological Decree declaring an area encompassing the landfill to be a Natural Area for the protection of rare cactus.⁶

¹ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 ILM 289 & 605 (1993) [hereinafter NAFTA].

² Metalclad Corp. v. Mexico (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), 40 ILM 36 (2001), at <<http://www.worldbank.org/icsid/cases/awards.htm>> [hereinafter Arbitral award]. The members of the arbitral tribunal (Tribunal) were Elihu Lauterpacht (president), Benjamin R. Civiletti, and José Luis Siqueiros.

³ Mexico v. Metalclad Corp., 2001 B.C.S.C. 644 (B.C. Sup. Ct. May 2, 2001), at <<http://www.courts.gov.bc.ca>> [hereinafter Supreme Court judgment].

⁴ Arbitral award, *supra* note 2, paras. 28–36, 40 ILM at 41–42.

⁵ *Id.*, paras. 37–56, 40 ILM at 42–44.

⁶ *Id.*, paras. 58–63, 40 ILM at 44.

As an initial matter, the Tribunal held that Mexico was responsible under NAFTA for the acts of San Luis Potosi and Guadalupe, noting that this holding was in accordance with both the text of NAFTA and established rules of customary international law.⁷ The Tribunal then turned to Metalclad's claim that Mexico had breached its obligation under NAFTA Article 1105(1) to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."⁸ In interpreting the phrase "fair and equitable treatment," the Tribunal followed Article 102(2)'s instruction to look to NAFTA's stated objectives.⁹ "These objectives specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties."¹⁰ The Tribunal interpreted transparency as imposing two related obligations. First,

all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.¹¹

Second, "Once the authorities of the central government of any Party . . . become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated"¹²

The Tribunal noted that Metalclad had been assured by federal officials prior to purchasing COTERIN that it had all the permits necessary.¹³ The Tribunal further interpreted Mexico's General Ecology Law of 1988 as giving the federal government exclusive authority over hazardous-waste landfills and as limiting the municipal government's authority to "construction considerations."¹⁴ The Tribunal faulted the municipality of Guadalupe for its delay in asserting the need for a municipal permit, for denying Metalclad the opportunity to appear at the meeting where the permit application was considered, and for denying that permit on environmental grounds.¹⁵

⁷ *Id.*, para. 73, 40 ILM at 47. See NAFTA, *supra* note 1, Art. 105, 32 ILM at 298 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

⁸ NAFTA, *supra* note 1, Art. 1105(1), 32 ILM at 639.

⁹ *Id.*, Art. 102(2), 32 ILM at 297.

¹⁰ Arbitral award, *supra* note 2, para. 70, 40 ILM at 46 (citing NAFTA, 102(1)(c)). The text of Article 102(1) provides, in relevant part: "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 . . . (c) increase substantially investment opportunities in the territories of the Parties" NAFTA, *supra* note 1, Art. 102(1), 32 ILM at 297. The Tribunal also quoted paragraph 6 of NAFTA's preamble, which says that the parties resolve to "ENSURE a predictable commercial framework for business planning and investment," and Article 1802(1), which provides that "[e]ach Party shall ensure that its laws, regulations, procedures and administrative regulations 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." See Arbitral award, *supra* note 2, para. 71, 40 ILM at 46.

¹¹ Arbitral award, *supra* note 2, para. 76, 40 ILM at 47.

¹² *Id.*, 40 ILM at 47.

¹³ *Id.*, para. 80, 40 ILM at 48.

¹⁴ *Id.*, paras. 82–86, 40 ILM at 48. The Tribunal also inferred from the municipality's challenge of the *Convenio* that the municipality itself lacked confidence in its right to deny permission for the landfill solely by denying a municipal construction permit. *Id.*, para. 94, 40 ILM at 49.

¹⁵ *Id.*, paras. 86–87, 90–93, 40 ILM at 48–49. The Tribunal stated that its conclusion was not affected by the "environmental measures" provision of Article 1114. See NAFTA, *supra* note 1, Art. 1114(1), 32 ILM at 642 ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."). The Tribunal reasoned that "[t]he conclusion of the *Convenio* and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns." Arbitral award, *supra* note 2, para. 98, 40 ILM at 49.

