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LITIGATING ENVIRONMENTAL DISPUTES: COURTS, TRIBUNALS AND THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

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Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law

[Contribution to the Liber Amicorum of Judge Thomas Menash – 2007]

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Over the past fifteen years environmental issues have been addressed by a growing number of international courts and tribunals, adding to the jurisprudence of the historically significant arbitral awards in the *Bering Fur Seals* case (1893), the *Trail Smelter* case (1941) and the *Lac Lanoux* case (1957). For the most part the recent decisions have played an important role in enhancing the legitimacy of international environmental concerns and confirming that global rules can play a significant role in contributing to the protection of shared environmental resources. International courts and tribunals have also acted to clarify the meaning and effect of treaty norms, to identify the existence of customary norms of general application, and to establish a more central role for environmental considerations in the international legal order.

Nevertheless, there remain certain areas of international law in which international environmental norms are yet to be recognized as having a material role to play. This is the case, for example, in the field of foreign investment laws, the rules of international law that seek to promote investment flows by establishing norms prohibiting expropriation or unfair or inequitable treatment. As in the field of trade, where progress has been made, the key issue is the relationship between two different subject matter areas in international law. As issues become more inter-related it will be incumbent upon those involved in arbitrating disputes with an environmental element to strive for balance, balance between potentially competing objectives of environmental protection on one hand, and the protection of rights of foreign investors on the other hand. Neither of these important societal interests should trump the other, they should be treated in an integrated manner.

I. HISTORICAL CONTEXT AND THE RISE OF ENVIRONMENTAL CONCERNS

It is appropriate to begin with some history. Environmental disputes have an impressive history. The subject is not a new one. As far back as 1893, a distinguished international arbitration tribunal gave an Award in the *Pacific Fur Seal Arbitration*.¹ This concerned a dispute between the United Kingdom and the United States as to the circumstances in which the United States - a coastal State – could interfere with British fishing activities on the high seas. This pitted interests of conservation against interests of economic exploitation. Half a century later, an Arbitral Tribunal gave its final award in the famous *Trail Smelter* arbitration, between the United States and Canada.² This concerned the transboundary pollution by sulphur deposits originating from Canada onto United States territory. A decade and a half later another distinguished tribunal gave its award in the *Lac Lanoux* arbitration, between France and Spain concerning the circumstances in which one State made lawfully use of shared international waters.³ What makes these cases noteworthy is that each raises the potential for conflict between economic interest and ecological interest. This is significant because it identifies issues concerning the need to balance competing interests: in the field of foreign investment rules, for example, of the need to balance the legitimate interests of a community to protect its environmental resources and the legitimate interests of a private investor to protect his or her property rights.

More recently, as most will know, the environment as a discrete subject matter has gone up the political agenda, both at national and international levels. There is a greater awareness of the need to protect the environment and environmental resources. This awareness has been accompanied by the adoption of a large number of environmental laws, again both at the national level and, in the form of treaties, at the international level.⁴ This recent environmental understanding and these new environmental laws coalesce around a number of features that distinguish environmental matters from other areas, and which pose particular challenges to international courts and tribunals faced with resolving disputes having an environmental component.

A first feature of the environmental field is that international courts and tribunals are faced with a particular, but by no means unique, difficulty: the development of international environmental law is often reflected in international treaties that involve a high degree of compromise, or “fudge”. In other words, the legislative body has presented the international judiciary with a set of rules and principles that can be rather vague. Called upon to interpret vague norms, an international court faces a situation of real difficulty when asked to apply the law to the particular facts of a case. This is not an easy task, as the ICJ recognized in the *Gabčíkovo-Nagymaros* case, and one can understand the Court’s reluctance to descend into detail if to do so is to adjudicate upon a dispute that has a broader context and that might lead to changes that the court is legislating.

¹ Moore’s International Arbitration, 755 (1893).

² 3 RIAA (1941), 1907.

³ 24 ILR (1957), 101.

⁴ See P. Sands, *Principles of International Environmental Law*, 2nd ed., 2003, Cambridge University Press.

A second feature is that environmental issues invariably raise competing scientific claims.⁵ A court will often be called upon to adjudicate on two sharply differing views, in which mountains of scientific arguments – several thousand pages in the *Gabčíkovo-Nagymaros* case – may be presented in an equally compelling manner. Unlike many national systems that provide for environmental or scientific assessors to join panels and assist in deciphering technical information, the international judge likely will often find herself in a difficult position when seeking to decide on the relative merits of a scientific claim. Again, this problem is not unique to the environmental field, but it calls for a specialized approach.

