Metalclad Corporation v. The United Mexican States

(ICSID Case No. ARB(AB)/97/1)

Submission of the Government of the United States of America

1. Pursuant to NAFTA Article 1128, the United States Government makes this submission to address certain questions of interpretation of the NAFTA arising in the case brought by Metalclad Corporation against the United Mexican States.

2. The United States wishes to comment on specific issues that have arisen during the course of the Metalclad arbitration. However, we must emphasize that our lack of comment on other issues does not indicate that the United States agrees with other positions expressed by the parties to the arbitration. No inference should be drawn from our failure to comment on a particular point.

NAFTA Coverage of Actions of Local Governments, Including Municipalities

3. One question that was addressed in oral argument was whether, as a general rule, the actions of local governments, including municipalities, are subject to the NAFTA standards. The United States believes that there is no general exclusion from the NAFTA standards for local government action. At the hearing, an argument that local government actions are generally not subject to these standards was made based on Article 105 of the NAFTA, which does not use the term "local governments" in describing the extent of the obligations set forth in the Agreement. According to this argument, the NAFTA Parties deliberately excluded the term "local governments" from Article 105 to signal a departure from otherwise applicable customary international law, which provides that a State is liable for the acts of all its political subdivisions, including local governments. Again under this line of argument, Article 201(2) ("unless otherwise specified, a reference to a state or province includes local governments of that state or province") means that it is only when state or provincial governments are specifically mentioned in a particular obligation that the obligation covers local governments' acts.

4. However, the United States believes that there is no such general exclusion from NAFTA standards for the actions of local governments. Rather, the U.S. intended, and we believe the Parties intended, that, except where specific exception was made, the action of local governments would be subject to the NAFTA standards. We made this clear in our Statement of Administrative Action submitted to the U.S. Congress with the text of the Agreement and proposed implementing legislation. In that Statement, the U.S. Government explains that NAFTA Article 105 "makes clear that state, provincial and local governments must, as a general rule, conform to the same obligations as those

applicable to the three countries' federal governments, subject to the same exceptions." U.S. Statement of Administrative Action 4, in Message from The President of the Untied States Transmitting North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. 1 (1993) (attached).

5. The Canadian Statement on Implementation expresses a view that mirrors the United States' understanding that local government measures are generally subject to the NAFTA standards. Its description of Article 1101 explains that Chapter 11's section A (which sets forth the substantive obligations of the Parties) "covers measures by a Party (i.e., any level of government in Canada)." Canada Gazette, Pt. 1, at 148, Jan. 1, 1994 (attached).

6. Moreover, the ordinary meaning of the provisions at issue is in line with the United States' position. Article 105 provides that "[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." Article 201(2), part of the NAFTA Chapter entitled "General Definitions," plainly defines any reference to a state or province to include the local governments of that state or province. Absent any treaty language to the contrary, the natural meaning of these provisions, taken together, is that Article 105's reference to states and provinces includes a reference to their local governments.

7. The context of these provisions further supports the United States' view. Other provisions in the NAFTA, both in Chapter 11 and elsewhere in the Agreement, make clear that local government measures, including municipal measures, are subject to the NAFTA standards. For example, Article 1108(1)(a)(iii) specifically exempts existing local government measures from the reach of Articles 1102, 1103, 1106 and 1107. If the argument proposed at the hearing were correct, no exemption would be necessary because these articles would not address the actions of local governments at all. Other chapters have similar exclusions reinforcing this point. See, e.g., Article 1206(1)(a)(iii); Article 1409(1)(a)(iii).

8. In sum, contemporaneous statements of the Parties' intent, together with the ordinary meaning of the relevant provisions taken in their context, establish that the actions of local governments, including municipalities, are subject to the NAFTA standards.

The Meaning of "Measure Tantamount to Expropriation"

9. With respect to the Tribunal's question as to the meaning of the term "tantamount to expropriation" in NAFTA Article 1110(1), we do not believe that

the Tribunal need address the question, as doing so is not required to resolve the issues in the case. We urge the Tribunal to limit its rulings to matters that are necessary to the resolution of the claim and that have been fully briefed and argued by the parties to the dispute. However, to respond to the Tribunal's request, it is the position of the United States that the phrase "take a measure tantamount to . . . expropriation" explains what the phrase "indirectly . . . expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. We believe that this conclusion is consistent with the positions taken by both the disputants in this case.