The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.¹⁶

The Tribunal further held that Guadalcazar's conduct constituted an expropriation in violation of Article 1110.¹⁷ It observed that

expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.¹⁸

The Tribunal held that by permitting Guadalcazar's unfair and inequitable treatment, Mexico had "taken a measure tantamount to expropriation"¹⁹ and that Guadalcazar's conduct, when considered "together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount[s] to an indirect expropriation."²⁰

Finally, "[a]lthough not strictly necessary for its conclusion," the Tribunal found that the "implementation of the Ecological Decree" issued by the governor of San Luis Potosi "would, in and of itself, constitute an act tantamount to expropriation."²¹ The Tribunal considered the "motivation or intent" of the decree irrelevant to the question of expropriation.²²

With respect to compensation, the Tribunal found that damages under Articles 1105 and 1110 would be the same since Metalclad had completely lost its investment.²³ The Tribunal rejected a discounted cash-flow analysis "because the landfill was never operative and any award based on future profits would be wholly speculative."²⁴ Instead, the Tribunal awarded damages based on "Metalclad's actual investment" in the project,²⁵ plus 6 percent interest from the date that Guadalcazar denied the municipal construction permit,²⁶ for a total award of \$16,685,000.²⁷

¹⁶ Arbitral award, *supra* note 2, para. 88, 40 ILM at 49.

¹⁷ NAFTA, *supra* note 1, Art. 1110(1), 32 ILM at 641 ("No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . .").

¹⁸ Arbitral award, *supra* note 2, para. 103, 40 ILM at 50.

¹⁹ *Id.*, para. 104, 40 ILM at 50.

²⁰ *Id.*, para. 107, 40 ILM at 50. The Tribunal found this case similar to *Biloune v. Ghana Investments Centre*, 95 ILR 183, 207-10 (1989/90), in which the tribunal had found an indirect expropriation caused by a stop-work order based on the absence of a building permit when the investor had justifiably relied on the representations of a government-affiliated entity in beginning construction. Arbitral award, *supra* note 2, para. 108, 40 ILM at 50-51.

²¹ Arbitral award, *supra* note 2, paras. 109-11, 40 ILM at 51. Mexico argued that the decree was outside the Tribunal's jurisdiction because it was enacted after the Notice of Intent to Submit a Claim was filed. The Tribunal, however, found that Metalclad's claims regarding the decree were properly presented under Article 48 of the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID), at <<http://www.worldbank.org/icsid/facility/facility.htm>>, which allows the addition of ancillary claims not later than the claimant's reply. Arbitral award, *supra* note 2, paras. 64-69, 40 ILM at 45-46. "A contrary holding," the Tribunal noted, "would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity." *Id.*, para. 67, 40 ILM at 46.

²² Arbitral award, *supra* note 2, para. 111, 40 ILM at 51.

²³ *Id.*, para. 113, 40 ILM at 51.

²⁴ *Id.*, para. 121, 40 ILM at 52. Metalclad had claimed approximately \$90 million in damages under a discounted cash-flow analysis. *Id.*, para. 114, 40 ILM at 51.

²⁵ *Id.*, para. 122, 40 ILM at 52. The Tribunal subtracted amounts invested by Metalclad prior to 1993, the year COTERIN was purchased, *id.*, para. 125, 40 ILM at 53, and "bundled" costs incurred on other sites in Mexico, *id.*, para. 126, 40 ILM at 53.

²⁶ *Id.*, para. 128, 40 ILM at 53.

²⁷ *Id.*, para. 131, 40 ILM at 54.

Mexico then sought to have the award set aside. Because the site of the arbitration had been Vancouver, British Columbia,²⁸ Mexico filed its application with the Supreme Court of that province. Justice David Tysoe held that his review of the award was governed by British Columbia's International Commercial Arbitration Act (ICAA),²⁹ which is based on the UNCITRAL [UN Commission on International Trade Law] Model Law on International Commercial Arbitration.³⁰ He reasoned that "the primary relationship between Metalclad and Mexico was one of investing"³¹ and that the ICAA applied to relationships of investing.³² He rejected Mexico and Canada's argument that the standard of review under the ICAA be determined by a "pragmatic and functional approach."³³ He held that the court's review of the award was limited to the grounds set forth in ICAA Section 34(2) and, more specifically, to whether "the Tribunal made decisions on matters beyond the scope of the submission to arbitration by deciding upon matters outside Chapter 11."³⁴