A third distinguishing feature of environmental law – and this is a legal rather than factual characteristic – is that environmental claims are rarely, if ever, raised in isolation of other international legal arguments. In other words, the environmental law arguments will almost always involve arguments about other substantive areas of the law. Such other areas include trade agreements in the WTO context, human rights norms before human rights courts, and issues of general international law, such as the relationships between treaty and custom, or the law of the environment and the law of State responsibility. This combination suggests most strongly that an international tribunal composed solely of experts in international environmental law might not fare well in attracting cases. Therefore, what is needed is a body of judges with a mix of general and specialized expertise. This also explains why no cases thus far have been presented to the ICJ's Environment Chamber, and in my view, why none may ever do so: no two States will agree that a given dispute is essentially "environmental".

A fourth distinguishing feature, relating more to issues raised before global bodies than regional bodies, is that the international community does not yet have a common appreciation of where environmental objectives stand in the general legal and political hierarchy. There are understandable differences of view between developed and developing countries as to what the priorities should be, and it seems clear that those differences will also extend to the bench.⁶ There are equally sharp differences of opinion between different regions, and even between developed countries. For example, the current debate over genetically modified organisms indicates that a German judge may be more likely to be risk averse and "precautionary" than an American judge.⁷

There is a fifth factor that must be mentioned: States remain hesitant about referring international environmental disputes to international adjudication. To the extent that States want international adjudicatory

⁵ See, e.g., Judgment in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 ICJ Reports 3, 27, 29-31 (September 25), reprinted in 37 *ILM* (1998), 162, 181-183 (referencing the conflicting and inconclusive scientific arguments in the Gabčíkovo Nagymaros litigation); see also EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, WTO Dispute Settlements.

⁶ Examples include the rather weak efforts at addressing the protection of forests, where differences in priorities between developed and developing countries meant that no binding global agreement could be adopted at Rio, or at any time subsequently: see the 1992 Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, in P. Sands and P. Galizzi, *Documents in International Environmental Law* (2nd edition, Cambridge, 2004, p. 751). The main international instrument concerned with tropical forests is aimed primarily at exploitation rather than conservation. The collision of interests was eloquently illustrated in the negotiation of the 1992 Biodiversity Convention. See Convention on Biological Diversity, opened for signature 5 June 1997, 31 *ILM* (1992), 818. The dispute over issues such as the fair distribution of the benefits from genetic resources (favored by developing countries) versus the uncompromised protection of intellectual property rights (advanced by the developed States) or means of provision of financial resources eventually led to the United States not signing the Biodiversity Convention. See M. Chandler, *The Biodiversity Convention: Selected Issues of Interest to the International Lawyer*, 4 *Colo. J. Int'l Envtl. L. & Pol'y* 141 (1993).

⁷ The precautionary principle evolved out of the German socio-legal concept of the Vorsorgeprinzip in the early 1930s. This concept, which is broader than the modern formulations of the precautionary principle requiring careful planning and responsibility, has been relied on widely in (West) German social and economic legislative activity and judicial practice; see generally Sands, *supra* note 4 at 266-278.

mechanisms, they do not seem to want those that apply a contentious and conflictual procedure to environmental matters. So, for example, in the field of ozone depletion, and soon also in other areas such as climate change and sulphur pollution States have put in place non-contentious procedures that are characterized by having more of an administrative function. This system exists as a sort of international alternative dispute resolution. The noncompliance procedure of the Montreal Protocol on Substances That Deplete the Ozone Layer has established an implementation committee that requires States alleged to be in noncompliance to explain why they have reached that situation and what they intend to do about it. The committee has the power to impose sanctions, as well as the task of bringing the State into compliance.⁸ For those who have watched the evolution of the early GATT panel systems into the quasi-judicial function of the Appellate Body of the WTO, the picture will be a familiar one.

