Citation:	The United Mexican States v. Metalclad Corporation 2001 BCSC 1529	Date: Docket: Registry:	20011031 L002904 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE UNITED MEXICAN STATES

PETITIONER

AND:

METALCLAD CORPORATION

RESPONDENT

AND:

**ATTORNEY GENERAL OF CANADA AND
LA PROCUREURE GENERALE DU QUÉBEC
ON BEHALF OF THE PROVINCE OF QUÉBEC**

INTERVENORS

**SUPPLEMENTARY REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE TYSOE**

Counsel for the Petitioner:	Patrick G. Foy, Q.C., J. Christopher Thomas and Robert J.C. Dean
Counsel for the Respondent:	D. Geoffrey Cowper, Q.C. Henri C.A. Alvarez, B.J. Greenberg and M.D. Parrish
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Counsel for the Intervenor, La Procureure general du Québec on behalf of the Province of Québec:	Jack M. Giles, Q.C. and Victoria Colvin

Dates of supplementary written submissions: October 15, 19 and 25, 2001

[1] These Reasons are supplementary to my Reasons for Judgment dated May 2, 2001 and cited as 2001 BCSC 664, [2001] B.C.J. No. 950 (Q.L.). The terms used herein have the same meanings as defined in the Reasons for Judgment.

[2] The Tribunal had based the Award on three breaches of Articles 1105 and 1110 of the NAFTA. The first two breaches were based on a concept of transparency and the third breach was based on the conclusion that the issuance of the Ecological Decree constituted an expropriation without payment of compensation. In my Reasons for Judgment, I held that although Mexico was successful in demonstrating that the first two of the three findings of breaches involved decisions beyond the scope of the submission to arbitration, it was not successful in showing that the third finding of a breach was beyond the scope of the submission to arbitration or that the Award should be set aside in view of Metalclad's allegedly improper acts or the Tribunal's alleged failure to answer all questions submitted to it. Accordingly, I concluded that the Award should not be set aside in its entirety. I went on to consider the fact that the interest included in the Award had been calculated from December 5, 1995 on the basis of the occurrence of the first two findings of breaches, while the third breach did not occur until September 20, 1997. It was my view that the Award inappropriately included interest from December 5, 1995 to September 20, 1997.

[3] During the hearing before me (which lasted two weeks), neither Metalclad nor Mexico made detailed submissions in the event that I agreed with any or all of Mexico's challenges of the Award. Mexico wanted the entire Award set aside and Metalclad sought to defend all aspects of the Award. In its written submissions, Metalclad requested that if intervention was found to be merited, the Court should consider whether remission to the Tribunal was required. In oral submissions, counsel for Metalclad spoke in terms of "remission", "remit any matters" and "remit rather than set aside" in the event that intervention was warranted. Counsel for Mexico did not take exception to the use of this terminology.

[4] On the basis of these submissions, I dealt with the inappropriate inclusion of interest in the Award as follows at paragraphs 135 and 136 of the Reasons for Judgment:

> [135] The result is that the amount of compensation ordered to be paid by Mexico to Metalclad includes interest from December 5, 1995 to September 20, 1997 (plus the compounding effects thereafter). As I would have set aside the Award in its entirety if it had been based solely on the first two of the Tribunal's findings of breaches of the NAFTA, the Award should be set aside insofar as it includes interest which flows only from those two findings. Therefore, I set the Award aside to the extent that it includes interest prior to September 20, 1997 (and any consequential compounding effects). If the parties are unable to agree on the interest re-calculation, the matter is remitted back to the Tribunal.
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> [136] Although I have concluded that the Tribunal made decisions on matters outside the scope of the submission to arbitration when it found the first two breaches of Articles 1105 and 1110, I should not be taken as holding that there was no breach of Article 1105 and no breach of Article 1110 until the issuance of the Ecological Decree. The function of this Court is limited to setting aside arbitral awards if the criteria set out in s. 34 of the *International CAA* are shown to exist. I express no opinion on whether there was a breach of Article 1105 or a breach of Article 1110 prior to the issuance of the Decree on grounds other than those relied upon by the Tribunal. If Metalclad wishes to

> pursue the portion of the interest contained in the Award which I have set aside, by establishing a breach of Article 1105 or Article 1110 prior to the issuance of the Decree without regard to the concept of transparency, the matter is remitted to the Tribunal.

I am advised that the parties were able to agree on the interest re-calculation referred to in paragraph 135.