Justice Tysoe then held that the Tribunal's finding of unfair and inequitable treatment based on a lack of transparency went "beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11."³⁵ Agreeing with the Chapter 11 tribunal's award in *S.D. Myers, Inc. v. Canada*,³⁶ and disagreeing with a different tribunal's award in *Pope & Talbot, Inc. v. Canada*,³⁷ he reasoned that the text of Article 1105 prohibited only such unfair or inequitable treatment as violated international law.³⁸ He further reasoned that "[i]n using the words 'international law', Article 1105 is referring to customary international law" rather than to treaty law.³⁹ He faulted the Tribunal for citing "[n]o authority . . . to establish that transparency has become part of customary international law."⁴⁰ In his view, the Tribunal improperly imported into Chapter 11 a transparency obligation from Chapter 18.⁴¹

²⁸ *Id.*, para. 11, 40 ILM at 38.

²⁹ R.S.B.C. 1996, c. 233 [hereinafter ICAA].

³⁰ UN Doc. A/40/17, Annex 1 (1985), reprinted in 24 ILM 1302 (1985). See Supreme Court judgment, *supra* note 3, paras. 39–56.

³¹ Supreme Court judgment, *supra* note 3, para. 46.

³² *Id.*, para. 44. Justice Tysoe relied on Section 1(6) of the ICAA, which provides that "[a]n arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following: . . . (p) investing." Supreme Court judgment, *supra* note 3, para. 41. He also relied on the UNCITRAL report on its Model Law on International Commercial Arbitration: "[t]he term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature." Supreme Court judgment, *supra* note 3, para. 43 (quoting UN Doc. A/40/17, 24 ILM at 1302 n.**). He rejected Mexico's argument that the award should be governed instead by British Columbia's Commercial Arbitration Act, which would have allowed the court to review issues of law decided by the Tribunal. *Id.*, para. 39.

³³ Supreme Court judgment, *supra* note 3, paras. 53–54. In Canada, the pragmatic and functional approach applies to judicial review of domestic administrative tribunals. See Pushpanathan v. Canada, [1998] 1 S.C.R. 982. Canada sought leave to intervene because, as a party to NAFTA, it has an interest in NAFTA's interpretation.

³⁴ Supreme Court judgment, *supra* note 3, para. 67; see *id.*, para. 50.

³⁵ *Id.*, para. 72.

³⁶ See *S.D. Myers, Inc. v. Canada, Partial Award* (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000), at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp>>.

³⁷ *Pope & Talbot, Inc. v. Canada, Merits, Phase 2* (NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001), at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp>>.

³⁸ Supreme Court judgment, *supra* note 3, paras. 60–65. See NAFTA, *supra* note 1, Art. 1105(1), 32 ILM at 639 ("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.")

³⁹ Supreme Court judgment, *supra* note 3, para. 62. On July 31, 2001, the NAFTA parties exercised their authority under Article 1131(2) to issue a binding interpretation of Chapter 11's text. This interpretation confirms both that "fair and equitable treatment" . . . do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment," and that "[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)." NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, at B(2)–(3) (July 31, 2001), at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp>>.

⁴⁰ Supreme Court judgment, *supra* note 3, para. 68.

⁴¹ *Id.*, para. 71.

On the question of expropriation prior to the Ecological Decree, Justice Tysoe found that “the Tribunal’s analysis of Article 1105 infected its analysis of Article 1110” because the measures deemed to constitute an expropriation were Mexico’s failures to ensure transparency.⁴² He held that the award could be sustained, however, on the ground that the Ecological Decree itself constituted an expropriation.⁴³ He noted that “[t]he Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110.”⁴⁴ But he also observed that “the definition of expropriation is a question of law with which this Court is not entitled to interfere under the *International [Commercial Arbitration Act]*.”⁴⁵ Since the Tribunal found that the Ecological Decree “had the effect of barring forever the operation of Metalclad’s landfill,” its “conclusion that the issuance of the Decree was an act tantamount to expropriation is not patently unreasonable.”⁴⁶

After rejecting Mexico’s arguments that the award should be set aside because of Metalclad’s improper acts⁴⁷ or because of the Tribunal’s failure to address all the questions presented to it,⁴⁸ Justice Tysoe set aside the award only to the extent of the interest accrued between December 5, 1995 (the date on which Guadalcazar denied the municipal construction permit, which was the point at which the Tribunal had determined that Mexico breached Articles 1105 and 1110) and September 20, 1997 (the date of the Ecological Decree that Justice Tysoe held to be an expropriation).⁴⁹ Because Metalclad had successfully resisted Mexico’s application to have the award set aside in its entirety, he ordered Mexico to pay Metalclad 75 percent of its costs in the proceeding.⁵⁰ Mexico filed a notice of appeal to the British Columbia Court of Appeal at the end of May, 2001,⁵¹ but the parties reached a preliminary agreement in June to settle the case for \$15,626,260.⁵²

* * * *

One often thinks of courts as being concerned with setting precedents to guide future conduct, and of arbitrators as being both less concerned with the content of the law and

⁴² *Id.*, para. 78. Justice Tysoe also found that the Tribunal did not independently rely on the award in *Biloune v. Ghana Investments Centre*, 95 ILR 183 (1989/90), and that *Biloune* was distinguishable. Supreme Court judgment, *supra* note 3, para. 80.

⁴³ Supreme Court judgment, *supra* note 3, paras. 81–105. Justice Tysoe agreed with the Tribunal that Article 48 of the ICSID Additional Facility Rules, *supra* note 21, allowed Metalclad to add this claim after submitting its claim to arbitration. *Id.*, paras. 86–91.

⁴⁴ Supreme Court judgment, *supra* note 3, para. 99; see *supra* note 18 and accompanying text.

⁴⁵ Supreme Court judgment, *supra* note 3, para. 99.

⁴⁶ *Id.*, para. 100. Mexico had argued that the court could set aside an award under the ICAA if the award was “patently unreasonable.” While expressing some doubt about whether the domestic “patently unreasonable” test applied under the act, Justice Tysoe found it unnecessary to decide the question because the Tribunal’s decision was not “patently unreasonable.” *Id.*, para. 97.

⁴⁷ Mexico alleged that Metalclad had bribed a Mexican federal official, one of its chief witnesses, regarding representations that Mexican federal officials made to Metalclad, and that Metalclad had tried to deceive the Tribunal by claiming as damages expenses unrelated to the landfill. Justice Tysoe found that the first allegation had not been proven, *id.*, paras. 110–12, and that the Tribunal had not relied on the unrelated expenses in making its award, *id.*, paras. 113–17.

⁴⁸ Article 53(1) of the ICSID Additional Facility Rules, *supra* note 21, states: “The award shall be made in writing, shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.” Rejecting Mexico’s reliance on annulment-committee decisions interpreting an analogous provision in the International Convention on Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 [hereinafter ICSID Convention], Justice Tysoe said that “[i]t 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.” Supreme Court judgment, *supra* note 3, para. 122. He further noted that setting aside an award under the ICAA was discretionary and that, because Mexico had failed to ask the Tribunal itself to address questions omitted from the award (as permitted by Article 58 of the ICSID Additional Facility Rules), he would not exercise his discretion to set the award aside on that basis. *Id.*, paras. 131–32.

⁴⁹ Supreme Court judgment, *supra* note 3, paras. 134–35.

⁵⁰ *Id.*, para. 137.

⁵¹ Metalclad Corp., Press Release (May 24, 2001).

⁵² Metalclad Corp., Press Release (June 13, 2001).

more willing to fashion compromises to satisfy the parties. In *Metalclad*, however, those roles were reversed. The arbitral tribunal tried hard to advance international law concerning foreign investment by finding that “fair and equitable treatment” required transparency and by adopting an expansive definition of expropriation. It was Justice Tysoe who gave each party what it wanted most—setting aside for Mexico the transparency aspects of the award, while giving Metalclad most of its money—but at the cost of consistency in the application of British Columbia’s ICAA. More broadly, the case may lead one to wonder whether it is appropriate to allow national courts to review Chapter 11 awards.

Although the relevant part of the award has now been set aside, *Metalclad* appears to have been the first arbitral decision to have found a breach of the duty of “fair and equitable treatment.”⁵³ Provisions establishing such a duty have been included in a large number of bilateral investment treaties.⁵⁴ To give content to this general concept, the Tribunal looked to other NAFTA provisions, specifically references in its statement of objectives and in Article 1802 to transparency, and in its preamble and statement of objectives to creating a “predictable commercial framework” for investment and to increasing “investment opportunities.”⁵⁵ It was this reasoning, of course, that led Justice Tysoe to conclude that the Tribunal had made “decisions on matters beyond the scope of Chapter 11.”⁵⁶

Justice Tysoe’s ultimate conclusion, however, depended on two propositions: (1) that the phrase “international law” in Article 1105 means customary international law and not treaty law,⁵⁷ and (2) that the Tribunal was not applying customary international law when it concluded that “fair and equitable treatment” required transparency.⁵⁸ On the first point, neither the text of Article 1105 nor the Tribunal’s award is completely clear.⁵⁹ Assuming, however, that the Tribunal did read “international law” to include treaty law, this interpretation

⁵³ Shortly after the *Metalclad* Award, a second NAFTA tribunal found a breach of “fair and equitable treatment” in *S.D. Myers, Inc. v. Canada*. See *supra* note 36 and accompanying text.

⁵⁴ UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, *BILATERAL INVESTMENT TREATIES* 41–45 (1988). The obligation of fair and equitable treatment is also found in Article 1 of the Organization for Economic Co-operation and Development Draft Convention on the Protection of Foreign Property, 7 ILM 117, 119 (1968) (“Each party shall at all times ensure fair and equitable treatment to the property of the nationals of other Parties.”). The commentary to Article 1 states: “The phrase ‘fair and equitable treatment’, customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals.” *Id.* at 120.

There has been some dispute about whether the provision for “fair and equitable treatment” in bilateral investment treaties extends beyond the protections of customary international law. F. A. Mann maintained that it did, and opposed efforts to equate “fair and equitable treatment” with an international minimum standard. F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT’L L. 241, 244 (1981), reprinted in F. A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 234, 238 (1990) (“The 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.”). The NAFTA parties, however, have now clarified that as used in Article 1105, the phrase “fair and equitable treatment” does not go beyond the requirements of customary international law. See *supra* note 39.

⁵⁵ See *supra* note 10 and accompanying text. This analysis reminds one of the World Trade Organization (WTO) Appellate Body’s interpretation in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. DS58/AB/R (1998), reprinted in 38 ILM 118, 172–74 (1999), of Article XX’s similarly general phrase “arbitrary discrimination” as requiring transparency in light of other provisions of the General Agreement on Tariffs and Trade. See generally Gregory Shaffer, Case Report: United States—Import Prohibition of Certain Shrimp and Shrimp Products, 93 AJIL 507 (1999).

⁵⁶ Supreme Court judgment, *supra* note 3, para. 67; see *supra* notes 35–41 and accompanying text.

⁵⁷ Supreme Court judgment, *supra* note 3, para. 62.

⁵⁸ Supreme Court judgment, *supra* note 3, paras. 68–72.

⁵⁹ Article 1105 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.” 32 ILM at 639. The Tribunal’s discussion strongly suggests that it read “international law” to include treaty law, see, e.g. Arbitral award, *supra* note 2, paras. 70–71, 40 ILM at 46; *id.*, paras. 74–76, 40 ILM at 47, but the award never addresses the issue explicitly. On July 31, 2001—after both the Tribunal’s award and Justice Tysoe’s judgment—the NAFTA parties issued an Article 1131 (2) interpretation of Article 1105, limiting it to violations of customary international law, see *supra* note 39.

would seem to involve an issue of law on which Justice Tysoe had no authority under the ICAA to second-guess the Tribunal.⁶⁰ Having concluded that Article 1105 was limited to customary international law, he then faulted the Tribunal for citing “no authority . . . to establish that transparency has become part of customary international law.”⁶¹ In fact, arbitrators have based international responsibility on a lack of transparency in a number of prior decisions,⁶² and if the Tribunal had taken the trouble to cite them, Justice Tysoe would have had a much more difficult time setting aside this part of the award.

On the issue of expropriation, the Tribunal read Article 1110 to prohibit “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”⁶³ Although Justice Tysoe characterized this definition as “extremely broad,”⁶⁴ it is worth noting that the award requires at least a “significant” deprivation of economic benefit, which is arguably more than the *Restatement (Third) of Foreign Relations Law* definition on which another Chapter 11 tribunal has relied.⁶⁵ It is unfortunate that the Tribunal did not make clear whether it read the phrase “take a measure tantamount to nationalization or expropriation” in Article 1110 as going beyond the protections of customary international law.⁶⁶ It would have required, however, neither a particularly broad definition of expropriation nor an interpretation of Article 1110 as extending beyond customary international law to find that a decree that “had the effect of barring forever the operation of the landfill”⁶⁷ was an expropriation.⁶⁸

Although the *Metalclad* Tribunal could have written a clearer and more persuasive award, it could hardly have written one more favorable to foreign investors. Justice Tysoe,

⁶⁰ Cf. Supreme Court judgment, *supra* note 3, para. 99 (noting that “the definition of expropriation is a question of law with which this Court is not entitled to interfere under the *International CAA*”).

⁶¹ *Id.*, para. 68.

⁶² See, e.g., *Amco v. Indonesia* (Resubmitted Case) (1990), 1 ICSID REP. 569, 604–05 (1993) (holding that procedural irregularities in the revocation of an investment license made the revocation unlawful regardless of whether substantive grounds for its revocation might have existed); *Biloune v. Ghana Investments Centre*, 95 ILR 183, 207–10 (1989/90) (holding that Ghana could not rely on the absence of a building permit where the investor had justifiably relied on government representations that no permit was necessary); *Owners of the Tattler* (United States) v. Great Britain, 6 R.I.A.A. 48, 49–51 (1920) (holding that a lack of clarity in Canadian laws governing the licensing of U.S. fishing vessels required the British government to pay an indemnity).

⁶³ Arbitral award, *supra* note 2, para. 103, 40 ILM at 50.

⁶⁴ Supreme Court judgment, *supra* note 3, para. 99.

⁶⁵ See *Pope & Talbot, Inc. v. Canada*, Interim Award (NAFTA Ch. 11 Arb. Trib. June 26, 2000), para. 99, 23 HASTINGS INT’L & COMP. L. REV. 455, 480 (2000), available at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp>> (“A state is responsible as for an expropriation of property . . . when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state’s territory” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §712, cmt. g (1987))). Elsewhere, the *Pope & Talbot* interim award requires that the deprivation of economic benefit be “substantial.” See *id.*, paras. 96, 102, 23 HASTINGS INT’L & COMP. L. REV. at 479, 481–82. A third Chapter 11 tribunal seems to have read the notion of expropriation in Article 1110 more narrowly. See *S.D. Myers, Inc. v. Canada*, Partial Award, paras. 280–81 (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000), at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp>> (“In general, the term ‘expropriation’ carries with it the connotation of a ‘taking’ by a government-type authority of a person’s ‘property’ with a view to transferring ownership of that property to another person The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.”).

⁶⁶ The award alternates between the phrase “measure tantamount to expropriation” and “indirect expropriation.” Compare Arbitral award, *supra* note 2, paras. 104, 111, 40 ILM at 50–51, with *id.*, paras. 107, 112, 40 ILM at 50–51. See also Supreme Court judgment, *supra* note 3, para. 77 (“It is unclear whether the Tribunal equated a ‘measure tantamount to expropriation’ with ‘indirect expropriation’ or whether it made two separate findings of expropriation.”). Other Chapter 11 tribunals have agreed with the three NAFTA governments that Article 1110 is meant to codify, rather than to expand upon, customary international law. See *Pope & Talbot*, Interim Award, paras. 96, 103–04, 23 HASTINGS INT’L & COMP. L. REV. at 479, 482; *S.D. Myers*, paras. 285–86.

⁶⁷ Arbitral award, *supra* note 2, para. 109, 40 ILM at 51.