II. NEW INTERNATIONAL FORA

The rise of environmental consciousness in international law has been accompanied by another phenomenon: the growing number of international fora within which environmentally related disputes can now be addressed.⁹ It used to be the case that the International Court of Justice was just about the only permanent international tribunal around. Since it was established in 1946 it has been joined by a large number of other international judicial and quasi-judicial bodies. I am thinking in particular of:

- the dispute settlement mechanisms established under the 1982 United Nations Convention on the Law of the Sea, such as the International Tribunal for the Law of the Sea and Annex VII arbitral tribunals;

- the Dispute Settlement Understanding established under the Agreement of the World Trade Organization, which sets up a panel and appellate body structure with competence to deal with environmental issues in their international trade context;

- the various international human rights courts, such as the European Court of Human Rights and the American Court of Human Rights, which frequently deal with environmental issues in their human rights context; and, more recently; and

- the International Center for the Settlement of Investment Disputes, which is now beginning to faced with environmental issues in a foreign investment context.

There are also numerous other bodies which merit mention. It is appropriate to mention the World Bank Inspection Panel, which now has a distinguished jurisprudence considering environmental and other issues in so far as they relate to the activities of the World Bank, as well as the non-compliance mechanisms established under various multilateral environmental agreements.¹⁰

The proliferation of international fora has been accompanied by the growth and willingness of international actors – States, corporations and individuals – to engage in international litigation (even if States remain hesitant to refer environmental disputes to contentious international adjudication). Each of the bodies mentioned above has been faced with a growing caseload. Amongst that caseload are many cases dealing with, or touching upon, environmental issues. In that regard, a number of decisions in the past decade are noteworthy for having contributed to the development of international environmental law, by identifying and then applying various rules, and also by clarifying their meaning and effect and relationship with other rules of international law arising outside the environmental domain. These cases include:

⁸ See Sands, *supra* note 4, at 205-210.

⁹ See generally the web site of the Project on International Courts and Tribunals for a list of the various bodies which are now active: <www.pict-pecti.org>.

¹⁰ *Supra* note 9.

• the ICJ's advisory opinion on the *Legality of the Use of Nuclear Weapons*,¹¹ its judgment in the Case concerning the *Gabcikovo/Nagymaros* dispute (Hungary/Slovakia) concerning the construction of barrages on the Danube (September 1997),¹² and its provisional measures order in the case concerning *Pulp Mills on the River Uruguay*, brought by Argentina against Uruguay (July 2006);¹³

• the WTO Appellate Body's decision in the *Shrimp Turtle* case, concerning the circumstances in which the United States was able to impose conservation measures under its laws on shrimping activities taking place in four Asian countries (October 1998),¹⁴ and the WTO Panel decision in the *EC-Biotech* case brought by Argentina, Canada and the United States challenging the European Community's import regime for genetically modified organisms (February 2006);¹⁵

• the International Tribunal for the Law of the Sea's provisional measures orders in the *Southern Blue-Fin Tuna* cases brought by Australia and New Zealand against Japan, addressing Japan's unilateral scientific experimental fishing (August 1999),¹⁶ in the *MOX Plant* case brought by Ireland challenging the United Kingdom's authorization of a new nuclear facility at Sellafield (December 2001),¹⁷ and in the *Land Reclamation* case brought by Malaysia against certain land reclamation activities of Singapore (October 2003);¹⁸ and

• the award of the arbitral tribunal (Permanent Court of Arbitration) in the case concerning the *Iron Rhine (Ijzeren Rijn) Railway* (Belgium v. Netherlands, May 2005).¹⁹

By contrast, to date the limited number of arbitral awards in the field of foreign investment that have been presented with arguments in international environmental law have been restrained in taking into account rules of international environmental law in interpreting and applying the requirements of a Bilateral Investment Treaty. Particularly noteworthy in this regard are the Award of the ICSID Arbitration Tribunal in the *Santa Elena v. Costa Rica* (April 2000) and the Award of a NAFTA/ICSID Arbitral Tribunal in *Metalclad v. Mexico* (August 2000).

Before turning to the central issue for this chapter – the arbitration of disputes relating to foreign investment protection and the environment – I would like to touch briefly on a related issue, namely how one identifies and characterizes an “environmental dispute”. In my view it is more appropriate to talk about disputes which have an environmental or natural resources component or which relate to the environmental or natural resources than to characterize a dispute as an environmental dispute. The reason for this is simple. In my experience it is most unlikely that both (or all) the parties to a dispute would readily agree on characterizing it as an environmental dispute. In the *Gabcikovo/Nagymaros* case at the International Court of Justice, for example, concerning the construction of barrages on the Danube river, Hungary treated the case as primarily an environmental case, whereas for Slovakia the case was about economic development and the law of treaties. For this reason the Environmental Chamber of the International Court of Justice, which was created

¹¹ ICJ Reports 1996, 226.