10. The United States Government believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation. The United States Government reflected that position in its Statement of Administrative Action, transmitted to the Senate during the process of concluding the NAFTA. See Statement of Administrative Action 140 (attached). Neither of the other Parties has ever expressed a view contrary to this United States public statements of intent. The customary international law of expropriation recognizes only two categories of expropriation: direct expropriation, such as the compelled transfer of title to the property in question; and indirect expropriation, i.e., expropriation that occurs through a measure or series of measures even where there is no formal transfer of title or outright seizure. To conform to these rules of customary international law, Article 1110(1) must be read to provide that expropriation may only be either direct, on one hand, or indirect through "a measure tantamount to nationalization or expropriation of such an investment," on the other.

11. The context in which the phrase "tantamount to expropriation" is found confirms that it was not intended to create a new category of expropriation. If Article 1110 had been meant to create a wholly new, third category of expropriation, thereby departing radically from customary international law, the Parties would surely have included language providing guidance on what circumstances, other than either direct or indirect expropriation, were meant to be covered. Instead, there are no standards for determining when such a new category would be applicable. It is extremely unlikely that the Parties would have exposed themselves to potentially significant liability for an entirely new category of expropriation without such guidance. As they did not provide the necessary standards, the only reasonable conclusion is that the Parties did not intend an expansion of the two categories of expropriation currently recognized under customary international law.

12. Furthermore, a separate meaning for the term "take a measure tantamount to . . . expropriation" is not required or even supported by the fact that the phrase is redundant in light of the provision's previous reference to

"indirect[] expropriat[ion]." In fact, its redundancy mirrors the construction of another passage in Article 1110. Article 1110(1) addresses the circumstances under which Parties may "nationalize or expropriate," even though the term "nationalize" is redundant since it is a type of expropriation. See, e.g., State Responsibility, [1959] 2 Y.B. Int'l L. Comm'n 1, 13, U.N. Doc. A/CN.4/119 (labeling "the practice . . . of carrying out acts of expropriation on a wide scale and impersonally" as a "type or form of expropriation . . . commonly referred to as 'nationalization'") (attached); B.A. Wortley, Expropriation in Public International Law 36 (1977) ("Nationalization differs in its scope and extent rather than in its juridical nature from other types of expropriation.") (emphasis added) (attached). As the term "nationalize" is but a subset of the broader term "expropriate," similarly, the phrase "take a measure tantamount to expropriation" is simply an elaboration of what "indirectly . . . expropriate" means, notwithstanding the presence in both instances of the disjunctive "or." The similar repetition of other concepts in the terms of Article 1110(1) suggests that this redundancy results, not from an intent to create a new category of expropriation, but rather from an abundance of caution taken to ensure that the two categories of expropriation, direct and indirect, that are recognized under customary international law would be covered. Thus, while perhaps not artful, these redundant usages in Article 1110(1) do not reflect a deviation from customary international law.

13. The preparatory work of the NAFTA confirms this conclusion. The NAFTA's expropriation provision was modeled on the expropriation provision of the bilateral investment treaties ("BITs") that the United States had concluded with many countries. All of the forty-five BITs signed by the United States contain similar language on expropriation, although their exact phrasing has varied over time. See, e.g., U.S. Bilateral Investment Treaties (BITs), at http://www.state.gov/www/issues/economic/7treaty.html (providing several BIT texts); Investment Treaties in the Western Hemisphere, at http://www.sice/oas.org/bitse.stm (same); Trade & Related Agreements, at http://www.mac.doc.gov/tcc/treaty.htm (same). Despite the variations in expression, the scope of protection provided by the BITs has remained the same, and all of these different formulations have been understood to incorporate the customary international law definition of expropriation, not to expand upon it. See, e.g., State Department, Description of the United States Model Bilateral Investment Treaty (BIT): Hearing Before the Senate Comm. On Foreign Relations, 102d Cong., 2d Sess. 61, 63 (1992) ("Article III incorporates into the Treaty the highest international law standards for expropriation and compensation.") (attached). Article 1110(1) should likewise be recognized as a further effort to capture that customary international law concept of "expropriation," not as an unprecedented departure from the BITs.

14. Thus, Article 1110 addresses measures that directly expropriate and measures tantamount to expropriation that thereby indirectly expropriate. This is the only possible interpretation of the terms of the provision consistent with the Parties' intent and the ordinary meaning of the terms in light of the provision's context, as confirmed by reference to the preparatory work. Therefore, NAFTA claimants may not seek damages under Article 1110 for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation.

Denial of Justice Issues

15. Finally, the United States notes that, during closing arguments, the President of the Tribunal asked counsel for Mexico a hypothetical question regarding whether a denial of justice occasioned by a federal court would be directly redressable by a NAFTA Tribunal. This issue need not be addressed in this case, as Metalclad has not alleged a denial of justice by the Mexican courts at any level. Again, the United States urges the Tribunal to limits its rulings to matters necessary to the resolution of the claim and that have been fully briefed and argued by the parties to the dispute.

Respectfully submitted,

/s/

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