⁶⁸ See Supreme Court judgment, *supra* note 3, para. 100 (“In my view, the Tribunal’s conclusion that the issuance of the Decree was an act tantamount to expropriation is not patently unreasonable.”).

by contrast, fashioned a compromise, setting aside the transparency portion of the award for Mexico but letting Metalclad keep most of the money that the Tribunal had awarded it. Yet he could not accomplish this result without some inconsistency. He correctly held that British Columbia's ICAA governed the award,⁶⁹ which meant that he was not entitled to review the Tribunal's legal decisions. Accordingly, he observed that he could not interfere with the Tribunal's definition of expropriation because it was a legal issue.⁷⁰ Nevertheless, he overrode the Tribunal on another legal issue: the question whether "international law" in Article 1105 is limited to customary international law.⁷¹ This inconsistency may have been expedient, but it was not principled.

In a prior case report, I suggested that it might be advisable to create an appellate body for Chapter 11 cases.⁷² *Metalclad* illustrates this need. A national court's review of a Chapter 11 award during a proceeding to set aside or to enforce the award will typically be limited to such questions as whether the tribunal decided matters outside the scope of the submission to arbitration.⁷³ A national court typically will not be able to correct errors of law made by the tribunal,⁷⁴ whereas an appellate body could be given such authority.⁷⁵ Both for this reason and because different Chapter 11 awards will come before different national courts, national-court review also cannot ensure a consistent interpretation of NAFTA. Moreover, as *Metalclad* itself illustrates—on issues ranging from the meaning of "fair and equitable treatment" under Article 1105 to the definition of expropriation under Article 1110—there are numerous questions on which Chapter 11 tribunals have reached different interpretations.⁷⁶ An appellate body to which all Chapter 11 awards were appealable could provide needed consistency.⁷⁷ It would also bring to bear greater expertise on questions of international law than is typically found in municipal courts.⁷⁸ Finally, an appellate body would ensure neutrality in the review of Chapter 11 awards. It was fortunate that in *Metalclad* the place of arbitration, and thus the court that was asked to review the award, was in neither the claimant's nor the respondent's country. In *S.D. Myers v. Canada*, by contrast, the place of arbitration was Toronto, and Canada has applied to the Federal Court of Canada to set aside the award to the U.S. claimant.⁷⁹ This application may create the appearance of bias if Canada is successful.⁸⁰

⁶⁹ See *supra* notes 29–34 and accompanying text.

⁷⁰ Supreme Court judgment, *supra* note 3, para. 99.

⁷¹ *Id.* para. 62.

⁷² William S. Dodge, Case Report: Waste Management, Inc. v. Mexico, 95 AJIL 186, 191–92 (2001).

⁷³ See *supra* notes 29–35 and accompanying text.

⁷⁴ But see *supra* note 60 and accompanying text.

⁷⁵ The WTO Appellate Body has authority to review panel decisions for errors of law but not of fact. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Art. 17(6), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404, 418 (1994), reprinted in 33 ILM 1226, 1236 (1994).

⁷⁶ See *supra* notes 36–38, 63–66, and accompanying text. For discussion of other interpretative issues on which Chapter 11 tribunals have differed, see Dodge, *supra* note 72, at 190–91.

⁷⁷ Interpretive consistency may also be achieved through Article 1131(2), which allows the three NAFTA parties to issue binding interpretations of the text. This provision was used for the first time on July 31, 2001. See *supra* note 39.

⁷⁸ There are few judges in national courts whose knowledge of international law can compare with that of the arbitrators in *Metalclad*, see *supra* note 2.

⁷⁹ See *Canada Appeals NAFTA Chapter 11 Case, Arguing That Panel Exceeded Its Jurisdiction*, 18 INT'L TRADE REP. 273 (Feb. 15, 2001).

⁸⁰ An alternative method of review would be the annulment procedure under Article 52 of the ICSID Convention. ICSID Convention, *supra* note 48, Art. 52. Chapter 11 contemplates that awards made under the ICSID Convention would be subject to this procedure, see NAFTA, *supra* note 1, Art. 1136(3)(a), 32 ILM at 646, but since neither Canada nor Mexico is a party to the ICSID Convention, this method of review is currently unavailable. ICSID's annulment procedure would provide expertise and neutrality, but it could not provide the interpretive consistency of an appellate body.

One hopes that the NAFTA parties will see fit to remedy this situation, either by amending NAFTA itself or by providing for an appellate body in the investment chapter of the instruments establishing a free trade area of the Americas, which might supersede NAFTA Chapter 11.