¹² *Case concerning the Gabcikovo-Nagymaros Project (Hungary / Slovakia)*, ICJ Reports 1997, 7.

¹³ ICJ, Provisional Measures Order, 13 July 2006.

¹⁴ *Shrimp Turtles case*, AB-1998-4, 12 October 1998; 38 *ILM* (1999), 118.

¹⁵ The Panel's conclusions are available at: <<http://www.tradeobservatory.org/library.cfm?refid=78475>>.

¹⁶ 38 *ILM* (1999), 1624.

¹⁷ Order of 3 December 2001, <http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en>.

¹⁸ Order of 8 October 2003, <http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=12&lang=en>.

¹⁹ Available at: <<http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf>>.

in 1993 and was never invoked, seems recently to have been dispensed with.²⁰ The mere characterization of a dispute as an environmental dispute will have implications for a case. For this reason it is most unlikely that there will be established in the foreseeable future the International Environmental Court for which some observers have called. It would be preferable to follow the effort, for example, of the Permanent Court of Arbitration to develop model rules on arbitration of disputes relating the environment and natural resources, which rules take into account the particular characteristics of environmental disputes.²¹

III. Foreign Investment Protection and the Environment

With that by way of background I turn now to address the issue of principle concern for this chapter: the arbitration of disputes relating to foreign investment protection and the environment. The subject arises because of the convergence of two recent developments: the rapid growth in direct foreign investment (flows of which now dwarf public sector development assistance), and the sharp increase in environmental consciousness, resulting in new norms of environmental law adopted at the national and international levels.

At first glance it might seem surprising that foreign investment and the environment could be related in law, and that disputes might arise as a result of conflicting tendencies between the norms which underpin both areas. However, a number of recent developments indicate that this is now a real subject in international law, and that it is set to be a permanent and expanding feature of the international agenda, which may also challenge national and international courts and tribunals.

How are the two subjects connected? In different ways. One way is the manner in which international environmental conventions are seeking to encourage foreign direct investment as a way of achieving their environmental protection objectives. A leading example is the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change (UNFCCC).²² This might be seen as the non-contentious (or less contentious) side of the relationship between foreign investment and environmental protection, where the two are mutually supportive.

But more recently there has emerged a more contentious side to the relationship, where there may be a conflict between, on the one hand, norms of international law which seek to encourage foreign direct investment by providing full and effective protection to them (for example, limiting the circumstances under which expropriation or “creeping” expropriation may take place) and, on the other hand, norms of international law which seek to protect the environment. A potential tension exists where a State adopts laws or regulations which in some way interfere with the foreign investment: it could be anything from a law which nationalizes or expropriates an investment, for example land, to turn it into a protected national park, or regulations which increase the restrictions on an investment to the point that it becomes less profitable, or even worthless.

This issue is one with which human rights lawyers will be familiar, where the potential conflict is between the protection of individual property rights, on the one hand, and environmental requirements of a community character on the other hand. This issue has arisen often in the case law under the First Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.²³ Article 1 (1) of the Protocol provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be

²⁰ See ICJ Press Release of 16 February 2006 (The judges of the International Court of Justice elect the members of the Chamber of Summary Procedure and of various Committees of the Court), in which no mention is made of the Environment Chamber.

²¹ See the optional rules on arbitration and conciliation at: <<http://www.pca-cpa.org/ENGLISH/EDR/>>.

²² 37 *ILM* (1998), 22.

²³ Done 20 March 1952, ETS No. 9, 213 UNTS 221.

deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

How is that to be squared with measures genuinely intended to protect the objective environmental requirements? In discussing the lawfulness of a measure interfering with private property, the European Court of Human Rights has recognized that “in today’s society the protection of the environment is an increasingly important consideration”.²⁴ Additionally, the Court has held that the right to compensation implied in Article 1 does not guarantee full compensation in all circumstances.²⁵ In the Court’s words:

“Legitimate objectives of ‘public interest,’ such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.”²⁶