[5] Mexico has appealed my refusal to set aside the Award. Metalclad has cross-appealed the referral back to the Tribunal based on my conclusions with respect to the first two findings of breaches of Articles 1105 and 1110 of the NAFTA. A five day appeal hearing has been scheduled for April 8, 2002 and a schedule of pre-appeal proceedings has been established by the Chief Justice.

[6] Counsel for Metalclad wrote to ICSID requesting that the issue of entitlement to interest for the period from December 5, 1995 to September 20, 1997 be remitted to the Tribunal. Following an exchange of correspondence, senior counsel at ICSID wrote to counsel for Metalclad on June 13, 2001 stating that the former members of the Tribunal, in their personal capacities, had expressed the view that the conditions specified in s. 34(4) of the *International CAA* for a remission to the Tribunal appeared not to have been met because there was no evidence of a request by Metalclad to adjourn the proceedings, the proceedings were not adjourned to allow the remission to take place and no period of time was determined by the Court in order to give the Tribunal an opportunity to resume the arbitral proceedings. Subsection 34(4) reads as follows:

> When asked to set aside an arbitral award the court may, if it is appropriate and it is requested by a party, adjourn the proceedings to set aside the arbitral award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside the arbitral award.

[7] By Notice of Motion dated October 1, 2001, Metalclad made application (i) for directions respecting the reference to the Tribunal contemplated in paragraphs 135 and 136 of the Reasons for Judgment (ii) to settle the form of Order flowing from the Reasons for Judgment and (iii) for an Order adjourning these proceedings generally or to a specified date to provide the Tribunal opportunity to resume the arbitral proceedings in accordance with the Reasons for Judgment and directions of this Court or to take such other action as in the Tribunal's opinion will eliminate the grounds upon which this Court has set aside the Award in part.

[8] Mexico took the position that the settlement of the form of the Order must first go before a registrar and took out an appointment in that regard for October 9, 2001. The Registrar settled the form of the Order, which included the following two paragraphs:

> 3. the application to set aside the Tribunal's assessment of damages is allowed to the extent of that portion of the award of interest for the period prior to September 20, 1997 representing the sum of U.S. $1,657,184 (Cdn. $2,541,457.30) (as of the date of this order), which is hereby set aside;
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> 4. if the respondent, Metalclad Corporation, wishes to pursue the portion of the award of interest hereby set aside by attempting to establish a breach of Article 1105 or a breach of Article 1110 occurring prior to the issuance of the Ecological Decree on grounds other than an obligation of transparency, the matter is remitted to the Tribunal;

The Order has not been entered in the court records; counsel for Mexico has agreed to

refrain from submitting it for entry pending the outcome of Metalclad's application.

[9] Counsel appeared before me on October 9 after the Registrar had settled the form of the Order. Counsel for Mexico took the position that I should not entertain Metalclad's application and that I should leave the matter to the Court of Appeal. I declined to prohibit Metalclad from making submissions on its application, while reserving to Mexico its argument that the Court of Appeal should deal with the issue. Counsel agreed to make written submissions, which I have now received and considered.

[10] Counsel for Mexico accepts that the Court has the discretion, in appropriate circumstances, to reopen proceedings prior to the entry of an order, but says that these are not appropriate circumstances to do so.

[11] Two of the circumstances where the court has held that it is appropriate to reopen the proceedings is (i) where the judge fails to deal with a matter which had been brought to the judge's attention by one of the parties (see Rule 41(24), *Liu v. Hansen* (1995), 38 C.P.C. (3d) 398 (B.C.S.C.) and *Coughlin v. Kuntz* (1997), 43 B.C.L.R. (3d) 360 (S.C.)) and (ii) where one of the parties should have drawn to the attention of the judge a matter which affects the consequences of the primary decision (see *Hellinckx v. Large,* [1998] B.C.J. No. 3072 (Q.L.)). In my view, whether the blame for failing to properly refer the outstanding issue to the Tribunal in accordance with s. 34(4) falls on me or counsel for Metalclad, this is an appropriate case to correct the Order flowing from the Reasons for Judgment. It is not necessary for me to decide whether the submissions of counsel for Metalclad during the initial hearing constituted a request under s. 34(4) because the request has now clearly been made in the October 1 Notice of Motion. I have no doubt that if the provisions of s. 34(4) had been specifically raised during the initial hearing, I would have clarified whether Metalclad was making a request under s. 34(4) if I concluded that intervention was warranted and I would have framed the Order in terms of s. 34(4).