WILLIAM S. DODGE

University of California, Hastings College of the Law

Criminal law—Italian constitutional law—European Convention on the Transfer of Sentenced Persons—agreement regarding confinement of a transferred prisoner—effect and constitutionality of such an agreement

BARALDINI. Judgment No. 73/01. Gazz. Uff., 1 Serie Speciale, No. 13 (March 28, 2001), at <<http://www.cortecostituzionale.it>>.

Corte costituzionale (Constitutional Court of Italy), March 22, 2001.

Following breast cancer surgery in a Rome hospital, Silvia Baraldini—an Italian national who had been transferred from the United States to Italy for the purpose of serving the remainder of her prison sentence in Italy¹—requested her release from prison while she received radiation treatments or chemotherapy.² By order of November 24, 2000,³ the Tribunale di sorveglianza (Supervisory Court) of Rome for the District of Lazio, on its own motion, brought a challenge of constitutionality against the Italian statute (Transfer Implementation Law)⁴ implementing the 1983 Council of Europe Convention on the Transfer of Sentenced Persons (Strasbourg Convention).⁵ According to the court, although Baraldini's health warranted a temporary suspension of her sentence on humanitarian grounds,⁶ such a suspension was precluded by the conditions of transfer agreed to by Italy (U.S.-Italy transfer agreement) in accordance with Article 3(1)(f) of the Strasbourg Convention.⁷ The Corte costituzionale (Constitutional Court), however, held that the Strasbourg Convention does not authorize the kind of agreement reached by Italy and the United States, and accordingly found no reason to address the constitutionality of the Transfer Implementation Law.⁸ Later, the U.S. Department of Justice, in the course of the proceedings

¹ See U.S. Dep't of Justice Statement Regarding the Transfer of Silvia Baraldini (Aug. 24, 1999), at <<http://www.usdoj.gov>>. In 1983, Baraldini was convicted in the Southern District of New York of racketeering and conspiracy under the federal Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§1961–1968, for her participation in the affairs of a terrorist group. She was sentenced to 40 years' imprisonment (with a judicial recommendation against parole) and fined \$50,000. The conviction and sentence were affirmed by the Court of Appeals for the Second Circuit, *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985). In a second, subsequent trial (Eastern District of New York, decided April 19, 1984), Baraldini was convicted of serious criminal contempt under 18 U.S.C. §401 and sentenced to 3 additional years in prison, to be served consecutively with her previous, 40-year sentence. The case is discussed in Marian Nash Leich, *Contemporary Practice of the United States*, 85 AJIL 338 (1991).

² On October 20, 2000, Baraldini had filed a request with the Tribunale di sorveglianza (Supervisory Court) of Rome for the suspension of her sentence under Article 146(1)(3) of the Italian Criminal Code, which provides for "mandatory" suspension of the execution of sentences in case of serious illness ("mandatory respite") or, in the alternative, for house arrest on medical grounds.

³ Trib. sorv., Nov. 24, 2000, Ord. No. 860/00, Gazz. Uff., 1 Serie Speciale, No. 3, Jan. 17, 2001 [hereinafter Supervisory Court order]. All translations of the Baraldini court cases are by the author.

⁴ Law No. 334, July 25, 1988, Gazz. Uff., No. 188, Aug. 11, 1988, [hereinafter Transfer Implementation Law].

⁵ Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, ETS No. 112 (entered into force July 1, 1985) [hereinafter Strasbourg Convention]. The Convention and an updated list of signatures and ratifications are available online at <<http://conventions.coe.int>>.

⁶ The Supervisory Court favored the application of a discretionary form of suspension in accordance with Article 146(1)(2) of the Italian Criminal Code ("discretionary respite"), instead of the "mandatory respite" provided for under Article 146(1)(3)—which, according to the Court, requires an "irretrievable" health condition that "fortunately here does not exist." Supervisory Court order, *supra* note 3, para. 3.2.

⁷ The terms of the agreement concluded between Italy and the United States for the purpose of Baraldini's transfer to Italy are described *infra* notes 13–16 and accompanying text.

⁸ Corte cost., Mar. 22, 2001, Judgment No. 73/01, Gazz. Uff., 1 Serie Speciale, No. 13 (Mar. 28, 2001), at <<http://www.cortecostituzionale.it>>, reprinted in 84 RIVISTA DI DIRITTO INTERNAZIONALE 489 (2001) [hereinafter