Similar considerations apply in relation to interference’s which are justified on environmental grounds. In cases such as these, in determining whether the level of compensation provided by the interfering State is consistent with article 1 of the First Protocol, the Court takes into account the nature of the property taken and the circumstances of the taking in order to strike a fair balance between the public interest and the private interests involved.²⁷ In doing so, the Court will generally accord to the State a wide margin of appreciation in laying down the terms and conditions, including the compensation standard, on which property is to be taken where it is genuinely intended to achieve a legitimate objective of public interest.²⁸ This is confirmed in the case of *Pine Valley Development Limited and Others v. Ireland*, where the European Court recognised that an interference with the right to peaceful enjoyment of property which was in conformity with planning legislation and was designed to protect the environment was “clearly a legitimate aim in accordance with the general interest” for the purposes of the second paragraph of article 1 of the First Protocol to the ECHR.²⁹

That deals with the standard of treatment by a State of the investments (or property rights) its own nationals or those subject to its jurisdiction under human rights law. What about non-nationals? The ECHR leaves that question to be determined by the rules of international law. The question has arisen as certain States adopt national environmental laws in such a way which may interfere with the property rights of foreign investors. This line of argument has been promoted in particular in the context of the North American Free Trade Agreement (NAFTA), Chapter 11 of which provides for protection of foreign investments from inter alia measures “tantamount to nationalization or expropriation”, and provides for investor-State arbitration under ICSID or UNCITRAL rules.³⁰ In the *Ethyl* case Canada banned all inter-provincial trade in and commercial imports of MMT, a manganese based compound which enhances the octane value of unleaded gasoline. The Ethyl Corporation – a US company – sued under NAFTA Chapter 11 on the grounds inter alia that violated national treatment requirements and represented an act “tantamount to an expropriation” without compensation. Ethyl Corp claimed damages of \$ 251 million. After the arbitrators found that the NAFTA/UNCITRAL tribunal had jurisdiction,³¹ and after a Canadian procedure had found that the ban violated Canada’s Agreement on Internal Trade, the parties settled the dispute, with Canada paying Ethyl \$ 13 million. Another case is now pending, this time involving a Canadian investor against the United States,

²⁴ *Fredin v. Sweden*, ECHR (Ser. A) No. 192 § 48 (Judgment of 18 February 1991) (withdrawal of a license to exploit a gravel pit for reasons of nature protection).

²⁵ *James v. United Kingdom*, 98 ECHR (Ser. A) No. 36, § 54 (Judgment of 21 February 1986); *Lithgow v. United Kingdom*, 102 ECHR (Ser. A) No. 50, § 121 (Judgment of 8 July 1986).

²⁶ *Id.*

²⁷ *Lithgow*, *supra* note 25.

²⁸ *Id.* at § 122.

²⁹ *Pine Valley Development Limited and Others v. Ireland*, ECHR (Ser. A) No. 222, paras 54 and 57 (Judgment of 29 November 1991).

³⁰ 32 *ILM* (1993), 605 at 641.

³¹ *Ethyl Corporation v. Canada*, Jurisdiction phase, 38 *ILM* (1999), 708.

in relation to Californian legislation relating to another fuel additive, MTBE. One sees in these two cases the rich prospect for conflicts between rules of law governing the protection of foreign investment and rules of laws seeking to protect the environment. In many ways this mirrors the tension which has emerged between the rules of free trade and the rules for the protection of the environment.

In the *Ethyl* case the Canadian environmental protection legislation was not based on international law. What if it had been? What if the conflict pitted against each other rules of international law arising in two different contexts and aiming at two different societal objectives? In this scenario there may be a clear conflict between two competing rules of international law: which is to prevail? In the recent Award of an Arbitral Tribunal in *Compania del Desarrollo de Santa Elena SA v Republic of Costa Rica* this issue arose, not so much in terms of determining the legality of an act of expropriation, but rather in terms of determining the methodology for valuing the environmental resource – in this case an area of rain forest which is rich in biological diversity – which the host State was seeking to protect for the creation of a national park.³² The arbitral tribunal ruled that environmental protection objectives, even if an application of international environmental norm, did not have any bearing on the matter, including in relation to the methodology of traditional valuation based on full and fair market value.³³ In other words, for this arbitral tribunal, comprising a most distinguished group of individuals, the international rules for the protection of foreign investment appear to take precedence over any rules of environmental protection however national or international. This poses a particular dilemma. Can it be right that one set of rules of international law ought necessarily prevail over another? Does international law recognise an *a priori* hierarchy? If the tribunal is right then the practical consequence may be to prevent States, in particular developing country States, from taking effective measures to give effect to their international obligations to protect their environmental patrimony, since they will often not be in a position to finance an interference. On the other hand, there is a need to be vigilant against the possibility of abusing the right to protect the environment at the cost of foreign (or indeed domestic) property rights. What is needed is balance, rather as between the rights and interests of upstream and downstream riparian States.³⁴

To my mind one can not start from the assumption that there exists an *a priori* hierarchy in the norms of international law. General principles of international law call for a balanced approach, in which the societal objective of encouraging foreign investment (as reflected in numerous international instruments) is treated in a balanced manner with the societal objective of protecting the environment (as also reflected in numerous international instruments), and vice versa. This need to treat developmental needs with environmental needs is now often referred to as the principle of “sustainable development”, as reflected in the Rio Declaration on Environment and Development, and as invoked by the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project*³⁵ and more recently the arbitral tribunal in the *Iron Rhine* case.³⁶ And observers will recognise this a lively issue in the trade and environment debate, and in which the WTO Appellate Body is moving towards seeking to reconcile the competing societal demands of free trade and environmental protection in the context of an integrated, holistic international legal order.³⁷

³² 17 February 2000. The Award is available on the ICSID web site.

³³ The Tribunal said (at para. 71): “While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.”

³⁴ See *Lac Lanoux Arbitration (Spain v. France)*, 24 *ILR* 101 at 140 (1957).

³⁵ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 ICJ Reports, p. 7, at para. 140.

³⁶ *Supra* note 19.

³⁷ See WTO Appellate Body, *Shrimp Turtles* case, AB-1998-4, 12 October 1998; 33 *ILM* (1999), 118 et seq.

It is against this background that the recent Award of a NAFTA/ICSID Arbitration Tribunal in *Metalclad Corporation v. United Mexican States* is of considerable interest.³⁸ The Tribunal ruled that Mexico had violated inter alia article 1110 of the NAFTA, which provides that “[n]o party shall directly or indirectly ... expropriate an investment ... or take a measure tantamount to ... expropriation” except under certain conditions. In so ruling, it interpreted article 1110 to mean 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 as the effect of depriving the owner, in whole or in significant part, of the sue or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.”³⁹

This definition significantly expands the concept of “expropriation” beyond its traditional meaning in classical public international law, to expressly include “regulatory takings” in the US constitutional law sense. The Tribunal did not cite a great deal of authority or precedent for the interpretation, and it is not clear that the parties to NAFTA intended so broad an approach. In the *Metalclad* case the Tribunal relied on the broad definition to rule, in effect, that the failure of Mexico to provide for a clear system of permitting (specifically concerning whether or not a local municipality was or was not entitled to grant a construction permit) constituted “a measure tantamount to expropriation” in violation of article 1110.⁴⁰ The effect of the Award is to open the door to “tantamount to expropriation claim” on many environmental regulations (or other national regulations intended to protect human health), including some adopted pursuant to international treaty obligations (such as the 1992 Convention on Biological Diversity or the 1971 Wetlands Convention).

The decisions in *Santa Elena* and *Metalclad* are not premised on an approach which treats the protection of private property rights and the protection of the environment in an integrated manner. The combined effect of both cases may have the unfortunate consequence of exposing ICSID as an institution to the kind of scrutiny to which the GATT was subjected, after the infamous panel decisions in the *Tuna/Dolphin* cases in 1991 and 1994,⁴¹ when the institution was criticized for failing to ensure the adequate integration of environmental considerations into the interpretation and application of free trade rules.

IV. CONCLUSIONS

The decisions in *Santa Elena* and *Metalclad* buck the trend of other cases which seek to strike a balance between environmental and other objectives. They do not indicate any particular sensitivity of the arbitrators to environmental considerations. It may be that the cases reflect a “generational issue”: that environmental issues remain novel with the consequence that it will take time to fully integrate environmental concerns into the better established norms of foreign investment protection. Yet developments in other areas – international trade stands as an example – indicates that understanding of the need for a balanced approach can emerge even where economic concerns are paramount. And the approach adopted by the arbitral tribunal in *Iron Rhine* points the way to the integration of apparently competing norms of international law, some of which may have emerged later in time.

³⁸ 25 August 2000, unpublished.

³⁹ *Ibid.*, at para. 103.

⁴⁰ The case raises important issues relating to inter alia federalism which the Tribunal appeared to gloss over, and the distinction between construction permits and operating permits on which the Tribunal did not appear to demonstrate a keen awareness.

⁴¹ See Sands, note 4, at pp. 955 et seq.