[12] I do not accept Mexico's submission that I should not vary the Order because there is a pending appeal and a reopening would compromise the orderly progress of the appeal proceedings. An appeal is not a bar to a judge reconsidering an unentered order (see *Sharp Electronics of Canada Ltd. v. Ono*, [1982] B.C.J. No. 470 (Q.L.) and *Constantinescu v. Barriault*, [1996] B.C.J. No. 2105 (Q.L.)). The timely issuance of these Supplementary Reasons for Judgment will avoid a disruption in the schedule of pre-appeal proceedings.

[13] The concept of remission is utilized in common law jurisdictions when the court is of the view that an award of an arbitral tribunal or administrative body cannot be upheld. As an example, s. 30(1) of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, provides that if an award has been improperly procured or an arbitrator has committed an arbitral error, the court may set aside the award or remit the award to the arbitrator for reconsideration. A different approach was adopted by the UNCITRAL Model Arbitration Law (which is the basis of the *International CAA*), as explained in the Seventh Secretariat Note, Analytical Commentary on Draft Text A/CN.9/264 (25 March 1985):

> 13. Paragraph (4) envisages a procedure which is similar to the "remission" known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.
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> 14. Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such "remission" turns out to be futile at the end of the period of time determined by the Court, during which

> recognition and enforcement may be suspended under article 36(2), would the Court resume the setting aside proceedings and set aside the award.

[14] Hence, it was inappropriate for me to have followed the usual common law approach of partially setting the Award aside and remitting the matter to the Tribunal. I should have clarified whether Metalclad was requesting me to adjourn the proceedings under s. 34(4) if I concluded that there were grounds to set aside the Award in whole or in part and, if Metalclad had made such a request, it would have been appropriate for me to adjourn the proceedings to give the Tribunal an opportunity to deal further with the matter in view of my conclusion that breaches of Article 1105 and Article 1110 could not be founded on an obligation of transparency.

[15] I do not agree with the submission on behalf of Mexico that Article 34(4) of the Model Law (and, hence, s. 34(4) of the *International CAA*) was intended to be restricted to procedural defects. There is no such limitation contained in the language of Article 34(4). There is no reason why Metalclad should be prevented from endeavouring to establish a breach of Article 1105 or Article 1110 of the NAFTA, on a basis other than the concept of transparency and at a date earlier than the issuance of the Ecological Decree, so as to entitle it to additional interest.

[16] I also disagree with the alternative positions of Mexico that the Award ought to be set aside in its entirety or that these proceedings should be adjourned in order to allow the Tribunal to resume the arbitral proceedings in respect of the Ecological Decree. I specifically concluded in the Reasons for Judgment that the Award should not be set aside in its entirety and there is no basis to reverse my decision in this regard. There is no point in adjourning the proceedings to allow the Tribunal to give further consideration to the Ecological Decree because I held in the Reasons for Judgment that the Tribunal did not make a decision on a matter beyond the submission to arbitration when it concluded that the issuance of the Ecological Decree constituted an expropriation without payment of compensation.

[17] Counsel for Metalclad argues that the Registrar was in error in settling the form of Order and that I have the inherent jurisdiction to settle the form of Order to be entered. Counsel also says that Metalclad is not applying to vary the Order made by the Court but, rather, is simply applying for directions with respect to the terms of the remission compatible with s. 34(4) of the *International CAA*. I do not agree with these submissions. The Registrar correctly settled the form of the Order in accordance with the Reasons for Judgment and, properly construed, this is an application to vary an unentered order.

[18] I vary the Order pronounced on May 2, 2001 by deleting paragraphs 3 and 4 of the Order as settled by the Registrar and substituting in their place an order adjourning these proceedings in order to give the Tribunal an opportunity to resume the arbitral proceedings for the purpose of determining whether there was a breach of Article 1105 or Article 1110 prior to the issuance of the Ecological Decree without regard to the concept of transparency and thereby determining whether Metalclad is entitled to interest prior to September 20, 1997.

[19] Metalclad requested that these proceedings be adjourned generally. In my opinion, an indefinite adjournment of the proceedings is not permitted by the wording of s. 34(4) of the *International CAA*. In view of the past history and the present circumstances, I order that these proceedings be adjourned for a period of 18 months from the date of these Supplementary Reasons for Judgment or such other period as may be ordered upon application to this Court. A further hearing may be scheduled at any time after the expiry of this adjournment for the purpose of determining whether the Award should be set aside to the extent that it includes interest prior to September 20, 1997.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe